February 1990
Question 1

Bilder operated a building company specializing in custom-built houses. In order to maintain his high standards of construction, Bilder kept his company small and never had more than two projects going at one time.

Homer owned a lot in Suburban Estates on which he wanted to build a house. After hearing of Bilder's reputation for doing superior work, Homer decided that he would have his house built by Bilder. On April 15, Homer and Bilder entered into a valid written contract for the construction of the house. According to the contract, construction was to be completed no later than November 30 and the contract price, $300,000, was to be paid upon completion.

Bilder estimated that the work would take about four months and, knowing that he was obligated to begin work on two other houses on December 1, determined that if he started construction on Homer's residence on July 1, he would finish by about the end of October. This left a one-month period, which Bilder considered adequate to accommodate unanticipated delays.

Bilder started construction on Homer's house as scheduled. By the end of August, the work was one-half completed at a cost to Bilder of $120,000.
On September I, the developer of Suburban Estates obtained a temporary injunction against both Homer and Bilder restraining further construction of Homer's house on the ground that the house violated the Subdivision's minimum set-back requirement. Upon receiving notice of the injunction, Bilder stopped work.

Six months later, the injunction was dissolved and the lawsuit was dismissed as without merit. By that time, Bilder, already at work on other projects, refused to resume performance for Homer, and demanded payment of one-half the contract price.

Because of increased construction costs, it appeared certain that it would cost Homer $200,000 to have another contractor finish the house.

Homer sued Bilder for breach of contract and specific performance. Bilder crosscomplained, seeking to recover $150,000.

What are the respective rights and liabilities of Homer and Ruder against each other, and what remedies can each obtain against the other? Discuss.

ANSWER A TO QUESTION 1

HOMER v. BILDER

Breach of Contract - Homer and Bilder entered into a valid contract, to which Bilder appears to have no defenses, and which called for completion of a house by November 30. Homer's duty to pay $300,000 to Bilder was subject to a constructive condition precedent, that is, Bilder's completion of the house. When Bilder did not complete the house by November 30, or indeed for several months thereafter, he was in breach unless his duty was discharged.

Impossibility - A duty to perform is discharged if it has become impossible, due to an event occurring after the contract was formed, which was not foreseen or foreseeable by them and the risk of which neither party assumed. Impossibility is judged by an objective standard, that is, it must be impossible for anyone, not just defendant, to have performed under the circumstances.

Due to the injunction, it was impossible, because illegal, for Bilder to continue construction of the house.

Homer may argue that if Builder had begun construction earlier, he could have completed it before the injunction issued. However, it seems likely the injunction was in response to the commencement of construction, and would have issued earlier if construction had been earlier begun.

It is not stated who prepared the plans for the house. If Bilder did, Homer might argue that the impossibility was his fault, since he did not leave sufficient set back to comply with the subdivision requirements. A party's duty to perform is not discharged by impossibility if he was at fault in bringing it about.

However, it is not indicated that Bilder prepared the plans, and in any case there appears not to have been a set back violation since the lawsuit was dismissed as without merit.

Since the injunction appears to have made performance impossible, and since neither party assumed or could reasonably have foreseen the risk of it occurring, Homer's duty to build will be excused by impossibility

Where impossibility is only temporary, however, the duty to perform is not discharged but only suspended. Therefore Homer will argue that Bilder's failure to complete the house on time was excused by impossibility, but he should have completed it after the injunction was lifted.

Bilder will argue that by then the duty had become substantially more burdensome for him, both due to the increasing construction costs in the interim and due to the small size and tight scheduling of his operations. Though Homer may not have been aware that Bilder's operations were subject to such scheduling difficulties, he did choose Bilder for his high standards and these were maintained by Bilder keeping his operation small.

Because the duty to perform had become substantially more burdensome due to the impossibility of performing at the anticipated time, Bilder's performance should be entirely excused.

Homer's remedies - Even if it should be held that Bilder's performance was not discharged and he therefore was in breach, Homer can have no recovery in damages. He has gotten or can get full performance by paying $200,000 for someone else to complete the house, and this is already well under the $300,000 contract price. He has not paid Builder anything.

With regard to his demand for specific performance, even if Bilder were in breach, construction is not usually considered a unique service, and Homer's legal remedy should be

considered adequate. Homer chose Bilder for his high standards, but there is no indication that someone else cannot adequately complete the construction. Because of the small size of Bilder's operation, moreover, he may do much of the work himself and ordering specific performance might be akin to ordering performance of a personal services contract, though construction contracts generally are not regarding as falling in that category. Personal services contracts are not customarily specifically performable, because the court hesitates to involve itself in the necessary supervision over the relationships and performance involved.

BILDER v. HOMER

Restitution - Bilder has no claim that Homer breached the contract, since he remained willing to perform and accept counterperformance at all times.

However, Homer has gotten half a house for nothing, and Bilder can seek restitution to prevent Homer from being unjustly enriched.

If, as argued above, Bilder is not in breach, his restitution would be measured by the cost of the work he has done plus a proportion of his profit calculated based on the contract rate. Bilder completed half the house for $120,000. His profit on the whole contract would therefore have been $60,000, and he should be entitled to half of this amount for a total restitution of $150,000, the amount he has sought.

However, if it is determined that Bilder ought to have completed the house after the injunction was lifted, he will still be entitled to restitution measured by Homer's enrichment. Here, if Homer has to pay $200,000 for completion of the house, he will have received the contract performance for $100,000 less than the contract price, and Bilder will be entitled to that amount in restitution.

Homer would, in the event Bilder is determined to have breached, also be entitled to an offset for reasonable incidental damages, such as the cost of finding and hiring a substitute contractor.

ANSWER B TO QUESTION 1

HOMER v.
BUILDER Valid
contract?

The facts state that there was a valid contract between Homer and Bilder. Bilder was to build and complete the home on Homer's lot no later than November 30 and, upon completion, Homer

was to pay Bilder $300,000.00.

Bilder's obligation to complete the house was an express condition precedent to Homer's obligation to pay the $300,000.00 to Bilder.

Was any performance by the parties excused?

As indicated above, Bilder's obligation was to complete the home for Homer no later than November 30. Knowing that he (Bilder) had two other jobs to begin on December 1, Bilder began working on Homer's house on July 1, knowing that it would take him approximately 4 months to complete, leaving one month for unanticipated delays, which appears to be adequate under the facts as well as reasonable.

However, Bilder did not complete Homer's house by November 30, because of an injunction placed upon the building of Homer's home by Suburban Estates. The injunction was placed on the property on September 1 and lasted for six months, or up until March 1 of the following year. This would excuse temporarily Bilder's duty to complete the home by November 30, because the injunction was placed on the construction of the home through no fault of Bilder. This obligation of Bilder is therefore excused under the doctrine of Impossibility, because there is absolutely no way that either Bilder or anyone for that matter could have constructed Homer's house during that time, absent breaking the law (the injunction).

In fact, upon receiving notice of the injunction, Bilder properly stopped work pursuant to the court order. His performance under the Homer/Bilder contract was therefore excused, at least until March 1.

Additionally, Homer's obligation to pay the complete price of $300,000.00 also was excused, because Bilder did not complete the house.

Did Bilder breach the contract once March 1 arrived?

Bilder's duty to again proceed building of Homer's house came due once again on March 1, because that is when the injunction was dissolved.

However, Bilder refused to resume performance for Homer because he had already had begun his other jobs as previously contracted for. Builder will indicate that since the injunction was unforeseeable, his performance was excused altogether by impossibility and he has no further duty to perform. This is a weak argument however, and Bilder will probably indicate that his further performance under the Homer/Bilder contract is excused by way of Impracticability or Commercial Frustration. Bilder may have a good argument based on these defenses, because the injunction was not foreseeable and to further perform would cause him to breach present contracts upon the homes he is currently building. Under these two defenses, the court would excuse Bilder's duty to further perform as of March 1, even though he had only completed onehalf of Homer's home.

On the other hand, if the court did not uphold these defenses of Bilder, he would be found in breach of contract and this would be a material breach, excusing Homer's duty to pay Bilder.

Remedies of Homer if breach found by Bilder

Homer would have a duty to mitigate his damages of which he apparently did in this situation, because of increased construction costs, it appeared certain that it would cost Homer $200,000.00 to have another contractor finish the house. This could only have been discovered if Homer checked with other

contractors to determine the cost of completion.

If Bilder is found in a material breach of the contract, Homer would be able to receive his out of pocket damages, that is the difference between the cost of completion and the contract price. Since it would now cost $200,000.00 to have another contract complete the home, and since the home was half-way done, the difference would be between the one-half contract price ($150,000) and the cost of completion, $200,000, or $50,000.00. This is what damages Homer would be able to recover for Bilder's breach, if the same were found in a material breach.

Specific Performance: Specific performance is an equitable remedy and will only be considered by the courts if damages are inadequate. Homer may argue that since Bilder specialized in custom-built homes and maintained high standards of construction he may be considered a personal service contractor, and that damages awarded to have another, maybe less adequate builder complete the home might not be an adequate remedy for him and that specific performance should be granted in this case. Additionally, the courts will not rule that another party must work for another pursuant to public policy and the Thirteenth Amendment of the Constitution. Accordingly, since damages would appear to be adequate, since another builder could more than likely complete Homer's home to specifications, and since the court would not order Bilder to complete Home's home for public policy reasons, specific performance should be denied and Homer should be left with the adequate remedy of damages.

BILDER v. HOMER

Valid Contract?

See supra under Homer v. Bilder.

Performance of Homer excused?

As indicated under Homer v. Bilder above, Homer's obligation to pay the contract price of $300,000 was excused since Bilder did not complete the house.

Restitution

It appears that Bilder is attempting to obtain one-half of the contract price by way of his cross-complaint against Homer. The contract price was $300,000. Since Bilder completed one-half of the house, he will argue that he is entitled to one-half the contract price, or $150,000.

However, since indicated under Homer v. Bilder above, Bilder was the one in material breach of the contract. Bilder might argue that it was probably Homer's fault for the injunction in the first place, since Homer owned the lot and should have known of the minimum set-back restrictions on his property. However, the facts indicate that the injunction lawsuit was dismissed as without merit, meaning the injunction was through no fault of Homer. Accordingly, Homer was not in breach of the contract. Accordingly, Bilder would only be able to receive restitution, that is whatever benefit was conferred upon Homer through what Bilder had completed one-half of the house.

> The only benefit conferred upon Homer was the construction costs of the half-completed house, or $120,000.00. Therefore, under restitution, also known as quasi-contract or unjust enrichment, Bilder would only be entitled to receive $120,000. Some jurisdictions will not allow restitution for a willful breach as lies on Bilder's behalf in this case, while other jurisdictions do allow restitution. In jurisdictions which allow restitution, Bilder would be able to receive from Homer the amount of $120,000, offset by the damages due to Homer of $50,000.00, or $70,000.00.

February 1991

Question 6

Technical University (Tech) solicited an offer from Data Equipment Company (Data), headquartered in State A, for the supply, installation and testing of air-quality monitoring equipment for Tech's floating Ocean Research Station in the mid-Pacific Ocean. Identical equipment, uninstalled, was available for $20,000 from several of Data's competitors, but only Data had the means to install and test the equipment in the mid-Pacific ocean.

At a meeting on April 3, 1990, Data's president, Dan, offered to do the job for $28,000 by July 30, 1991, and Tech accepted. On April 4, 1990, Tech sent Data a letter confirming their April 3 discussions.

One month later, Tech called Data to ask if the work could be completed by May 1, 1991, so that Tech could participate in a U.S. Navy experiment. Dan said that the work would be completed by May 1, 1991, at no additional charge.

On May 15, 1990, Data signed a lucrative contract with a major oil company and wanted to have all installation personnel available for work on that contract. Then, on June 1, 1990, Dan informed Tech by telephone that Data would not be able to install the air-quality monitoring equipment at all.

On June 15, 1990, after having searched unsuccessfully for a substitute to supply, install and test the equipment, Tech sued Data in State A court for specific performance, demanding that Data be required to supply, install and test the equipment by May 1, 1991.

What legal arguments could Data raise as defenses, and how should the court rule on each of them? Discuss.

ANSWER A TO QUESTION 6

The legal arguments which Data could raise as a defense(s) depend upon how the court is to characterize the contract allegedly entered into between Tech and Data.

I. Characterization of the Contract

Tech is a university, not a merchant, which solicited an offer from Data, which is arguably a merchant because it supplies (installs and tests) equipment.

A merchant is one who deals regularly in the goods which are the subject of the contract.

A. Does the UCC apply

Data will attempt to argue that the UCC applies to this transaction because the contract involves the sale of goods of $500 or more.

Data's offer was to supply, install and test the equipment for $28,000. Since this was a contract for the sale of goods for $500 or more, then the contract had to be in writing under the statute of frauds.

Data will argue that the April 4, 1990 letter sent by Tech to Data confirming their discussion is not a sufficient writing under the statute of frauds to make the contract enforceable. The writing must be signed by the party against whom enforcement is sought and must contain the essential terms to the contract.

Tech may attempt to argue that their April 14, 1990 letter confirming the discussion is sufficient to identify the existence of the contract and satisfy the statute of frauds.

However, Data will make a strong argument that Tech is erroneously relying on UCC 2-201(2). This provision allows an exception or rather a leniency with the writing requirement if both parties are merchants.

It states that a letter sent in confirmation of a conversation between merchants which is sufficient to bind the sender, will also bind the receiver if not objected to within ten days.

Here, however, Data will argue this provision does not apply because Tech is not a merchant. This is a strong argument on behalf of Data and provided this court finds the contract to be one for the sale of goods for $500 or more, the statute of frauds has not been satisfied. The contract would have to have the parties, subject matter, price, and quantity, and be signed by the party to be charged. Because this was not complied with here, the statute of frauds may be a valid defense.

B. Does common law apply: service contract

Although the facts state that Tech was soliciting offers for supply of air testing quality equipment, the facts also state this identical equipment, uninstalled, was available from several of Data's competitors. But only Data had the means to install and test the equipment in the mid-Pacific Ocean.

A very strong argument on behalf of Tech can be made that this is a contract for services and not for the supply of goods and therefore the contract need not comply with the statute of frauds to be enforceable.

However, once again, although this appears to be a facially valid and potentially strong argument, Data has another defense to this claim.

C. Contracts not capable of being performed within one year must be in writing to be enforceable unless full performance has occurred

This would be Data's reply to Tech's contention that this contract is actually one for services and not the sale of goods.

Data's president Dan made the offer to complete the job by July 30, 1991 at the April 3, 1990 meeting. Since the time for performance is measured from the time the offer is made, April 3, it will take more than one year to complete this contract.

The statute of frauds requires that such contracts must be in writing and signed by the party against whom enforcement is said to be enforceable.

Again, the provision under UCC 2-201 which applies to a letter in confirmation of an agreement and may bind the receiver, only applies between merchants. Tech is not a merchant.

Because there is no writing, the statute of frauds is a valid defense. II. May 4, 1990 Modification

In the event that for some reason, the contract is found not to have fallen within the statute of frauds, or the court for some reason finds there to be an enforceable contract, the next issue centers around the effect and validity of the May 4, 1990 modification.

Under the original contract, work was to be completed by July 30, 1991. However„ on May 4, 1990, one month after the contract was entered into, Tech inquired of Data as to whether the work could be completed by May 1, 1991, so Tech could participate in an experiment with the Navy. This would be two and one-half months early.

There are two views which must be taken as to these modifications: Data's best defense as to the invalidity of the modification is that this contract is one for services (and not subject to the statute of frauds).

Note: If Data concedes contract is one for services, they may be waiving their statute of frauds defense unless they pursue one year defense.

Common Law Modification

At common law, in order for a modification to be valid there had to be mutual assent, there had to be new considerations given for the modification, but the modification could be oral.

Here, Data would argue that no new consideration was given by Tech for Data's promise to complete the work two and one-half months early. Therefore, under common law principles, the modification is invalid and the court should rule the same.

UCC Modification

Under the UCC, with a contract for the sale of goods, Data would also have a valid defense which the court should uphold. Of course, Data will argue this is a contract for the sale of goods because Data was to supply the equipment (in excess of $500).

In order for a modification to be valid under UCC principles, there must be mutual assent, there need not be any consideration so long as the modification is made in good faith, but the modification must be in writing if the contract (original) must be in writing.

Because Tech called Data and requested this oral modification to a contract which itself had to be in writing, the modification is invalid. The original contract terms remain in effect and the completion date of the project would still be July 30, 1991.

III. Defenses to Specific Performance

In the unlikely event the court ignores all of Data's previously raised defenses and decides to find a

validly modified, enforceable contract, Data may still have one last chance at avoiding performance at all under the contract.

Tech is requesting specific performance. In order to get this equitable remedy, Tech must demonstrate their remedy at law is:

1) inadequate;

2) that there is a definite and certain contract to be enforced;

3) that there is feasibility of enforcement of the contract and no jurisdictional problems; and

4) that there is mutuality of remedy. Traditionally, if one party could get specific performance, the other party had to be able to. Modernly, so long as one party can either provide surety of performance, or, if that party has substantially performed, specific performance may be available.

Defenses Inadequacy

First of all, there is certainly a problem here with inadequacy of legal remedy. Identical equipment was available to Tech. Furthermore, compelling Data to install and test the equipment would amount to involuntary servitude, which is prohibited under the U.S. Constitution.

Feasibility

Secondly, feasibility of enforcement may also be a problem. The equipment is to be supplied, installed, and tested at a floating ocean research station in the mid-Pacific Ocean. How is a court to enforce a decree of specific performance over Data somewhere out in the middle of the Pacific Ocean?

The fact that the station is in the middle of the Pacific Ocean may also present jurisdictional problems of a State A court since oceans tend to be the jurisdiction of the federal judiciary.

Based on the aforementioned arguments, the court should rule that specific performance is not a proper remedy, and if it deems necessary, award Tech money damages.

ANSWER B TO QUESTION 6

Formation of Contract/Offer and Acceptance/Statute of Frauds

The first defense that could be raised by Data is that while an agreement had been reached by its offer and by Tech's acceptance on April 3, the agreement is unenforceable against Data because it did not satisfy the requirements of the statute of frauds.

One requirement of the statute of frauds is that any agreement which cannot be completed by its terms within one year from the date thereof is unenforceable unless in writing. Data will argue that since the agreement was made on April 3, 1990 and completion is due July 30, 1991, more than one year is involved and the agreement requires a writing setting forth the terms.

However, this defense should not be sustained since the statute of frauds provision relates only to contracts which cannot be performed within one year. Here, while completion might not occur before July 30, 1991, it could occur and therefore the statute of frauds is not a defense to enforcement.

The U.C.C. Applies/Goods/Merchant's Confirming Memo/Applicability

Data can also argue that the contract does not comply with the statute of frauds provision that requires that all agreements for the sale of goods for over $500 must be in writing in order to be enforceable and the contract here is for goods.

Goods are defined as items which are moveable, sold as items rather than sold in the connection with the sale of services.

Data will contend that the agreement required it to sell and deliver equipment which is generally otherwise available and therefore a moveable, tangible product which is governed by the statute of frauds provision.

Tech will counter that argument with its assertion that Data was to supply services and therefore the "goods" provision of the statute of frauds does not govern since what was purchased included installation and services (testing) in the mid-Pacific. Tech will argue that the 40% increment in price means that this was a services contract which is not governed by the statute of frauds.

Merchant's Confirming Memo

Tech will further argue that if the goods definition does apply, then Tech confirmed the agreement by sending a merchant's confirming memo and Data is thereby bound. Under the U.C.C., in a sale of goods by merchants (those normally dealing in goods of that kind) a memorandum sent is binding upon the other party if the receiving party does not object within ten days of receipt of the memo.

Tech will claim that since Data is a merchant within the meaning of the U.C.C., it is bound by the memo. Data will counter that Tech is not a merchant and therefore the memorandum cannot bind Data.

As between Tech and Data, the court will find that both are merchants who regularly deal in goods of this kind and Data is bound by the memorandum. It can be implied that Tech regularly uses and obtains such equipment and Data regularly supplies and sells it as a merchant.

Data will be bound to deliver and install the goods (the installation and testing being a delivery and incidental requirement to the sale of goods).

May 1 Installation/Modification

At common law, a modification required consideration. Under the U.C.C., a good faith modification does not require consideration. However, under the U.C.C. a modification of an agreement which must be in writing requires a modification in writing. Here the change of the contract terms was not in writing and therefore no modification occurred.

Anticipatory Breach/Voluntary Disablement/Reasonable Assurances

Data will claim that Tech's lawsuit is premature and that Tech cannot sue until July 30, 1991, the date when its performance is due. Tech will claim that Data's actions constitute anticipatory breach and/or voluntary disablement thereby accelerating the breach and providing a current right of action.

A party commits anticipatory breach when, before performance is due, it advises the other that it will not or cannot perform as required. A party also commits anticipatory breach when it voluntarily makes itself unable to perform.

Here, Data has anticipatorily breached and Tech can sue, await performance, or, under the U.C.C., seek reasonable assurance that Data will perform as required.

Injunctive Relief /Mandatory Injunction

A party can seek against the breaching party damages, restitution and, in some cases, specific performance for the breach of a contract.

In order to seek specific performance, a party must show that monetary damages are inadequate. This may be shown by demonstrating the uniqueness of the goods, or that monetary damages will not give the relief necessary to compensate plaintiff.

Plaintiff must also demonstrate the definiteness and certainty of the agreement and that the injunction

sought is feasible.

Feasible means that the court can both fashion an injunction and enforce it. Usually the court can enforce an injunction when it has personal jurisdiction over the defendant. Here Data is a defendant within State A.

Data will claim that since this contract involves personal services, the contract cannot be enforced against it. However, a court can enforce certain contracts even if there is a measure of services involved, such as delivery and installation or construction. Here the contract is enforceable and the injunction feasible.

The court can enter an injunction where mutual obligations are involved. The court will condition Data's performance upon assurances that Tech will pay (perform) so that there will be mutuality of performance.

February 1996
Question 1
Contracts

Insert pages 1 and 2

setting a date for A's performance to be finished, and creating liability in 0 to pay. Absent an excuse for A's meeting the September 1, 1994 date, A will be liable to 0 for foreseeable damages.

Excuse of Conditions

Express conditions to a contract may be excused by impossibility of performance, commercial impracticability of performance, or by frustration of the purpose of the contract.

Impossibility

Impossibility arises when no one, under any circumstances, can satisfy a promise or condition to a contract.

The impossibility must be such that no person in the world could get the job done.

A will contend it became impossible to perform as scheduled due to unusually rainy weather. However, A could have hired more painters or subcontractors to speed up A's work and finish painting by September 1, 1994. Consequently, it was not impossible for A to finish on time, and impossibility will be no excuse to performance.

Commercial Impracticability
A commercial impracticability arises when the new costs or unforeseen costs make it a losing project for a party. Mere losses are insufficient. There must be substantial losses or potential of those losses. Moreover, these losses must not be contemplated by the parties.

Frustration of Purpose
When the value of performance is no longer, the purpose of the contract is frustrated. It is inapplicable on these facts.

Again, A will claim that performance became commercially impracticable if forced to hire additional painters or subcontractors. While losses may accrue to A, A's liability to perform would not be extinguished by this excuse. A will claim losses from several jobs, yet these complications are foreseeable, and A may not defend by the excuse of commercial impracticability.

Breach
A breach occurs when a party to a contract fails to perform under the terms of the contract. 0 will claim that A breached the contract by failing to finish performing by September 1, 1994. The characterization of the breach depends on its relation to the contract.

Material v. Minor
A material breach occurs when a promise, which goes to the heart of the contract, is not fully performed. 0 will try to classify A's failure to perform by September 1, 1994 as a material breach since time was of the essence. However, the court would not find time of the essence here. Alternatively, the court would find A had satisfied his performance by complete performance. If any breach was committed, it was minor, and thus, 0 is liable to pay A for his work.

Remedies of 0

Consequential and Compensatorv Damages $6.000
Compensatory damages seek to compensate the aggrieved party for losses incurred due to a breach by a party. Four factors must be shown to be recoverable. Consequentials flow from breach.

Foreseeability
Under Hadley v. Baxendale, damages must be foreseeable at the time the contract is entered into. When 0 and A entered into their contract, no mention of 0's intent to move and sell his home were made. Thus, it was not foreseeable to A that 0 would incur losses by paying mortgage payments for a year. This element is not satisfied.

Certainty
Damages must be proven with exactness and certainty. 0 can establish the $6,000 figure. It is a certain amount. However, it is unforeseeable under Hadley v. Baxendale.

Unavoidable
Parties have a duty to mitigate damages. 0 could have listed the house for sale long before he did. Moreover, 0 made no effort to rent. The court will look down upon this failure to mitigate by O.

Causal
The breach must cause the damage proximately and actually. Here, 0 sold his house, so 0 could argue he would have sold it sooner if A had finished on time. 0 will not recover, his damages were not foreseeable.

A's recovery

Quantum Meruit
A party may recover for the benefit conferred on another to avoid unjust enrichment. A could recover $4,700

so 0 will not be unjustly enriched.

Contract Price
A is entitled to the full contract price since he completely performed, and his breach was minor.

ANSWER B TO QUESTION 1

Owner v. Ace
This is a contract for services. As such, the common law will govern this building contract. As Owner entered into a contract with Ace to paint the exterior of his house, it is a service contract.

Is there a valid contract?
In order to have a valid contract, there must be an offer, acceptance, and consideration.

On June 1, 1994, Owner signed a contract with Ace Painting to paint the exterior of Owner's house by September 1, 1994. There is an intent to be bound by the parties as evidenced by their signed written agreement. Furthermore, Owner was to pay $4,700 to painter Ace for painting the house - since there was a bargain for exchange (money for the painting service) there was adequate consideration.

There was a valid contract.

Defenses

Statute of Frauds
Since this is a service contract capable of performance within one year, the statute of frauds is no defense to this contract.

Terms
The terms of the original contract are that the house is to be painted by September 1 for the price of $4,700.

Modification
A modification is a subsequent agreement entered into by the contracting parties after the original contract was entered into. At common law a valid modification required additional consideration.

Since this is a services contract, additional consideration would be needed for a valid modification. On July 1 Owner called Ace by telephone and stated that "time was of the essence" as the house was to be painted by September 1. Although this was the original finish date stated in the contract, in building contracts time is not of the essence unless explicitly stated.

As there was no additional consideration offered by owner to builder to make time of the essence, this is not a valid modification.

Performance
A contract must be performed by both sides in order to receive the benefit of their bargains. Performance must occur unless discharged, excused, or satisfied.

Conditions
In order for performance to arise in the parties, conditions are attached by courts to determine when parties performance arises.

Discharge
Owner will argue that his duty to pay has been discharged because Ace did not paint the house by the requested date. Ace's duty to paint was a condition precedent to his duty to pay.

Frustration of Purpose
Frustration of purpose occurs when there has been a change so as to frustrate the material part of the contract. It must be unforeseeable at the time the contract was entered into.

Ace will counter saying that the weather was unusually rainy for this time of year, so much so that it was unforeseeable the weather would be this bad when he entered into the contract. Therefore, the September 1 date was materially frustrated by the unusually heavy rains. However, since weather is always foreseeable, this will not be a valid defense.

Impossibility
Impossibility is when an unforeseeable event happens making performance impossible

Again, Ace could try to argue that the rain made it impossible to complete the house on time. Further, Ace will argue that he would have lost money on other jobs, but he could have subcontracted out some of the jobs, therefore this was not impossible and not a valid defense.

As owner will argue that Ace's duty to paint the house on September 1 was a condition precedent to his payment, owner may have a case. However, since owner's telephone call asking for modification was not valid, Owner will be liable for damages.

Breach
The amount of damages owner will be entitled to will depend on whether Ace's breach will be construed as material or minor.

Material Breach
A material breach occurs when the parties did not get "the heart of the bargain."
If Ace's not painting the house by September 1 is seen as a material breach, Owner may not be required to pay Ace.

Minor Breach
A minor breach is when the performing party has substantially performed. Since the "time of the essence" clause is not a valid modification, Owner will only be entitled to minor damages for Ace's minor breach. Ace did substantially perform, and Owner was 21 days late in listing the house on the market. Since the "selling season" was May 1 - October 1, Owner can receive damages for his loss of not placing the house on the market 3 weeks earlier.

Remedies
Contract remedies look to the future to see where the person would have been if the contract was fully performed.

Expectation Damages
Expectation damages are what was expected out of the contract. As Owner expected to have his house painted by September 1, he can recover nothing under expectation damages because he received the benefit

of his bargain - the house was painted.

Consequentials
Under Hadley v. Baxendale contract claims must be foreseeable, unavoidable, and sufficiently certain.

Foreseeable
The damages must have been foreseeable at the time the contract was entered into. Ace will argue that it was not foreseeable that Owner needed to put his house on the market by September 1 because it was not mentioned at the time of the contract - it was by a later invalid modification.

Unavoidable
A party to a contract has the duty to mitigate his damages. Since Owner did nothing to mitigate his damages, because he did not rent the house or otherwise, he did not attempt to mitigate his damages.

Sufficiently Certain
Damages must be sufficiently certain. Owner wishes to recover for $6,000, which is the interest payment on the mortgage. These are not sufficiently certain because the real estate market is unreliable. Further, as owner was attempting to put his house on the market at the end of "selling season" anyway, there is no recovery. Owner should recover nothing.

Ace v. Owner
See above discussion for defenses.

Substantial Performance
Ace will argue that since he substantially performed, he should be able to recover for his work.

Minor Breach
If his completion of September 21 is seen as a minor breach, he should be able to recover for the contract price minus damages, or the owners cost to mitigate. Since Owner did not mitigate, Ace should get contract price.

Material Breach
If this breach is seen as material, he may be able to recover on a quasi contract theory, and recover the value of these services.

July 1999

Question 3

Susan is the Chief Operating Officer of WestTel, a telecommunications company. Felix is the Chief Executive Officer of CodeCo, a software company. About a year ago, Susan and Felix negotiated and signed a valid written contract under which WestTel purchased from CodeCo a license to use and sell software that prevents interception of telephone communications during transmission. Susan was assisted in the negotiations by Larry, an in-house attorney then employed by WestTel.

Throughout the negotiations, WestTel insisted that the license from CodeCo be an exclusive license for WestTel to use and sell the software in the national cellular telephone market. The only language bearing on the subject in the contract stated that, "WestTel shall have the use" of the software. The contract contained a clause stating that the written contract represents the entire agreement of the parties.

Susan was given oral assurances by Felix that the language quoted above would be interpreted by CodeCo to mean that WestTel was granted the exclusive license and that CodeCo would not license the software to others in the national cellular telephone market. Larry advised Susan that he was satisfied with

Felix' oral assurances.

Last week, Susan saw an ad in a trade journal announcing that NewCom, a competitor of WestTel, was marketing a new national cellular phone service using the same anti-interception software produced by CodeCo. She immediately called Felix to inquire about the NewCom ad and remind him of WestTel's exclusive license. Felix confirmed that CodeCo had licensed the same software to NewCom and denied that WestTel had an exclusive license.

Susan then called NewCom and informed its chief executive officer that WestTel had the exclusive license for the use of the software and that, if NewCom went forward with its plan to use the software in the national market, WestTel would sue NewCom. She was told that if she wanted to discuss it further she should talk to Larry, NewCom's in-house attorney who had negotiated the NewCom/CodeCo contract.

It turns out that at the time Larry was assisting Susan with the WestTel/CodeCo negotiations, NewCom had contacted Larry and offered him a job. NewCom knew when it offered him the job that Larry was participating in the WestTel/CodeCo negotiations. Larry quit WestTel about six months ago and joined NewCom's legal staff.

When Susan confronted Larry and reminded him of his advice about the exclusivity of the WestTel/CodeCo deal, Larry responded only with, "Well, you signed it."

1. What theories, if any, might WestTel reasonably assert against CodeCo to establish and enforce a right to an exclusive license and what is the likely outcome on each theory`? Discuss.

2. Should WestTel prevail in actions for tortious interference with the WestTel/CodeCo contract against:
   a. CodeCo? Discuss.
   b. NewCom? Discuss.
   c. Larry? Discuss.

3. What, if any, ethical duties has Larry breached? Discuss.

ANSWER A TO QUESTION 3

1) Exclusive License Theories

Reformation

WestTel may seek to reform the contract to reflect the parties true intentions. WestTel will argue that the parties intended an exclusive license and such intention was not reduced to writing.

CodeCo will argue that Parole Evidence bars introduction of any statements made prior to or contemporaneous with the writing because the clause in the contract states that it is a complete integration.

WestTel will counter by arguing the Parole Evidence should be admitted to interpret the meaning of the words "WestTel shall have the use." A court is likely not to allow Parol Evidence in because an exclusive license contract would naturally reflect such an agreement specifically, and the plain meaning of the words used does not indicate exclusivity.

Fraud in the inducement

WestTel will argue that CodeCo induced the agreement by fraud and misrepresentation. Here, Susan was given oral assurances by Felix that WestTel would have an exclusive license.

Susan reasonably relied on Felix's assurances. Felix should have known that Susan would rely on such statements.

Furthermore, Susan's inquiry to Felix about the contractual terms indicate that WestTel was concerned and probably would not have entered into the deal but for Felix's fraudulent statements.

Thus, it would be equitable to bind CodeCo to the deal pursuant to WestTel's exclusive license understanding.

CodeCo is at fault and should not benefit from its own fraud at the expense of the innocent party.

Specific Performance

A court will grant specific performance if there is a valid contract, which is present here.

Money damages (legal damages) must be inadequate. It is not clear whether CodeCo's software is sufficiently unique to find that the legal remedy is inadequate.

The terms must be sufficiently clear and definite. This requirement is lacking here unless the court first allows the contract to be performed or interpreted according to WestTel's terms.

Specific performance must be feasible. The court here could give a negative injunction ("Don't license to anyone but WestTel"), and would not be burdened by excessive supervisory duties.

Mutuality exists because both parties could seer specific performance. However, modernly, even mutuality did not exist, courts now use the "Security of Performance" as a substitute.

Nevertheless, unless the problems of uniqueness and definite terms favor WestTel, they probably will not prevail in a specific performance action.

2) Tortious Interference

Tortious interference is the deliberate inducement to breach a contract done by a third party who is aware of the existence of a contract between the parties.

The remedy is either all foreseeable damages as a result of breach or all remedies that a

(P) would have against a breaching party.

CodeCo

CodeCo will not be liable for two reasons.

First, CodeCo is not a third party and was not induced in anyway to breach.

Second, it is unclear whether a breach has occurred given the arguments about the terms. However, regardless of the breach, CodeCo was not a third party that induced breach,

NewCom

NewCom may be liable if they induced CodeCo to breach the contract with WestTel.

However, liability will turn on whether there was a breach to speak of stated

above. If NewCom believed reasonably that no breach would occur, they will

not be liable.

However, since Larry negotiated their deal, NewCom may have known through Larry that the deal was exclusive and if this is true, they are liable.

Larry

Larry is liable because he knew of the existence of the contract. He also knew that CodeCo had assured WestTel that the license was exclusive.

Thus, by helping NewCom, Larry induced a breach of contract. He will be liable for either of the two remedies previously stated.

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I

3) Ethical Violations

Duty of Loyalty

A lawyer must be loyal to his client's interests and avoid actual/potential conflicts of interest.

When Larry took the NewCom job and left WestTel, an actual conflict arose. The two companies were competitors and sought the same software.

Larry should not have accepted the job at NewCom.

At the very least, Larry should have quit when asked to negotiate the NewCom/CodeCo deal.

Larry's failure to quit/refuse the job/or disclose the actual conflicts in writing to both WestTel and NewCom was a clear ethical violation.

Duty of Confidentiality

Larry was in-house counsel for WestTel and had an ethical duty to keep all information learned during representation confidential.

When Larry began working for NewCom, and negotiated a licensing deal with CodeCo, it is inevitable that he either revealed confidential information about WestTel's deal with CodeCo to NewCom, or at a minimum, used such confidential information to NewCom's advantage, and to the detriment of his former client WestTel.

Larry should have declined representation of NewCom or quit as soon as the conflict was actual, or at a minimum discussed to both parties in writing and gotten a waiver.

Larry violated his duty of confidentiality to WestTel.

Duty to Third Parties

By doing a new deal with CodeCo on behalf of NewCom, Larry may have exposed CodeCo to a lawsuit from WestTel.

Larry had a duty to act fairly with third parties such as CodeCo and not to contribute to the possibility of a lawsuit from either his former or current client.

ANSWER B TO QUESTION 3

I. THEORIES FOR THE ENFORCEMENT OF THE EXCLUSIVE LICENSE

EXCLUSIVE LICENSE CLAUSE: If WestTel (W) wishes to assert a contract claim against CodeCo (C) it must successfully incorporate the exclusive license term into the contract. The facts indicate that the agreement between W and C was in writing and that the writing contained an integration clause. If the court determines that the integration clause is effective then the parole evidence rule will apply.

PAROLE EVIDENCE: The parole evidence rule prevents the introduction of extrinsic evidence to prove contracts additional or inconsistent contract prior or contemporaneous oral terms if the contract is **in** writing and fully integrated. Here, the facts do not provide adequate information to resolve whether the contract was fully integrated. However, even in a fully integrated contract evidence of oral contemporaneous discussion my be offered to explain

ambiguous terms.

Here, W will argue that the language in the contract "WestTel shall have the use" of the software is ambiguous with respect to its exclusivity. CodeCo will argue that the meaning of the terms is plain on its face. The court will consider evidence of the industry custom and practice in reaching its decision. As the facts indicate that WestTel is a company **in** the telecommunications industry and that is is a national market, the court might determine that an exclusive license is the industry standard. Furthermore, the court will consider whether the price paid by W for the license is commensurate with an exclusive national license or a nonexclusive license. If the court determines that the term is ambiguous, it will admit the oral evidence of its meaning into evidence.

The oral representations of CodeCo and its agents will be considered nonhearsay party admissions and therefore are admissible evidence.

REFORMATION: A party may seek reformation of a contract if its terms do not reflect the original intent of the parties either because of a mistake of law or fact material to the contract or because of fraud. The facts are not sufficient to establish a case for reformation conclusively, However, Susan may argue that she intended all along to negotiate for an exclusive national license and that she made this intention clear. Therefore, the contract maybe reformed to include the terms necessary to create an exclusive national license.

Additionally, the facts indicate the possibility that the contract was induced by fraud on the part of Larry, NewCom and CodeCo. Apparently Larry and NewCom had engaged in discussions at the time the CodeCo/WestTel contract was negotiated. If Susan can establish that WestTel knew that Susan wanted a national exclusive license but fraudulently induced her to execute the contract without adequate language, Susan will have grounds to reform the contract.

RESCISSION: Rescission of the contract will only be available on the above grounds. However, rescission would cancel the contract entirely, allowing W to recover any consideration it paid for the license. However, as W wants to enforce the agreement this is not an adequate theory.

SPECIFIC PERFORMANCE: In the event that W establishes the national exclusive license, it should seek specific performance of the contract. Specific performance requires a showing that the remedy at law is inadequate, that the terms are definite and certain, that an order would be feasible, there is mutuality, and that there are no effective defenses.

Here, W will be able to establish a case for specific performance. The remedy at law is inadequate because damages will not fully compensate W as it will allow its competitor to compete more effectively and it may lose market share. Susan will argue that part of what W

bargained for was the security that its competitors would not have the technology. The terms of the order could be definite, certain, and feasible and the court would order CodeCo to deny a license with NewCom. The mutuality rule is satisfied because both WestTel and CodeCo have specific performance available to them. Finally, CodeCo has not equitable defenses.

2. TORTIOUS INTERFERENCE

A claim for tortious interference must establish that the defendant wrongfully interfered with an existing contract with a third part. It is not enough to show that a competitor merely engaged in competitive acts.

CLAIM AGAINST CODECO: W does not have a claim against CodeCo for tortious interference because CodeCo was the other party to the contract. The facts do not indicate that CodeCo interfered with a contract between WestTel and some other party. I n fact, the facts indicate that WestTel may have attempted to interfere with its contract with NewCom. Therefore WestTel will not prevail for this cause of action against CodeCo.

CLAIM AGAINST NEWCOM: The facts are not sufficient to resolve whether NewCorn is liable to WestTel for this tort. The tortious interference requires some act of interference. Here, the facts indicate that NewCom engaged in communications with Larry, WestTel's counsel, that it subsequently hired Larry, and that it sought and obtained a license from CodeCo. Susan will argue that the acts were wrongful and will assert that NewCom knew about the negotiations with CodeCo and that even though she successfully executed a contract with CodeCo that contract was insufficient because NewCom actively solicited Larry's help to ensure that the contract with CodeCo would not be exclusive. If she can prove these assertions she will probably prevail. NewCom will argue that their conduct was merely competitive and not wrongful. If they can show that they did not attempt to interfere with the negotiations between CodeCo and WestTet, NewCom will prevail on this claim.

CLAIM AGAINST LARRY: WestTel's claim against Larry is stronger. Here the facts indicate that Larry was aware of the negotiations with CodeCo and that he was simultaneously communicat

ing, in breach of his ethical duty, with NewCom. These facts strongly suggest that he falsely advised Susan with respect to the sufficiency of the language in the contract and therefore that Larry wrongfully interfered in her contract with CodeCo.

3. LARRY ETHICAL BREACHES

DUTY OF COMPETENCY: An attorney owes a duty of competency to this client. This duty requires that **an** attorney exercise the standard of care of a competent attorney in his field. Here, Larry gave advice concerning the WestTel/CodeCo contract. Larry breached this duty

if he was not sufficiently familiar with contract law and drafting principles to advise Susan. Furthermore, Larry breached his duty of care by advising Susan that the clause would be effective. Although it is possible that Susan may prevail on the contract, the language of the contract is clearly ambiguous. Given the absolute clarity of Susan's intent with regard to an exclusive license and the likelihood that such a provision would be litigated, Larry is liable to Susan if a competent lawyer would have advised her to make the language more clear by including the words "exclusive" and would have advised her about the effects of the parole evidence rule.

DUTY OF CONFIDENTIALITY: A lawyer owes a duty to keep any communications with his client in absolute confidence unless the communications involve a future crime or fraud or unless they relate to a malpractice claim. None of the exceptions apply in this situation. The facts indicate that Larry may have disclosed information to NewCom about the contract negotiations. Such a disclosure would be malpractice and would subject Larry to discipline.

Furthermore, Larry owed WestTel a continuing duty of confidentiality not to disclose confidential information even after he began to work for NewCom. Therefore, he will be liable to WestTel and subject to discipline for any disclosure after working for NewCom. ,

DUTY OF LOYALTY: An attorney owes a duty of loyalty to his client. An attorney must not assume an adverse position to a client or former client. Here, the facts indicate that Larry went to work for NewCom. While working for NewCom, his ongoing duty of loyalty prevents him from working on a project that is adverse to WestTel. A new negotiation with CodeCo would qualify if it involved any confidential information that Larry acquired while working at WestTel.

IMPUTED DISQUALIFICATION: Additionally, an attorney's disqualification will be imputed to all other attorney's working at that attorney's firm. Where as here, the firm is not a law firm, a disqualification will be imputed where the lawyers share office space and resources. Therefore, here Larry's disqualification would be imputed to any other lawyer working for NewCom under these conditions.

FRAUD: The facts do not clearly indicate that Larry was involved in a fraudulent attempt to misadvise Susan with respect to the contract. However, if he was involved in a fraud, it would be an ethical violation in addition to a tort.

July 1977

QUESTION NO. I

In December 1975, during his last year of college, Paul applied for post-graduation employment with Dryden, an accountant. On January 15, 1976, Dryden wrote to Paul: "I offer you employment with my firm, beginning August 1, 1976 at $15,000 per year." A few hours after mailing the letter, Dryden telephoned Paul. Dryden stated that a letter offering employment was in the mail and that he wanted to make it clear that "I will keep you on staff and expect you to stay for at least a year to see how things work out if you accept the job." Paul stated that he would reply promptly.

Upon receipt of Dryden's letter, Paul responded by letter, "I accept your employment offer of January 15, 1976."

On March 3, 1976, Paul received a letter from Dryden stating: "It was my intention in hiring you to have you work with my International Union account. However, the Union no longer retains my firm. Therefore I lack the funds and will not hire you. Good luck in securing other employment."

Thereafter several weeks of communication ensued, in which Paul demanded at least $5,000 in compensation and Dryden refused to pay more than $200. At last Dryden wrote: "I am tired of hassling. I enclose a check for $500 to settle this mess." The check was conspicuously marked: "In full satisfaction of all claims of Paul against Dryden." On April 15, 1976, Paul cashed the check, but printed above the. endorsement: "Under protest, reserving all rights."

On May 1, 1976, Paul consults you regarding his rights, if any, against Dryden. Advise him concerning the potential causes of action available to him, the defenses that may be asserted by Dryden, the likelihood of Paul's overcoming these defenses, and the measure of damages he may recover or other relief that may be ordered if Paul is successful in his lawsuit.

Answer A to Question 1

Dryden's letter of Jan. 15, 1976

The letter constitutes an offer for a personal services contract by which Dryden's (D's) intent to presently enter a contract is indicated and which is properly communicated to Paul (P), creating a power of acceptance in P.

Terms of the Offer

Were the terms of the offer sufficiently certain to overcome any defenses by D to formation and thus discharging his obligation by operation of law?

There is a serious problem here because the letter of 1/15/76 does not state the duration of the contract, an essential term. Will this constitute a defense to formation by D?

Statute of Frauds

The contract if any is within the 1 yr. provision of the Statute of Frauds since D indicates by telephone that P is to remain "at least a year." Will P be unable to recover because of the defense that the Statute of Frauds prevents judicial enforcement? The letter constitutes a sufficient memo except for one term -- duration, even though time performance is to begin is provided for.

Will parol be admissible to show D added term of duration by telephone?

Usually parol evidence is inadmissible to add to and vary terms of an agreement where parties have reduced agreement to writing, i.e. integration was intended. Since this does not fall under any of the exceptions, notably to interpret ambiguous terms, of the parol evidence rule since there is no term here, parol would be inadmissible.

Will the Court imply reasonable term here where the parties have been silent as to an essential term?

Court hearing the case would imply the one-year term because compensation of $15,000 per year is provided for in the letter of offer.

Contract formed?

Since a valid offer can be established, P's response by letter soon after receipt of offer was a proper exercise of the power of acceptance created in him by D's offer and, upon communication to D, a valid contract was formed.

Letter of March 3, 1976

What was the legal effect of D's repudiation of the contract prior to the time set for performance?

D has anticipatorily repudiated the contract with P which in effect gives rise to an immediate cause of action for breach of contract by P against D. All conditions are excused i.e. having to wait for date of performance to sue and D can go to court at this point.

D may try to argue that his obligation was discharged by operation of law on the ground of impracticability. The traditional view was to apply this doctrine where there is a failure of mutually presupposed conditions and (1) such change was unforeseeable at formation stage and, (2) the consideration is now become grossly disproportionate in comparison to what was originally bargained for.

In other words, performance would now be a real hardship and the unforeseen change in circumstances would have to give rise to right to rescind on behalf of D in order to allow application of the doctrine of impracticability.

Modernly, using the UCC as analogy and modern trend of cases, mere commercial impracticability requiring less of showing of unforeseeability, but, since personal services involved here, hardship would still have to be shown by D.

I conclude that this is not a case for application of the doctrine because D did not condition the offer on the contingency that he would have a certain account by the time P arrived for work. He could have easily inserted such a condition precedent as part of the bargain and his failure to do so should not require P to bear the burden.

Effect of $500 check

D may attempt to raise the defense that his contractual obligation was discharged by law on the theory of accord and satisfaction. The duties of both parties being executory D's tender would constitute accord and satisfaction if there was an actual dispute constituting consideration, regarding P's claim and if P accepted with intent to discharge or extinguish the claim. Note, Statute of Frauds complied with since check may be regarded as sufficient writing.

Effect of reserving rights

P indicates intent to preserve his rights and the $500 will serve as a set-off to carry future recovery by P. Despite fact that D offering $200 all along and D asking for at least $5,000 does not make the sum of $500 a "compromise" because, as stated above, P reserved rights.

Duties of Paul

Since Paul has a few months left before performance was to begin and about one month before graduation, given the material breach by D of the personal services contract, he is under a duty to cooperate in good faith to mitigate damages, i.e. he must attempt to make productive use of his time.

Does D have any defenses to P's cause of action?

Since he will be a professional, i.e, an accountant, he is not required to find another job outside his field but he may have trouble since interviewing takes place during winter-spring season of last year of school, but he can in good faith, shop around.

If he does not, his recovery may be reduced by what the avoidable consequences may have been, although difficult to calculate.

Specific Performance

Courts in equity loathe to specifically enforce personal services contracts because of the supervision problems involved but P may attempt to obtain this relief nonetheless. Problem also is that it almost amounts to involuntary servitude requiring D to employ P.

Conclusion: probably can't get spec. perf.

NOTE: negative convenant enjoined D from hiring anyone else here, difficult to get, and inapplicable because D doesn't want anyone else.

Damages

P can sue for damages, the measure based on what he would have been entitled to under the contract less any avoidable consequences, i.e. amount of compensation he would have received if he in good faith sought and found other (comparable if possible) employment. P can also recover expenses incurred in good faith in mitigating damages.

Conclusion: As of May 1, 1976

(1) D is in breach of contract;
(2) P has a right to an immediate cause of action against D;
(3) D must attempt to find comparable employment;
(4) D will recover for expenses incurred and for the benefit of his bargain measured by difference he would have received under contract and amount received under other employment.

Answer B to Question 1

Potential causes of action available to Paul (P):

In December 1975, Paul's (P) application for employment with Dryden (D) was an invitation on P's part for an offer of employment from D. The letter of D written on January 15, 1976 would be deemed a valid offer of employment since the language of the author was clear and definite in its manifestation of D's

intention to be bound by P, the offeree's assent to its terms. The offer can be deemed an offer to enter into a bilateral contract with the term of salary at $15,000 year and the term of duration of the contract viewed as periodic, from year to year, on the basis of the fact that D expressed in his letter the term of salary at "$15,000 per year". However, another very plausible construction of this language would deem the offer to be seeking acceptance to form a contract of employment terminable at will, in accordance with the traditional or customary practice in the professional office employment area. Finally, even if the ambiguity of the duration term of the offer of employment were such as to render the offer uncertain for purposes of establishing assent such that a court would deem the terms clear and definite enough to force the bargain as a contract, D's subsequent telephone conversation with P in which D stated that he wed "will keep [P] on staff and expect [him] to stay for at least a year clearly supplemented the original written offer so that any ambiguity regarding the duration of the contract was removed. From that oral modification of the written offer, it can be shown that the offer looked to a minimum employment duration of one year. The additional language used by D in his

telephone conversation, namely, that the one year minimum duration will be recognized "to see how things work out if you accept the job" could be construed as an expression of a condition subsequent being imposed upon and made a part of D's offer of employment, such that D would be free to terminate the employment contract at his option should "things not work out" to D's satisfaction.

Because this modification and/or addition to the terms of the original written offer (set out in the letter) were only orally effected, by way of the telephone communication, the problem arises whether the contract would he enforceable by P against D or whether it would result in an unenforceable contract due to the Statute of Frauds. The Statute of Frauds requires that any contract which by its terms cannot be performed within one year must be evidenced by a writing. A court would probably find, however, that D's letter of January 15, 1976 would satisfy the Statute of Frauds as a written memorandum signed by D, the party to be charged.

A second issue arising from the fact that the subsequent modification to the offer was oral is whether such oral modification of the terms of the offer (and therefore of the agreement once P accepts the offer) would be admissible or not in showing the terms of the contract under the parol evidence rule. The common law has consistently recognized the principal that parol evidence is admissible where there is an ambiguity in the terms written memorial of the contract. As stated above, such an ambiguity did exist in-the written offer of D's letter and so it would be possible to have the oral term of one year minimum duration admitted as evidence to show the true understanding and assent of the parties when P accepted the offer as modified.

In the telephone conversation P indicated to D that he (P) would "reply promptly". D's silence to P's remark would be deemed as a manifestation of D's willingness to keep his offer open for a reasonable extension of time.

P's response by letter was in fact prompt, and his acceptance should be deemed a valid and effective acceptance, creating a valid and enforceable bilateral contract. The language used by P in his acceptance indicated a clear unequivocal and definite intention on P's part to accept the offer of D as modified. There is no problem of consideration insofar as both P and D agreed each to suffer a detriment, namely P's rendering his personal services for D's payment of $15,000. as promised.

D's subsequent letter of March 3, 1976, revealing a hidden theretofore undisclosed assumption on D's part that the funds from which D would pay P's salary would come from a particular source is obviously an attempt by D to terminate the contract. D's unequivocal, clear assertion that he "will not hire" P must be viewed as an anticipatory breach of contract, which in the majority of jurisdictions would be deemed to give P an immediate cause of action, following the old English doctrine set forth in Hochester v. De la Tour. Other jurisdictions, also recognizing anticipatory breach would compel P to await the date of performance, namely the scheduled date of the commencement of employment on August 1, 1976, before P could bring any action for breach of contract, on the theory that an immediate action would prevent D from changing his mind and also give P more rights than he originally had under the contract as agreed to. In any case, P has a cause of action against D at this point for D's anticipatory breach.

Defenses that D may raise

D may seek to raise the defense of impossibility of performance arguing that because the intended source of funds for P's salary has become unavailable, it is impossible for D to perform and so his duty to

perform is discharged. But this defense is groundless, since the doctrine of impossibility is strictly applied to situations where it is physically or legally impossible to perform, which the facts here do not support.

Another defense D may seek to assert is the defense of frustration of purpose. This too will fail, since the basic requisite of that doctrine, that there be a destruction of an underlying purpose of the agreement which purpose was within the contemplation of both parties at the time of contracting, just is not supported by the facts. Until D sent this second letter in March, P had no idea that his salary was to come from a particular fund. This defense will not discharge D of his obligation to perform under the contract.

D's subsequent tender of check in the amount of $500 as an offer of settlement to discharge his obligations and liabilities under the contract can be viewed as an accord. D's writing "in full satisfaction" on the check in a conspicuous fashion would normally be considered sufficient to discharge D's duties and liabilities for "all claims of P against D" if P cashed the check, amounting to a "satisfaction" of the accord, working a complete discharge in favor of D since the accord and satisfaction is supported by consideration (the $500).

A question arises of the effect of P's cashing the check after having written "under protest, reserving all rights". Such a notation by his signature is in complete contradiction of the conspicuous notation put on the tendered check by D, and it is likely that a court would disregard P's notation and hold P to the discharge of D's liabilities by the accord and satisfaction, compelling P to accept the $500 as his sole remedy for D's breach of contract.

Should the court, however, deem the cashing of the check "under protest" ineffective as an accord and satisfaction, P's measure of damages would be the loss of salary for one year and no more, since, as indicated above, the contract was subject to a condition subsequent where D could have terminated P's employment after one year at his option. However, P has a duty to mitigate the damages, here, meaning he must make a good faith effort to seek and find alternative employment for that year. He need not accept any offer of employment, however, allowed to insist on comparable employment as an accountant or office professional.

Fall 1978

QUESTION NO. 8

In March, Owner wrote Builder asking for a bid on a contract to build a home on Owner's lot. Builder replied in a letter as follows:

"I am happy to quote you my price of $60,000 to complete the house according to the specifications you supplied. Please let me know immediately if you accept. Payment of $10,000 must be made when building begins. The remainder is due when the house is complete."

Owner wrote back:

"I accept your offer, provided you can guarantee completion by November Ist or forfeit $100 per day for each day after November 1st."

Builder, after further oral discussions with Owner about the specifications for the house, began work on June 1, at which time Owner paid Builder 5-10.000. One fourth of the work was completed by the end of June. In July and August; there was a strike by all carpenters and bricklayers, and no work on the house was accomplished during that time. The strikers returned to work on September 1, and on September 2 Builder notified Owner that he would be unable to complete the house before January 15 without considerable overtime work. Builder asked that Owner agree that no damages for delay would be deducted or charged to Builder and stated that if such an agreement was not immediately forthcoming, Builder would abandon the contract and move his men to another project.

Owner consults you on September 2. He tells you that he need not vacate his old home until mid-January, but that he has ordered furniture for delivery on December 15, which will have to be stored at great expense as well as be moved a second time from storage to the new home if the new home is not ready on time.

Advise Owner of his rights as of September 2 and of his eventual liability or recovery, if any, if:

(1) He agrees to Builder's request. Discuss.

(2) He does not agree to

Builder's request. Discuss.

Answer A to Question 8

The first issue is to determine the contract itself over which Builder and Owner are in disagreement. The letter from Builder is clearly an offer which can be accepted by Owner and binding on each party. But Owner's reply is not an acceptance under the common law since it adds a new term which is clearly material, that is the

penalty clause for late completion and a specified completion date. Under the common law this was a rejection and counter offer. The
UCC doesn't apply since this doesn't involve goods and it appears that the parties themselves did not consider this yet a contract since they had further discussions. I would contend that a contract exists evidenced by the 2 letters and such other further terms as were agreed to by the parties subsequent to these letters. It includes the late completion charge since it was accepted by Builder by his failing to object to its inclusion and treating it as included when a reasonable person would object if it were not acceptable.

Now the Sept. 2 issue. The statement of Builder is an anticipatory repudiation of this covenant of the contract. It is an offer to modify the contract. The problem with this is that there is no consideration for the modification. Builder is under a pre-existing duty to complete the building by Nov. 1 or to pay letter completion penalties. Indeed, it is just this kind of event which Owner tried to protect against him he insisted upon the set completion date and the penalty fee if not done. And clearly the Builder knew the purpose of the clause so exactly the type of risk for which the clause was included has resulted in the present situation. Builder could even have insured against this risk so if the purpose of the court is to allocate damages for the risk according to the contemplation of the parties, the burden for late completion must lie with Builder. We 3o not have true impossibility, only impracticability since to complete the job will cost the Builder money but it could be done.

Now as to what should be done. If owner agrees to Builder's request
in order to get him to complete the job, what can he get. As discussed, I see no consideration for the modification and without new consideration most courts would find the agreement to waive the late charges without effect. What then can Owner get. The charges in the contract are in the nature of liquidated damages and these are enforceable only so long as they are not penal and are an attempt to reasonably approximate the damages occasioned by a breach. Here it was in the contemplation of the parties that late completion would result in loss to the owner. Additional rent must be paid, storage for furniture and other costs are foreseeable. But $3000 a month might seem excessive when we are only speaking of a $60,000 house. I would conclude that the late payment charge is penal and Owner can recover what he loses in additional moving, storage and rental expenses.

Some courts might disagree that there was no consideration and find it in the Builder's giving up the "right" to abandon the contract. Though this doesn't appear logical, nevertheless it has been adopted occasionally. In these courts Owners agreement would bind him. Other courts would find estoppel to apply since Builder was acting in good faith when he attempted to modify. The hardship was not caused by his action but by 3rd parties. Owner's agreement with the intent not to follow through would then be a misrepresentation upon which Builder reasonably relied to his detriment in not abandoning his contract at that point and allowing Owner to find another to complete. But since estoppel is an equitable theory, it appears that a proper result would still be that Builder would owe the cost of completion over the contract price plus any foreseeable consequences of late completion as above, less that amount completed by Builder ($15,000). Builder would probably be better off completing the job himself, unless he has a more lucrative job he must give up.

If owner doesn't agree to the modification, as I believe he needn't as explained for lack of consideration, he could treat this as an anticipatory repudiation of the contract by Builder. This would allow him to consider it a present material breach which would enable him to seek out a new contractor to complete the job and to immediately sue for damages. This appears to be the best available tactic for Owner since he has a duty to mitigate damages. The longer it takes to find someone to complete the job, the more damages from delay will occur. Some courts require that to consider as an anticipatory repudiation, the non-breaching party must seek assurances from the breaching party. But here the breach is unambiguous. The builder's action is in the nature of duress in trying to take advantage of the owner's situation to force concessions. This should not be allowed under these circumstances when the owner has made every effort in the contract to provide for the eventuality that caused the injury.

Answer B to Question 8

(1.) Initial Contract between Owner & Builder

The letter from Builder was a valid offer to build the house. It was intended as an offer and contained requisite specific terms: it named the price, the subject matter, the parties, and the quantity.

Owner's letter back to Builder in reply to the offer was probably not a valid acceptance. It was a qualified

acceptance. Acceptances generally must be unequivocal, or at least merely restate conditions that are implicit in the offer itself. Owner's letter contains a condition not implied in the offer (guaranteed completion by November 1.) Thus, Owner's letter was a rejection and a counter-offer to Builder.

Builder's beginning construction constituted a valid acceptance of Owner's offer, on the owner's terms. A valid bilateral contract was formed. Because courts prefer to uphold contracts if possible, thus an act indicating an acceptance will suffice.

The owner's paying Builder $10,000 and the Builder beginning construction were conditions concurrent in the contract, and gave rise to duties in each (to build the rest of the house, and to pay the rest of the price).

(2.) If Owner agrees to Builder's request

It is possible to argue that builder's duty to continue construction on the house was discharged by impracticability or impossibility. If the strike has a totally unforeseen occurrence which prevented completion of the building as agreed, then builder's duty might be discharged.

If builder had a right to abandon his duties, then owner's agreeing to waive damages and let him continue would be a valid contract. The consideration would be builder's resuming duties that he was discharged from. It would not be an agreement to perform pre-existing duties if he was discharged.

If builder was not discharged however - because a strike has a risk he should have foreseen at the beginning, then the agreement might be not be a valid contract - no consideration for duties one already must perform.

However, it might be argued that the consideration given was builder's right to abandon the construction and breach the contract.

If there was a valid consideration, then Owner could not collect damages against builder.

(3.) If Owner does not Agree

If Owner does not agree to builder's request, and it's assured that builder's duties are discharged by impracticability - then builder would not be
liable for breach of contract. Owner would have to pay builder for the work done so far, minus what it would cost to have the building completed.

If it's assured that the builder's duties are not discharged, then builder's announcement would an anticipatory breach of the contract, and owner could collect damages.

The liquidated damage provision is valid only if the parties anticipated difficulty in determining damages and if it provides a reasonable approximation of the damages. It cannot be a penalty.

If owner couldn't collect under the liquidated damage provision - he could get any damages that were cause, foreseeable, certain, and unavoidable. He would be able to get the cost of completion of the house, and probably could get the cost of storing the furniture - since this was a foreseeable result of not completing the house on time. The builder would be able to collect what was due on the contract, minus all of owner's damages.

Spring 1978

QUESTION NO. I

Owner (0) wished to build a summer house on his mountain lot. He retained Architect (A) to draw the plans and specifications and to supervise the construction of the house. The contract between 0 and A stated, in part: "The total fee for Architect's work herein promised is $4,000

payable on completion of the construction; *provided,* that no amount shall be due Architect if the plans and construction fail to meet the personal satisfaction of Owner."

Plans and specifications were prepared for 0 by A and were approved by O. 0 then entered into a contract with Contractor (C) to build the home for $45,000 payable on completion. This contract incorporated the plans and specifications as an exhibit and contained the following provisions:

"The architect shall be, in the first instance, the interpreter of the conditions of this contract and the judge of its performance.

"The $45,000 shall be due and payable when 0 receives from A a certificate stating that the work provided for in this contract has been completed and is accepted by

O did not see the house during construction. C finished the work under the contract and requested A's certificate. When A and 0 visited the site, 0 noticed that the siding was of a different kind than that specified and gave an appearance to the exterior different from that which 0 had desired. A refused to issue his certificate of completion.

C refused to remove and replace the siding. C explained that a severe shortage in the supply of the lumber specified had increased its cost to the extent that he could(not afford to use it, and that the lumber substituted was at least equal in quality and' durability. These matters were confirmed by A.

A demanded payment of his fee. 0 wouldn't pay him and stated: "The plans for the house were great, but I hate the siding. I'm personally dissatisfied with the construction."

O then wrote C: "Although I do not owe you anything, in view of the effort and money you have expended, I am giving you $35,000." 0 enclosed a check for $35,000 with these words on the back: "Accepted in full settlement of all claims to date."

C endorsed and cashed the check and has now demanded that 0 pay him the balance of $10,000 on the contract price.

What are C's rights against 0? Discuss.

What are A's rights against O? Discuss.

Answer A to Question 1

Existence of Contracts

Executory bilateral contracts were successfully formed between 0 and A and between 0 and C. The terms, at least to the extent they are material here, were unambiguous and not mutually mistaken. No statute of frauds problems exist, since each contract might have been completed within one year (and, in addition, since it appears that both contracts were in writing, so probably signed). No indication exists that any overreaching or grossly unsufficient consideration was involved, so unconscionability will not be a

bar to enforcement.

Extent of Performance Demanded by Contracts

C & 0 Contract. Completion of the house and receipt of the certificate from A was an express condition precedent to C's entitlement to O's performance under the contract, payment of the $45,000. Where conditions precedent exist expressly in contracts, they are enforced by courts. This is true even where contracts might be severable if no express conditions were present. (Severability would normally exist in cases such as this, where partial completion (e.g. foundation, exterior, interior) would confer a partial benefit to the other party, making return performance in stages proper.)

Nor is substantial compliance sufficient where conditions precedent are express, Compliance must be letter perfect, to give rise to a return performance obligation,

The condition precedent here, receipt of the certificate of completion from A, vested discretionary authority in A to approve or disapprove performance, and to mature or not mature 0's duty to pay the $45,000, In such cases as this, where A was not expressly authorized to exercise unfettered discretion, an implied obligation to exercise judgment reasonably exists, No problem of illusoriness of 0's obligation exists, both because the discretion to mature 0's contract duty was held by someone other than himself, and because reasonableness was required.

A & 0 Contract. This contract was substantially like 0's contract with A, with respect to the existence of an express condition precedent to 0's duty to perform (here completion to 0's personal satisfaction) and the requirement for perfect rather than mere substantial compliance with that condition in order to mature the contract obligation. The analyses of the first two paragraphs dealing with the A & 0 contract are equally applicable here.

Reservation by 0 to himself of power to determine whether his obligation to pay A had matured does not present problems of illusoriness here. Although the contract made "personal satisfaction" a condition precedent to 0's obligation to pay A, unfettered discretion was not reserved expressly, so 0 is bound to exercise his discretion in good faith, since the Architect is providing, presumably, personal services. If 0 disclaimed personal satisfaction for reasons unrelated to true satisfaction, the condition would be excused and his obligation to pay A would mature.

Compliance With Contracts and Rights Under Contracts C v 0:

As noted above, perfect compliance with terms of the contract - receipt of the certificate from A - was required to mature O's duty to pay C the $45,000. C did not perfectly comply and so, under the technical contractual terms, 0 is not obligated to pay the $45,000, UNLESS the condition precedent was excused, although not satisfied by C.

C might be able to argue that A did not exercise independent and reasonable judgment in exercising his discretion to withhold the certificate. If substitution of different siding was common and acceptable in the industry, this might be the case. In addition, if A was overborne by 0 while inspecting the house, he may not have acted reasonably.

Furthermore, C may be able to argue successfully that A, as O's agent to supervise construction, implicitly approved use of the substituted siding by not complaining to C about it when C first began using it. 0, through his agent A, would then be estopped from enforcing the condition precedent on grounds of improper siding, since C detrimentally relied to his severedetriment on A's implicit representation that the substitute siding was satisfactory.

If these theories do not work for C, it is clear that 0 is not liable to C, at least for the full contract sum.

Substantial compliance with contract terms, so 0 received the substantial benefit of his bargain, generally would have been sufficient to mature 0's contract duties, offset by damages to repair,' if economically not wasteful. In this case, economic waste probably would result, so 0 probably would be entitled to offset only nominal damages. However, where compliance is substantial rather than perfect because of wilful disregard of contract terms by the performer, substantial compliance does not occur, and return contract obligations do not mature.

Nor will the doctrine of impracticability of performance help C. This doctrine discharges contract obligations if performance becomes extremely burdensome and grossly disproportional in cost to the return performance under the contract, due to unforeseen circumstances. Absent war or natural disaster, just about,

rises in prices due to shortages or inflation are not considered unforeseeable. Thus C's contract obligation is not discharged by impracticability.

As indicated above, C may prevail on arguments of estoppel and abuse of discretion by C. Thus, there was a real dispute as to the obligation of 0 to C. In sending C the $35,000 check with accompanying letter, 0 proposed an Accord & Satisfaction, which if executed after acceptance would discharge all remaining obligations under the contract. By cashing the check, C accepted and executed the accord, and thus discharged contract obligations to the **ex**tent not formerly performed. C therefore has no remaining rights against 0.

A V. 0.

A undertook, in effect, to be a guarantor to 0 of C's performance under the contract, by agreeing that 0's personal satisfaction was a condition precedent to his obligation to pay A. Most likely', O exercised his discretion in good faith, since he probably was genuinely dissatisfied by the appearance of the house. His payment to C was evidence of his general good faith. The condition therefore was not discharged.

A, therefore, probably is not entitled to any compensation under the contract since he failed to satisfy the condition precedent.

Nor, probably, does he have grounds to set aside the contract and sue in quasi contract for the benefit of his services rendered to O.

Answer B to Question 1

I C V. 0

The C-0 contract to construct is a services contract governed by common law. It was supported by valuable consideration on both sides (O's promise to pay if A is satisfied being sufficient legal detriment). The contract, however, contains an express condition precedent to O's obligation to pay--that is, that A be satisfied with the work and issue its certificate. A court will give literal enforcement to this condition, although imposing a requirement of good faith on A, because it is A's judgment for which the parties bargained. This condition was not satisfied. Therefore O's obligation to pay C never matures.

However, the condition may have been excused, in which case O's obligation to pay would mature. The argument for excuse would be based on the increase in the price of lumber. This might be a proper excuse (depending on how high the price had gone and its forseeability) if the condition were C's performance--construction of the house, but such is not the condition. The condition is A's certificate. Based upon the facts of the quality of the lumber and A's confirmation thereof, an argument can be made that in good faith he was required to issue his certificate. Although attractive, I'm not sure this would be accepted by a court and no excuse of the condition would be found. Accordingly, O's obligation to pay C never matures.

If an excuse is found, however, then C has committed an immaterial breach (which may itself be excused on the same rationale, and 0 is obligated to tender counter performance. He is however entitled to a set-off for the diminution in value caused by the breach.

If 0 has no obligation to perform under the contract, C is entitled to quasi contractual relief for the benefit conferred on O-- $45,000 minus the diminution in value caused by the offending lumber, limited to a maximum of the contract price (as C would be the offending party).

There remains to be considered the $35,000 check tendered by 0 and accepted by C. This may constitute in conjunction with the accompanying letter an accord and satisfaction. 0 seemingly has made an offer and attempted to put C under a duty to respond. C's acceptance of the benefits of the check by cashing it is arguably acceptance of the proposed accord and simultaneous satisfaction of it. There is a bona fide dispute. Both parties have compromised their position as required by some common law jurisdictions. On the other hand, there appears to be overreaching by O. Absent an express reservation by C before cashing the check, there may well be an accord and satisfaction, which would discharge 0 from any further liability to C.

Even if an accord and satisfaction is found, however, C may be able to obtain an additional $10,000 minus the diminution in value from 0 on his Quasi contractual theory--as the gist of such a claim is unjust

enrichment of the defendant.

II A v. 0

0's contractual obligation to pay A is subject to an express condition precedent--personal satisfaction of 0 as to the plans and construction of 0's home. Such conditions are regarded with disfavor by the courts, but are enforced if they relate to an inherently personal subject matter. If so, the only qualification is the good faith of the person to be satisfied. If the subject matter of the contract is not inherently personal a "reasonable person standard" is imposed.

The O-A contract should be bifurcated. The plans are personal in nature, but the construction is arguably an objective area. The contract should be divisible. The two functions are often separated, although the single contract price indicates a contrary intent in this case.

Thus applying the rules stated above to the facts, A is entitled to the full measure of his contract price for that portion attributable to making the plans. It is clear from the facts that 0 was personally satisfied with the plans. Therefore, the condition was met and his duty to pay matured. (It should be noted that A might not have had a valid claim for quasi contractual relief, if 0 was in good faith not satisfied, since arguably 0 would have obtained no benefit. The better view would be contra, however).

As to the second half of the condition--that satisfaction be personally given to 0 regarding construction. This is not a personal sort of duty; accordingly, a reasonable person standard would apply. The facts indicate that 0 was being unreasonable given the value of the substitute and the inflation in the cost of the wood called for by the plans. Thus, the condition is regarded as satisfied and O's duty to pay A for the construction segment of the contract matures. (With respect to this half of the contract A might also have a valid claim for quasi contractual relief if a court were to find construction personal in nature and 0 not acting in bad faith. Here 0 clearly has received a benefit).

In short, A should recover his entire contract price.

Fall 1981

QUESTION NO. 5

On October 15, 1980, Coll, a collector of art, telephoned Art, a well-known painter, and said, "Last February [saw your painting of sunflowers. Is it still available and, if so, how much do you want for it?" Art responded, "You can have

it for $25,000 and I can deliver it on November 1, but I want a clause stating that if either of us decides not to go through with the deal, the other party is entitled to $5,000." Coll replied, "You've got a deal. Draw up the papers and mail them to me."

The painting which Coll had in mind was entitled "Sunflowers." In July 1980, unknown to Coll, Art had painted another picture of sunflowers which he had entitled "Sunflowers II."

Art prepared, signed, and mailed to Coll a document stating: "October 16, 1980. I hereby sell to Coll my sunflower painting for $26,000, the price to be paid and the painting to be picked up by Coll on November 1. In the event either party fails to perform, it is agreed that, because of the difficulty of proving how much damages have been sustained by the non-breaching party, the non-breaching party shall be entitled to damages in the sum of $5,000."

Coll received the document on October 17. He telephoned Art that day and said, "I accept your offer and will pick up the painting on November 1." Coll did not sign the writing or return it to Art. The $26,000 figure in the writing was a typographical error made by Art's secretary. Neither Art nor Coll had noticed that the figure was $26,000 rather than the $25,000 they had specified in their October 15 telephone conversation.

On October 25, the directors of Museum expressed great interest in "Sunflowers." Flattered by their attention, Art delivered "Sunflowers" to Museum as a gift that same day.

On November 1, when Coll tendered $25,000, Art tendered to Coll the painting entitled "Sunflowers II." Coll refused to accept "Sunflowers II" and, at the same time, learned that "Sunflowers" had been donated to Museum.

What are Coll's rights and remedies, if any, against: Art? Discuss. Museum? Discuss.

Answer A to Question 5

Coll Rights Against Art

Coll would argue that during the October 15th phone call between him and Art a valid contract was formed for the sale of the painting "Sunflower."

Arts response to Coll question regarding how much he wanted for the sunflower painting appear to be a valid offer. The requisite present intent to contract may be implied from Coll language, "You can have it for 25,000." Additional the terms were clearly stated: the paint for $25,000; delivery November 1.

Coll response to Art's offer, "You got a deal. . .," appear to be a valid acceptance as it is an unequivocal assent to Art's terms.

Art may attempt, however, to assert several defense to the formation the contract.

First Art may allege that there was an ambiguity involved since there was two paintings of sunflowers: (1) "Sunflower" and (2) "Sunflower II." If one party to an ambiguous contract is aware of the ambiguity while the other party is not, the contract will not fail but be held to the innocent parties interpretating.

The facts clearly indicate that Coll was unaware of the two paintings. It may be argued that Coll was aware of the ambiguity however. During the phone conversation Coll mentioned that he saw the painting in February 1980. "Sunflower II" was not painted until July 1980. Therefore Art would have known which sunflower painting Coll was referring to. Hence the contract would not fail for ambiguity.

Secondly Art may allege a statute of frauds defense since the painting may be viewed as a good over $500. However the paper signed by Art which he sent to Coll would be sufficient to satisfy the statute of frauds since it include the essential terms. It is immaterial that Coll failed to sign and return the document.

Finally Art may assert the price error in the document he sent to Coll as a defense. However the facts indicated that this was a mere typographical error and since there was otherwise a valid prior contract Coll may seek reformation to correct the error.

Art failure to delivery the painting when Coll tendered the money on November 1 would therefore constitute a breach of the contract.

Coll may attempt to collect the $5,000 liquidated damage. Liquidated damages are valid provided it can be shown (1) that it would be difficult to determine damage, (2) that the amount is reasonable and, (3) that the amount is not merely a penalty.

Here because of the uniqueness of the painting it would be difficult to determine the damages for breach. Therefore if the $5,000 was reasonable and not a penalty, Coll may receive it.

Coll may also sue for specific performance. The existence of a liquidated damages clause will not prevent Coll from receiving specific performance unless it can be shown by Art that it was a true alternative to all other remedies. The language of the clause did not indicate this intent and therefore specific performance is not precluded.

Even though there was the ambiguity, the term still appear definite and certain enough that the court would know what was to be enforced.

Coll would argue that legal damage were inadequate since a painting is a unique one of a kind type of property. Furthermore Coll would contend that the transfer of the painting is a simple manner and therefore there would be no feasibility problem.

Art may contend, however, that there is no mutuality of remedy. Since the statute of fraud applies and Col never signed the writing, Art could not enforce the contract against Coll.

Most courts today have discard the mutual of remedies requirement in favor of the security of performance test. Here the court may decree Arts delivery conditioned on Coll payment. Hence the the return performance by Coll is secure.

Coll Rights Against Museum.

The purchase by a bona fida purchaser would cut off Coll rights to the *painting.* Here, however, it may be argued that since the museum way a donee it would not qualify as a B.F.P. Hence the court may place a constructive trust on paint in favor of Coll if Coll is successful in obtaining specific performance.

Answer B to Question 5

10-15-80 Art orally offered to sell a painting for $25,000 to deliver on November 1, 1980 with a $5000 liquidated damages clause

Coll accepted

latent ambiquity: Art had painted two paintings of Sunflowers but when he made the offer to sell he knew which one Coll intended. Coll told him he had seen the painting in February which was before Sunflowers II was painted. Since only Art was aware of the ambiguity and knew what Coll meant the agreement is enforceable in accord with Coll's intent.

10-16-80 Art prepared a written document which incorporated the latent ambiguity, changed the delivery terms, and misstated the price. Art signed it

Coll accepted Art's counter offer but did not sign. Acceptance: Where the offeror does not specify the means of accepting the offer generally acceptance may be properly made by the same means used to make the offer or any other means as speedy and dependable. In view of the dealings between the parties this should be a sufficiently speedy and dependable acceptance.

11-1-80 Coll tendered $25,000 Art tendered Sunflowers II Coll v Art:

There is no statute of frauds problem here -- even though a writing is required to make this sale enforceable a sufficient memorandum exits signed by the party to be charged (Art). The fact that Coll did not sign the agreement does not affect its enforceability against Art. Two problems exist

1) Parole Evidence Rule: where the parties to an integrated agreement reduce it to writing extrinsic evidence of prior or contemporaneous agreements is inadmissible to vary the terms of the writing. The rule does not preclude the use of extrinsic evidence to clarify a latent ambiguity -- as explained above the reference to "my Sunflower painting" is a latent ambiguity. Art both knew of the ambiguity and knew what Coll meant. Coll should be able to introduce extrinsic evidence to clarify this ambiguity and show that the agreement was for the sale of Sunflower I. The Parole Evidence Rule also does not preclude reformation -- where the writing does not accurately reflect the valid prior agreement of the parties the court has discretion to reform the document to comply with the parties intent. Here Art's secretary erroneously misstated the agreed purchase price. Coll may introduce evidence that the writing is in error and that the agreed figure was $25,000.

2) Liquidated Damages: Where the parties to an agreement enter into a valid liquidated damages the agreed figure will be the sole remedy for breach barring an action for specific performance. However a liquidated damages provision will only be upheld where the parties recognized formation that damages in the event of breach would be difficult or impossible to fix, they made a good faith attempt to fix damages, and the agreed figure is not disproportionate to the actual damages.

Here the five thousand dollar figure was proposed and accepted in the initial discussion not as part of a good faith attempt to fix damages but as a forfeiture provision. The statement in the written agreement is phrased in terms of the legal rule. However since the clause does not state the $5000 figure to be the innocent party's sale or exclusive remedy it will not deprive Coll of his action against Art.

Coll may seek damages against Art for breach of the agreement not limited to the $5000 figure. He/She may seek specific performance. Because Art's gift to the museum was made in fraud on Coll's rights the court may require him/her to rescind the transaction. Coll can show that damages would be inadequate -because this is a unique chattel -- The terms of the agreement are definite and certain, a specific performance decree would be feasible to enforce -- no personal service is required. Art must simply turn over the painting, and there is mutuality of remedy -- here no problem since Coll has fully performed. Coll should be able to obtain specific performance of the contract plus consequential damages for its breach limited to those reasonably foreseeable damages which were within the contemplation of the parties at formation. Coll could also seek rescission for material breach -- this would get his $25,000 back but still leaves him w/o the painting which was the object of the transaction.

Coll v Museum

The museum is clearly without fault. They acted without knowledge of the contract between Art and Coll so are not liable on an interference with contract theory. However, since they were donees of the painting they acquire no equities as a bona fide purchaser. If Coll can show that Art made the transfer in fraud on Coll's rights the court should impose a constructive trust on the painting. The museum as constructive trustee has, as its sole duty, the duty to convey the painting to Coll.

Spring 1982

QUESTION NO. 9

Betty had long dreamed of building a home on top of a hill on Sam's farm, but she could afford neither the land nor the cost of building on the steep terrain. In 1975, however, her Aunt Kate's lawyer told Betty that Kate had named Betty the sole legatee of Kate's large estate. Kate was then 94 years old and very ill.

Sam and Betty thereafter negotiated for and signed the following document: "Sam offers to sell Betty one acre, to be selected by her on the hilltop on Sam's farm, for $10,000 cash. Betty agrees to make the selection within six months after the death of Betty's Aunt Kate."

Sam died in 1978, survived by Aunt Kate. Carla, Sam's sole heir, having been told that Sam's death revoked his offer to Betty, sold the farm to Wilma for $100,000 in cash.

Kate died January 1, 1979. Betty received the legacy she had expected, but not until seven months after Kate's death. As soon as she received the legacy, she tendered $10,000 first to Carla and then to Wilma, demanding from each a deed to one acre which Betty said she would now select on the hilltop. Both Carla and Wilma rejected the tender and refused to deliver a deed.

To what relief, if any, is

Betty entitled: 1. Against

Carla? Discuss. 2.

Against Wilma?

Discuss.

Answer A to Questio

I. Was there a contract between S and B?

a. Interpretation.

The terms of the writing signed by B and S are subject to various interpretations. It could be construed simply as an offer, based primarily on the fact that it contains the words "S offers", and that it does not appear to contain words of immediate acceptance by B: the words "within six months of K's death" are use. Alternatively, it could be read as an actual contract, embodying both an offer by S and an acceptance by B. This view would be supported by the fact that it states that S "offers" to sell land and that B "agrees" to purchase it at a certain time. This would also be supported by the fact that both parties signed the writing, which would be less likely if it were viewed solely as an offer by S. Finally, it might be viewed as an option contract, by which S made B an offer to buy the land, which B would have the right to accept at any time up until six months after the death of K. However, this alternative is the least likely of the three discussed because there would have to be some form of consideration passing to S to make a binding option contract, which is not present here. Consideration would of course be present if this were a contract to buy and sell the land, since the promises of S and B would be consideration if executed and thus are consideration for each other. The view of the writing as a contract is also consistent with modern contract law which tends to find the existence of a contract where this appears to have been the intention of the parties, as is the case here, regardless of the actual words use.

An argument might also be made that there is no contract between B and S because of lack of definiteness of the writing. This argument would be supported by the fact that the writing does not specify which land S is to convey to B, and would rely on the property case law holding language in land sale contracts simply promising to convey "my farm" as insufficient where the seller owns several properties. However, these cases can be distinguished by the fact that the contract gives B the right to choose. Nor is it a defense that B might refuse to choose, for case law such as the case of Wilhelm Lubrication v. Brattrud indicate that where a choice is to be made and the buyer breaches, the seller may make a reasonable choice for him which will be effectuated by the courts. Therefore, this contract would not fail for lack of definiteness. B's promise is thus not illusory and does supply consideration for the promise of S to convey.

II. Effect of death of S.

The significance of the categorization of the writing as a contract, an offer or an option contract relates to the effect of S's death. The death of the offeror revokes an offer made by him, and if this were an attempt to create an option contract invalid for lack of consideration the effect would be the same: it would be simply an offer terminated by S's death. However, a contractual right in B to purchase land will survive S's death and will bind C, S's heir. Since it has been concluded that the writing between S and B constituted a contract, it will be concluded that B's rights thereunder did not terminate with S's death, and B may exercise such rights as she has against C.

III. Construction of "within 6 months of K's death."

A construction issue arises as to the above-quoted language. According to one's interpretation of the contract, it could be found to be either a condition to the duty of S to perform, or as a promise by B to perform within a certain time, within the

context of whether this language provides C with a defense to a suit by B for specific performance. In interpreting this language, the court should strive to ascertain and effectuate the intent of the parties. If it is construed as a condition to S's duty, as C will argue, then B's failure to tender the money within the stated time excused any return performance by C. However, if it was merely a promise by B, then C's duty of performance was not excused and C can only recover damages from B for the breach. In looking at the facts here, it appears that a court should view this term in the contract as a promise rather than a condition to S's duty to perform. First, there is no particular reason to believe that it was inserted primarily for S's benefit, since there was no reason to expect K to die immediately. (It must be admitted, though, that since K was quite elderly S may have not felt that it was necessary that he have any greater time limitation on B.) The circumstances here indicate that it was more likely that the term was inserted as an accommodation to B, so that she could obtain money to finance the purchase. In addition, the law is generally said to abhor a forfeiture so that there is a definite constructional preference for finding a promise rather than a condition.

b.
Definiteness.

Finally, looking at some of the factors suggested by the Restatement of Contracts, even if the term is interpreted as a breach, it is probably not such a material breach as to excuse C's performance since it was apparently not wilful by B (K's estate had simply not been distributed, there is a very high degree of likelihood of performance by B, C's legal damage remedy would be adequate and B would suffer undue hardship as opposed to C.

IV. B's rights against C.

If C still had possession of the land, an action on B's part against her for specific performance of the contract would lie. Specific performance of a contract for the sale of land is always available because land is viewed by the law as unique. However, C no longer has the land, having conveyed it to W, and accordingly B is probably left only with an action at law against C for the breach. Since the sale by C was not wilful, and made in good faith belief that she had no duty to B, no punitive damages may be recovered. B's contractual remedy at law would be the difference between the contract price and the price of acquiring a comparable piece of land to that which B had the right to buy. This might be established by finding a similar tract in the area with a high elevation and a good view, which B was presumably interested in making the agreement of sale.

However, the facts here indicate that C sold the farm to W for $100,000. It is not clear from the facts how much land was owned on the farm and what the increase was
over what C would have received from the sale to B of the one acre. However, B might in the alternative to the previous remedy assert the doctrine of equitable conversion, under which as of the time of the execution of the contract for the sale of land the buyer becomes the equitable owner. If this applies, B may be able to assert a constructive trust against that portion of the sale proceeds in C's hands as represents the land that B had the right to buy. Since this particular piece is not specified, B could arguably assert a right to the value of the most valuable acre of the land.

V. B's rights against W.

B's rights against W are not clear-cut from the facts given. If W is a bona fide purchaser from C without notice of B's rights in the property, then B would not have any rights against W, since a purchaser by a BFP, then B could impose a constructive trust on the land and W would be held to hold it for B's benefit.

Answer B to Question 9

Betty's remedies depend on the nature of the 1975 document signed by Betty and Sam. If it was truly an offer, then offers are revoked by death of the offeror and Betty would have had no power to accept. Accordingly, no contract would have been formed and Betty would have no right to relief.

I believe, however, that the 1975 writing constituted a valid contract. I. Was the 1975 writing a contract?

The written document indicates a mutual exchange of promises sufficient to form a bilateral contract. Sam promised to convey land (one acre) and Betty impliedly promised to pay $10,000 for it and to select any portion of the farm for the one acre conveyance within six months of Kate's death. The promises alone constitute sufficient consideration for a contract, even though Betty's promise wasn't worth much because her ability to perform was dependent on a mere "expectancy" of inheritance from Kate.

Since the contract is in writing, it does not violate the real property conveyance section of the Statute of Frauds.

The only major problem with the contract is uncertainty or indefiniteness as to subject matter (the price and other required terms are present). While the liberal gap-filling provisions of the U.C.C. don't apply here because this is a sale of land (not goods), I believe a modern court could still find this contract definite enough as to the one acre to be conveyed. Even though different one-acre sections of the farm are presumably of different value, the over-all boundaries of the farm are known and the parties appear to have fixed in the contract a reasonable method of specifying the exact one-acre parcel (though this in turn raises the issue of whether the document is a mere "agreement to agree" and not a contract).

II. Effects of Events After Kate's Death

A. Was the 6-month choice provision a covenant or a condition?

While death revokes an offer, it does not necessarily end a contract obligation. Assuming Sam and Betty had a valid executory contract when Sam died, could Carla (and Wilma) still avoid liability? Yes--if the 6-month provision was a condition precedent to Sam's liability, then Betty's failure to choose her parcel until seven months after Kate's death might serve to discharge Carla's liability (as Sam's successor under the contract). Alternatively, maybe substantial performance of this condition would be enough (7 months instead of 6).

The law abhors forfeitures and will probably construe the "6-month choice" clause in the contract as a covenant, or promise, rather than a condition. Accordingly, when Betty failed to make a choice of lots within 6 months after Kate's death, she was technically in breach of contract. But, Carla didn't do anything about it--and it was certainly no more than a minor breach. The problem, of course, is that the breaching party in a contract cannot ordinarily sue on the contract, but must resort to quasi-contractual, or restitutionary remedies. Perhaps the one month is so de minimis that it is not a "material breach" sufficient to prevent Betty from suing on the contract?

B. Remedies Against Carla

Assuming Betty can overcome all the many hurdles involved in proving the existence of a contract and that Betty fulfilled all conditions precedent and is not in material breach, she can recover contract damages against Carla. The normal measure is a "benefit of the bargain" or "expectancy" measure of recovery--an attempt to give Betty what she would have received but for Carla's breach of contract by rejecting Betty's tender of $10,000. In other words, Betty should get the value of a comparable one acre lot at the time of breach in a similar locality.

Specific performance is the normal remedy for land sale contracts because land is unique. However, the remedy is not available here because it is not feasible--Carla no longer owns the land.

Restitution remedies (quasi-contractual) will probably not be available to Betty because there was no unjust enrichment (she has paid no money yet).

C. Remedies Against Wilma

Betty will have a hard time recovering anything from Wilma because she is a bona fide purchaser for value. Wilma paid good money ($100,000) for the farm, and had no notice (actual, constructive or inquiry) of Betty's claim or contract with Sam.
Betty cannot sue Wilma on a contracts theory because there is no privity of contract--or any kind of contractual relation between the two of them. It is hard to figure a tort theory on these facts. If Wilma and Carla were "conspirators" attempting to defraud Betty of the land, perhaps she could seek a constructive trust. But the facts do not reveal any fraudulent or tortious conduct by Wilma.

Fall 1982

QUESTION NO. 5

Katy and Mike operated a motorcycle dealership under the name K&M. In May 1980, Cycles orally agreed to supply motorcycles to K&M for resale at a price 5% less than Cycles' factory list prices. The term of the agreement was for the succeeding five-year period but could be terminated at any time by either party. Cycles immediately sent a written signed confirmation of the agreement which, however, omitted the 5% discount provision. K&M never received the written confirmation.

In November 1980, Katy and Mike terminated their business relationship. They executed a document by which Mike assigned all his rights in K&M contracts to Katy, and by which Katy agreed to be solely liable for all of K&M's business obligations. A copy of the signed document was delivered to Cycles. Cycles continued to ship motorcycles to K&M.

A year after receiving the copy of the document, Cycles sent Katy a statement for $40,000, the factory list price for the latest shipment of motorcycles accepted by Katy. Katy sent Cycles a check for $30,000 with a letter stating that the check was sent in full payment of the statement because Cycles had billed her at prices which were too high. Cycles deposited the check and immediately sent protest letters to Katy and Mike demanding payment of $10,000 and cancelling the agreement to supply motorcycles on the ground that the agreement was not binding and, alternatively, that it was invalidated because Mike had left the dealership.

1. To what relief, if any, is Katy entitled against Cycles? Discuss.
2. To what relief, if any, is Cycles entitled against:

(a) Katy? Discuss.

(b) Mike? Discuss.

ANSWER A TO QUESTION 5

I. Katy v. Cycles

A. Is there a valid contract?

Since goods (motorcycles) are involved in these transactions, Article 2 of the UCC applies in the determination of the validity of this contract.

Under the UCC (as well as at common law), oral contracts are generally held to be valid, subject to two possible defenses in this case: first, that no real consideration was given by K & M to Cycles; second, the Statute of Frauds as it applies in the UCC where goods of value greater than $500 are involved.

As to the first question, the UCC requires only that the subject matter of a valid sales contract be identified and quantified. It seems likely that motorcycles in Cycles' inventory can reasonably be identified, but no quantity term is given in this situation. The UCC will imply a standard of good faith in upholding requirements contracts, but there is no indication that the requirements of K & M (or the output of cycles) is in any way implicated in the contract. K & M seems free to order as many or as few cycles as they want, and there is no apparent restriction of exclusive dealing. Thus, unless a court can find that this is a requirement contract, and subject K & M to a good faith standard, no contract will exist, since there is no commitment or consideration on the part of K & M.

(A similar lack of consideration argument may be made with regard to the free terminability of the contract by either party. However, here both parties have the right to terminate, and moreover, K & M and Cycles would both be bound until one party actually received the other's notice.)

If a valid contract is found, Cycles may not use the Statute of Frauds as a defense. First of all, there is a written signed memorandum of the oral agreement which Cycles itself created, and this will be enough to satisfy the evidentiary requirements of the Statute of Frauds (provided quantity and subject matter are mentioned). Cycles may also be estopped from asserting the Statute by its acceptance of prior benefits under the contract and by its partial performance.

Katy may freely use extrinsic evidence to prove the existence of the 5% discount provision, since the Statute of Frauds does prohibit the use of such evidence once a contract is shown to exist. (The Parol Evidence Rule is only implicated where the parties have attempted a "total" or "partial" integration of their agreement.) Here, the extrinsic evidence of the oral agreement and the past course of dealing under the contract would seem strongly to prove Katy's case.

Thus, if a valid requirements contract is shown to exist, Katy is entitled to pay only 95% of the list price of motorcycles received or ordered from Cycles.

As to future dealing between the parties, Cycles has probably terminated the agreement. As noted above, the termination provision probably is not a defense to the formation of the contract, but will be enforced subject to an implied standard of good faith. Either a good faith dispute over amounts owed or an unwillingness to continue under changed circumstances (Mike's leaving K & M) would probably be sufficient to invoke the termination provision. Therefore, Katy can probably not recover damages for future orders.

II. Cycles v. Katy, Mike A. Katy

Cycles may seek either to enforce the contract against Katy, or seek restitution.

If it elects to enforce, it runs into two problems. First, as noted above, there is a problem with the formation of the contract -- no valid requirements contract may exist. Second, Katy may assert the Statute of Frauds since she never signed any memorandum of agreement, and Cycles' confirmatory memo was never received by K & M. However, she will not succeed with this defense if she sues on the contract, or the past acceptance of benefits by K & M is held to estop her from pleading the Statute.

Cycles' relief under the contract would consist of damages: any amount (under the contract price) which Katy had failed to pay. However, the 5% discount could be brought in by Katy, as noted earlier.

If no contract exists, Cycles may rescind and recover its latest shipment of motorcycles upon return of the $30,000 payment. Prior transactions under the contract would be deemed completed and could not now be affected be rescission. (If it seeks rescission, Cycles must elect remedies -- i.e., plead rescission first and always; otherwise the court will award only damages.)

Cycles may finally recover restitution; the less the amounts she has paid.

B. Mike

Mike will have both of Katy's defenses (no contract, Statute of Frauds), plus the defense that the contract

was validly modified to exclude him and make Katy solely liable.

Under the UCC, no consideration is required for the modification of agreements, provided this is done in good faith or under changed circumstances. Here, Katy and Mike split up, and notified Cycles of the change. Thus, Katy and Mike acted in good faith according to changed circumstances (i.e., Mike wanted to leave). Cycles had a right to object upon such a change in the nature of its customer, but failed to do so and indeed continued to operate under the contract. Probably it will be estopped (having accepted later benefits) from objecting to Mike's departure and therefore won't be able to recover from him.

ANSWER B TO QUESTION 5

I. Katy v. Cycles

Is the contract enforceable?

A. The parties' promises are not illusory.

At one time, it was believed that a contract which allowed the parties to cancel at any time without notice was void because the promises were illusory. Under the modern rule, a good faith performance duty is implied in all contracts.

Therefore, the contract is not void because the promises were illusory.

B. Is the contract enforceable by K?

1. Statute of Frauds.

The contract is for the sale of motorcycles, a sale of goods, which is in excess of $500. Therefore under Art. 2 of the UCC, the contract must be in writing Normally, a contract must be signed by the party against whom it is being enforced. Under the UCC, C's memo would be sufficient to enforce the contract against C.

It is not clear from the facts, but it seems that K never received the memo. Therefore, there is nothing to enforce and the oral contract is unenforceable. If she later received it, it is a sufficient memo to enforce the contract under the UCC.

C. Can the 5% discount provision be admitted into evidence to prove the contract terms?

Generally, even under the liberal UCC parole evidence rule, a prior or contemporaneous oral term to a contract which contradicts the contract can be admitted to prove the terms of the contract. In this case, it appears that a price reduction is inconsistent with the memo.

Therefore, if Katy tries to enforce the memo against Cycles, she will not be able to prove the 5% discount that was orally agreed to.

D. Does part performance take the contract out of the statute of frauds?

An exception to the statute of frauds is that if there is part performance, the statute does not apply. Here, there appears to have been performance. Therefore, the statute may be avoided.

If that is the case, then Katy may sue on the oral contract instead of the memo. If that is the case, the parole evidence rule is avoided because it applied only to written contracts. Furthermore, parole evidence would be admissible to show a 5% discount had become a custom of dealing between Cycles and K & M or that a 5% discount was an industry-wide practice, if Katy sues on the written contract.

E. Was Katy entitled to reduce the price as she did.

If the contract that is proved provides for a 5% discount, Katy's paying only $30,000 instead of $38,000 was a violation of the terms. Sending a bill for the full price might still allow Katy to reduce that amount by $2,000, not $10,000:

F. Katy cannot get continued performance even at the 5% discount from Cycles because the contract by its own terms is cancelable at will.

G. Does Cycles' cashing the check constitute an accord and satisfaction thereby discharging each party under the contract?

Under older law, the acceptance of less than full payment for a good wherein there was a bona fide dispute, was considered an accord and satisfaction discharging everyone's liability. In the present case, Cycles cashed the check under protest; therefore, there is no accord and satisfaction. Moreover, there is no bona fide dispute about $8,000. Therefore, there is no accord and satisfaction. Consequently, Katy's and Cycles' liabilities are not discharged by the cashing of the check.

H. Since Katy willfully breached the contract, she cannot sue off the contract for the $30,000 under a theory of restitution.

II. Cycles v. Katy

Can Cycles circumvent the statute of frauds to render the contract enforceable?

Since the contract is for a sale of goods, it is governed by the UCC. Under the UCC, a contract between merchants like K & M and Cycles can be enforced against a non-signing merchant if the non-signing merchant receives the memo and does not object in 10 days. Therefore, the first memo will not serve the statute because it was not received. Therefore, Cycles can't enforce the memo they sent to Katy. Under a similar theory, they can't enforce the second memo because it is unsigned and Katy objected in a timely manner. Since Cycles can't enforce the contract against either K & M or Katy, because it fails to comply with the statute of frauds, Cycles will seek to enforce its rights under a theory of money had and delivered. Since the cycles were received by Katy, she has a duty to pay for them. Since she breached the duty to pay, which is implied by the delivery of the cycles, Cycles can either sue on the implied contract for $40,000 or in quasi-contract for their reasonable value.

Since his cashing of the check was not an accord and satisfaction, he may recover the difference between the $30,000 paid and the $40,000 owed.

III. Mike

A. Effect of Cycles' failure to object to the assignment.

Since the sale of the cycles invariably involved the extension of credit, Cycles could have objected to the assignment of all of Mike's liabilities to Katy. It did not do so after having notice of the assignment. Therefore, Cycles waived its right to object to the assignment even though it could have.

Even though the assignment was waived, Mike is still liable if there was a contract. If there was no contract dating from 5/80, then Cycles has no rights against Mike. See discussion above.

If at the time the motorcycles were shipped to Katy, Cycles knew of the fact that Katy was solely responsible and that there was no contract except the one created by the shipment, Mike is not liable.

However, if Cycles was shipping on the original contract, and that contract was valid, which it appears that it is not, Cycles can hold Mike liable as the guarantor of Katy's performance. Moreover, Cycles can proceed against Mike without going against Katy first.

Conclusion

It appears that the original oral contract was not enforceable under the statute of frauds by either party. Therefore, Katy has no grounds for any reduction in price on the cycles unless the exceptions above are proven.

Since the contracts are unenforceable against Katy and Mike because of the statute of frauds, Cycles has no cause of action against Mike because there were no rights to assign or duties to delegate. Cycles does have a cause of action against Katy for the cycles shipped in the latest shipment. The asking of the check discharges none of Cycles obligations or duties or rights. Hence, Cycles can recover $10,000. If Katy can prove the first contract, then Cycles can recover $8,000 and enforce its rights against Mike as an assignor The assignment to Mike is not a breach.

July 1983

QUESTION 5

In January 1983, Owner contracted in a signed writing to sell Greenacre, a 50-acre square parcel of unimproved realty, to Byer for $50,000. Byer was to pay $5,000 on March 1. The remainder of the purchase price and the deed were to be exchanged on April 1.

On February 1, in a signed writing, Byer assigned to Ellis all his rights under the contract, and Ellis, also in a signed writing, agreed with Byer to pay the contract price to Owner. Byer then notified owner that he had assigned the contract to Ellis, that Ellis had agreed to pay the contract price, and that, therefore, Byer considered himself "free and clear of any further obligations under the contract." Owner received, but did not reply to, this communication.

On March 1, Owner accepted the $5,000 installment paid to him by Ellis. On March 15, Owner notified Byer and Ellis that he had just discovered that he did not own a strip three feet wide along the western edge of Greenacre.

On April 1, Owner tendered to Byer and Ellis a deed to Greenacre, excluding from the description of the property the three-foot strip. Both Byer and Ellis refused to accept the deed or to pay the remaining $45,000. Owner thereupon commenced a suit for specific performance against both Byer and Ellis. Ellis cross-complained against Owner for restitution of the $5,000 installment he had paid to Owner.

1. What result in Owner's suit against Byer? Discuss.

2. What result in Owner's suit against Ellis and Ellis' cross-complaint against Owner? Discuss.

ANSWER A TO QUESTION 5

1. Owner v. Byer

A contract for the sale of land must be in writing and signed by the person to be charged. This requirement of the Statute of Frauds is met here. The contract specifies the land in question, the price to be pair], time of performance and parties to the agreement.

In a land sale contract, the seller has a duty to deliver marketable title. Marketable title is not a title totally free from doubt, but tit1P that is sufficient for the reasonable use of the grantee. Here, it is unimproved property and we're not told what the grantee intends to use it for.

There has been a mistake as to the actual amount of acreage involved in the deal. It is not cle[a]r why Owner does not have title to the three foot wide strip -- whether an easement exists, or why Owner has not taken title to the land through adverse possession. Under the principles of equitable abatement, the seller may still be able to specifically enforce the contract if the missing three acres is not too material. A seller has less leeway as to how much of a variation will be *tolerated* while still allowing for specific enforcement. If the court decrees that three acres will not materially alter the grantee's intended use of the land, it can specifically enforce the contract, with an abatement in the purchase price for the missing acreage. If the land did have an existing money making improvement, the court would more readily specifically enforce the contract without the abatement, if the abatement did not effect the money making improvement. Three acres out of fifty does not appear *to* be that crucial. If it had been bigger, or the court felt it was material, the contract would not be specifically enforced; the court not willing to make a contract that the parties themselves had not agreed on.

1) For specific performance, Owner would need to show his legal remedy inadequate. Courts hold that sellers of land can specifically enforce land sale contracts since land is unique and the fact that they had bargained to be free of responsibility of land.

2) The contract needs to be definite. The parties, consideration, and time of performance are definite, but the type of deed was not specified. This probably is not sufficient grounds to prevent specific enforcement, and the court could chose the type of deed commonly used for these deals.

3) Feasibility: The court can order one party to pay and the other to convey.

4) Mutuality: Here, you have mutuality of remedy, in that both sides could sue for specific enforcement, and security of performance. Court can order both *to* perform.

5) Defenses: Other than the abatement above, there do not appear *to* be any defenses.

Affect of Assignment/Delegation.

Byer assigned his rights to receive land under the contract to Ellis, and had a delegation contract with Ellis for Ellis to perform Byer's duties under the contract. For an assignment and delegation, the consent of the other original contracting party (Owner) is not necessary. If the assignment or delegation increases either the duties of the obligor (Owner) through the assignment, or increases risk of non-performance through the delegation, then the assignment and delegation are invalid. Owner may have relied on the personal credit rating of Byer, but if the land is in a state with anti deficiency legislation, and a purchase money mortgage used, then Owner would not have been concerned with Byer's personal credit. Owner accepted the $5,000

from Ellis, which shows that Owner was not concerned over the assignment ®r delegation.

Byer will still be liable to the owner in the absence of a novation. A novation is a new contract, substituting Ellis for Byer. A novation would have ended Byer's liability to the contract. Owner does not appear to have consented to a novation. His absence of communication to Byer's attempted method to relieve liability would not be enough.

Owner can sue Byer directly on the original contract, or could sue Ellis since Owner would be a third party beneficiary of the Byer/v.Ellis, delegation contract. In any case, Byer is still liable, but could properly implead Ellis, the delegatee, for any liability he may have to Owner.

2. Owner v. Ellis and Ellis v. Owner

Since Owner has accepted the delegation of Byer's duty to pay, as evidenced by his accepting the $5,000 from Ellis, Owner can sue Ellis for specific performance. As stated above, owner is a third party beneficiary of the Byer/Ellis delegation contract and can sue Ellis directly for performance. The same specific performance analysis used in Part 1 applies here against Ellis. Since Owner has sued Ellis, his status as a third party creditor beneficiary has vested. A third party beneficiary's right to performance vests when he either 1) finds out about it and relies to his detriment or 2) assents at the request of either of the contracting parties or 3) sues for performance. Here, by suing Ellis, Owner's status as third party beneficiary has vested and Ellis and Byer cannot legally contract and change his rights.

If the court finds that the three acre difference in Greenacre is material, then Owner has not performed his part of the contract. The paying of the money and the exchange of the deed are constructive concurrent conditions. Since both are capable of being performed at the same time, each party must tender to put the other party in breach. Ellis and Byer did not tender on April 1, and will have to show that the March 15 statement of Owner was an anticipatory repudiation, thus excusing the need to tender. Anticipatory repudiation occurs when one party, before time of performance is to occur, makes a statement showing intent not to perform. Since Byer and Ellis had the duty to pay money still remaining, they could wait until April 1 before claiming breach.

Ellis will therefore have to claim that the three acre difference was material enough to put Owner in breach and, therefore, it would be unjust for Owner to retain the $5,000. If Ellis breaches by not paying the price for land, he may still be entitled to restitution for an amount above the Owner's damages.

Since there probably should have been an abatement of price, or in the alternative, the three acres were material, Ellis should succeed on his restitution claim for $5,000.

ANSWER B TO QUESTION 5

1. Owner's Suit Against Byer - Owner Prevails Due To Byer's Breach Assignment of Contract

Byer will contend in Owner's suit that he has assigned the contract and is therefore no longer liable under the contract.

However, a valid assignment, in which a party to the contract assigns his rights and delegates his duty, will only relieve the original party of primary liability to perform.

Owner is entitled to performance, if not from Ellis, then from Byer. Byer's obligation to perform was not dissolved by his notification to Owner that Byer considered himself "free and clear" of his contractual obligations.

If Byer were to be totally free of his contract obligations, Owner would have to join in a novation agreement. Therein Owner, Byer and Ellis would agree that Ellis be substituted for Byer as a party to the contract.

Owner never indicated any such agreement to release Byer and hold him harmless from the contract. Such intent to agree will not be inferred from Owner's lack of response to Byer's communication. Owner had no duty to respond and was free to hold Byer liable, in spite of Byer's protestations to be out of the contract.

Further, the contract was a land-sale contract. If Owner were to be contractually bound with Ellis, a writing evidencing such agreement, signed by Owner, must have been made. No such writing existed.

Constructive Condition of Delivering Full 50-Acres

Substantial Performance

Byer may next contend that he is not obliged to perform as owner breached the constructive condition precedent to his duty of delivering title to the full 50 acres.

The writing did not expressly condition the duty to pay on Owner's tendering the full 50 acres, but the law will construe the contract to impose such a condition in the interest of fairness.

However, if such a condition did exist, Owner can satisfy it by substantially performance. Since the condition is not express, strict compliance is not needed.

Owner can satisfy the condition by tendering performance that is substantially what Byer bargained for, and thereby place Byer in breach for non-performance.

A 50 acre that is minus a three-foot strip is a negligible deviation from the contract. The difference can be accounted for by an abatement in the purchase price of the land. Byer would thereby receive substantially what he bargained
for.

The deed tendered by Owner with the property (excluding the three-foot strip) is sufficient performance to satisfy any conditions to Owner's right to performance in return.

Specific Performance

Owner's right to specific performance fill be recognized if the elements are satisfied for grant of a decree.

Owner's contract is in respect of land, a historical basis for equity jurisdiction. The contract is valid as it is in writing, and enforceable, as all the material terms are present. (Price - $50,000; parties - Owner/Byer; subject matter - Greenacre; and time for performance - March 1 and April l.)

Owner has a recognizable property interest at stake (Greenacre) and the feasibility of enforcing a decree is had. The court can simply order Byer to pay.

If Byer were to contend the mutuality of remedy requirement were not present, he would have no basis for such contention. Byer would be able to enforce a contract for sale of land against Owner. Owner, however, is only seeking money, and a suit for damages would accomplish this result.

However, some jurisdictions permit specific performance in such cases.

Owner will be forced to find a buyer to purchase the land; the delay may cost uncertain sums before a suitable buyer is found. For these reasons, some courts would grant relief to Owner.

2. Owner's Suit Against Ellis

Assignment of Contract

The Byer/Ellis contract created rights in favor of Owner.

When Byer assigned his rights and obligations under the Byer/Owner contract, Byer manifested an intent to extinguish present contract rights in himself and vest them in Byer.

Also, an assignment of contract generally includes a delegation of duties. If the delegatee manifests an intent to assume the duties under the contract, and the nature of the duties do not materially alter the rights of the party receiving performance, the delegation is proper.

Ellis expressly agreed to assume the duty to pay money and this is a general obligation performable by any person.

When Ellis expressly agreed to assume the duties of Byer under the contract, he became primarily liable under the Byer/Owner contract.

Owner was entitled to proceed directly against Ellis on the contract. Also, Owner was entitled to exert the same rights and defenses against Ellis as he was allowed to assert against Byer.

Third Party Beneficiary Liability

If Ellis can successfully argue there was no assignment of contract as he did not assume the duties, Owner can maintain suit as a third party creditor beneficiary.

Owner would be entitled to assert that the Ellis/Byer contract was intended to benefit him, with performance running directly to him. Thereby Owner, as intended beneficiary of the Byer/Ellis contract, could sue Ellis on his promise to Byer to pay Owner for the land.

Since Owner is a creditor beneficiary, his rights vested when he brought suit and was notified of the contract. Therefore, Owner has a separate basis for asserting his rights against Ellis.

Owner would prevail against Ellis on the grounds discussed. Ellis'

Cross-Complaint Against Owner Assignee Rights

Ellis will seek to assert that there was no valid delegation. However, as he expressly assumed Byer's duties, this argument will not prevail.

Ellis will next contend that Owner cannot sue on the Byer/Ellis contract. However, as a third-party intended creditor beneficiary with vested rights, this argument has no merit.

Any argument by Ellis that Owner did not satisfy his condition precedent will fail upon Owner's showing substantial. performance.

If Ellis wants to be relieved of the contract, he must show that there has been a novation or release, or that he is entitled to rescission.

Rescission

Rescission is available to Ellis on a showing of mutual material mistake.

A mistake is material if the party would consider it important in choosing to contract.

The deficiency of the three-foot strip may have been material depending on Ellis' motivation for buying. If he needed exactly 50 acres, the deficiency would make him refuse to buy.

If Ellis had a general purpose, the deficiency would be immaterial.

If material, then Ellis would be entitled to rescission. Owner was also mistaken as to the exact acreage and therefore the mistake was mutual.

Restitution

Upon a proper showing of basis for rescission, restitution is available to prevent owner's unjust enrichment.

Ellis would have to return anything received under the contract and would then be entitled to that which he tendered, $5,000.

February 1984
QUESTION 1

On January 15, 1983, Jones agreed with motors in a writing signed by both to supply Motors with 10,000 pounds of specifically described bolts each month, for a period of ten months, beginning March 1, 1983. The stated price was $.85 per pound. On February 1, 1983, Jones, in good faith, notified Motors that he could not afford to sell the bolts at the agreed price. He said he would charge $.90 per pound. Motors orally agreed to the increase in price to begin with the first installment.

In a written confirmation, signed only by Jones and delivered to Motors, Jones' secretary mistakenly typed the new price as "$.91 per pound" rather than "$.90 per pound." Motors received the confirmation but did not read it and did not reply to it.

Prior to March 1, 1983, Jones notified Motors that he would deliver no bolts because he had just contracted to sell his entire output to Ted at $1.10 per pound.

Despite diligent efforts, Motors was unable to buy bolts from a new supplier until May 1. The price charged by the new supplier was $1.00 per pound.

Because of the 60 day delay in obtaining a new source of supply, Motors was delayed in delivering motors to Electric, a company with which Motors had a contract that contained a valid liquidated damages clause providing for damages of $10,000 a day for delay in delivery of motors.

Although Jones knew that Motors sold motors, he did not know specifically, nor did he have reason to know, that Motors had a contract with Electric or that that contract contained a liquidated damages clause.

In a suit by Motors against Jones commenced on October 1, 1983, Motors prays for the following damages.

Count 1: $15,000, being the difference between the price paid by Motors ($1.00) and the original contract price ($.85) for 100,000 pounds;

Count 2: $600,000, being the amount Motors had to pay Electric in liquidated damages;

Count 3: $1,000,000 as punitive damages, alleging that Jones' breach was malic-ious.

In his answer to the complaint, Jones denies liability for damages, and contends that if he should be found liable under count 1, his liability would be limited to $9,000, being the difference between the price paid by Motors ($1.00) and the modified price in the written confirmation ($.91).

What result on each count, and what amount of damages, if any, should be awarded? Discuss.

ANSWER A TO QUESTION 1

I. Applicable Law

Since Jones' contract with motor was for the sale and purchase of bolts, the applicable provisions of the Uniform Commercial Code may apply.

The UCC applies to transactions in goods. Since the contract calls for a sale, a transfer of title for value, and the bolts are goods which will be identifiable to the contract at the time for performance under the contract,
this agreement between Jones and Motors is controlled by the provisions of the UCC.

Furthermore, since Jones and Motors both deal in goods of a kind, Jones' line being bolts and Motors' line being motors, it appears they are merchants. Thus, the UCC provisions that apply specifically to merchants will apply to both.

II. Count 1

Jones and Motors' agreement appears to be a valid contract containing definite and certain terms for installment deliveries of specifically described bolts to be delivered in periodic shipments at the price of $.85/lb. Furthermore, it is supported by valid consideration as each party bargained for a legal detriment and benefit. Jones must deliver the bolts and receive money and Motors must accept conforming bolt--; and pay for them.

Jones' notification to Motors prior to March 1, 1983, that he would not deliver any bolts to Jones because of his contract with Ted may have given rise to actionable breach by Jones. Since performance was not due yet, it cannot be a present breach. However, the unequivocal repudiation of intention to perform under a contract ordinarily gives rise to an anticipatory breach.

Even though the contract called for installments, the fact that Jones notified Motors of his voluntary disablement to perform due to the Jones/Ted contract will not require Jones to make a request for further assurances due to the unequivocal repudiation actually spoken by Jones. Therefore, Motors will succeed on a breach of contract action based on the theory of anticipatory repudiation.

Motors' measure of damages in this case will be calculated to the extent of actual cover he incurred as a result of having to purchase the bolts elsewhere at a higher price.

For that portion of the contract term that Motors did not actually "cover" their needs under the contract, they will receive the market-contract price differential which in this case appears to be the same as the cover differential since through diligent efforts, Motors was unable to obtain the bolts elsewhere at any price. Without this attempt to mitigate its losses, Motors would not be entitled to receive cover damages.

It does not appear that Motors will be likely to succeed in obtaining the cover damages on the price differential of $.85 and $1.00. It appears more likely that the proper price differential should be $.90 - $1.00.

This is so because prior to time for performance of the Jones/Motors contract, there was a valid modification of the price term. Under the
U. C. C., no consideration is needed to support a valid modification. Therefore, the absence of such consideration here will not defeat the validly agreed upon modification.

However, since the contract as modified, being for the sale of goods in excess of $500.00 value is under the Statute of Frauds, the modification must be in writing.

Jones' attempt to memorialize the modification in his confirmation memo to Motors may have satisfied this memo/writing requirement.

As Jones and Motors are merchants, a memo signed by either party which contains the terms of the modification is a sufficient writing to establish the statute of frauds requirement when received by the party to be charged. Since Motors had good reason to know of the memo's contents, the fact that he did not read the memo or reply to it will not defeat its effect as a valid writing.

The fact that Jones' secretary mistakenly typed the new price as $.91 instead of $.90 is immaterial, as it was merely a mistake in execution. Jones and Motors apparently had a meeting of the minds that the price was to be $.90.

Therefore, by the equity jurisdiction of the court, the judge can reform the writing to express the true intentions of the parties. The equity power is available to do this as there is no remedy available at law equivalent to reformation.

Therefore, on count one, Motors will be successful in obtaining cover damages on his contract for the 100,000 pounds of bolts at the difference of the $.90 and $1.00 a pound price.

III. Count 2

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Motors' ability to receive the $600,000 in consequential damages suffered may be limited by the general rule of damages that states: "A breaching party is liable for all foreseeable damages that flow naturally from the breach."

Although by virtue of the fact that the liquidated damages clause between Jones and Electric had to have been a reasonable forecast of damages as between those parties, to impute that this would be reasonably foreseeable to Jones is an attenuated assumption. Jones clearly had no knowledge of this clause and the fact that it would cost him $600,000 for his failure to supply bolts to Motors is absurd.

Although it is not entirely *fair* that Motors should suffer such damages as a result of Jones' breach, there is no law to support placing responsibility for unforeseeable damages upon Jones in such a magnitude. Thus, Motors will lose on the second count.

IV. Count 3 -

Motors' request for punitive damages from Jones in an amount of $1,000,000 will also probably fail. As a general rule, punitive damages are not awarded in breach of contract cases.

However, a modern exception has allowed them when the court construes the breach as a breach of the implied covenant of good faith. While it is logical to assume that all unexcused breaches of contract would violate this covenant implied into all contracts, the court usually looks for actual malice as Jones has alleged.

Clearly Jones' breach was predicated on his desire for more profits and not to injure Motors. Furthermore, Jones gave Motors notice of his intention prior to the time performance was due. This could be inferred as an act of goodwill, giving Motors a chance to get a new supplier prior to the time performance was due. Under these attendant circumstances, it does not appear punitive damages should be awarded.

V. Conclusion

The only damages Jones should receive is the cover damages discussed in part II.

ANSWER B TO QUESTION 1

Count 1

To begin with, the original contract between Jones and Motors was obviously valid since it was a bargained for exchange of promises, with legal detriment to both parties, and since it was in writing, as is required of UCC contracts (for salt- of goods over $500) by the Statute of Frauds.

The modification of this contract on February 1 was also valid. The modification from Motors paint lacked consideration, since he gained nothing additional to what was already owed him under the contract, even though he agreed to a price increase. Nevertheless, the U C C provides that good faith modifications of contracts between merchants do not need consideration to be binding. And, although the modification agreement was oral, it was followed up by a "written confirmatory memorandum" sent by Jones. The UCC specifically provides that such a post-oral confirming memorandum satisfies the requirements of a writing and becomes binding on the parties if received by the other party and not objected to within 10 days. Here, the memo was received by Motors, and such receipt is effective, notwithstanding that Motors did not in fact read it. Thus, the modification of the original contract became valid and binding when Motors failed to reply to the memo.

One wrinkle here, however, is that the memo as sent did not conform to the terms of the oral modification because of the typing error of Jones' secretary. Normally, the risk of such a mistake is on the party who causes the mistake or controls or selects the intermediary responsible for it. Thus, if the error had been against Jones' interest, say, if the secretary had typed 89 cents rather than 91 cents, Jones would not have grounds for relief from this unilateral error. Here, however, the equities seem to cut the other way since Motors rather than Jones would end up with more liability because of Jones' mistake. Thus, a court might be more inclined to allow Motors to seek a reformation of the contract to correct it to the figure actually agreed upon, 90G . However, Motors' proper course would have been to correct the error by replying to Jones' confirmatory memo and its failure to do this in a sense makes it as responsible as Jones for the mistake. Thus, the court would probably deny equitable reformation and enforce the modified contract in accordance with the terms of the memo.

Jones' anticipatorily repudiated the contract as modified prior to performance by either side and, when he did so, Motors was entitled o treat it as a breach and to take steps to cover, which it did. Since the contract when breached was fully executory, all duties were immediately accelerated and Motors could sue for full damages at any time -- it did not have to wait until performance was due. Thus, that it eventually sued October 1, before the time for all performance, does not bar it from full damages. (Parenthetically, the fact that Jones announced that he had entered into. an output contract also in a sense constituted a voluntary disablement, also allowing immediate suit.)

Motors, in good faith, attempted to and eventually did cover. Its actions were a reasonable

response to the breach. Motors is certainly entitled o obtain the difference between the $1.00 contract it covered with and the 91 cents modified contract Jones breached for the eight months from May 1 to the end of the original 10-month contract. The question is what damages it should get for March and April, before it covered. In its prayer for $15,000, Motors essentially asks that the $1.00 contract price it eventually obtained with Electric should be extended to cover March and April as well. But a better argument is that Jones' $1.10 contract should be used as the measure of the market price for March and April. Motors would obviously not be limited by its prayer for relief in terms of what it could recover.

Count 2

The single question here is whether these special consequential damages caused by Motors' inability to cover to meet its contracts were reasonably foreseeable by Jones at the time of the contract and whether they were themselves reasonable. I believe they were reasonably foreseeable to Jones and that he should be liable for them. Although Jones had no particular knowledge of the exact contracts which Motors had with its customers, he did know that Motors sold motors and could reasonably have foreseen that his willful breach might cause Motors to be unable to meet its contracts as a motor seller. The major question is whether Jones could have foreseen that Motors would not be able to "cover" for such a long period. This would depend on the nature of the bolts Jones was supposed to supply. We are told they were "specifically described" bolts. If they were custom made for Motors, and took a while to manufacture, then Jones should have anticipated that it could take a couple of months for Motors to cover and that there could be heavy consequential damages. If Jones could reasonably believe the bolts were standard and widely available, then he probably would have been reasonable in believing that Motors could immediately cover, then he might not be liable for the $600,000. (We are told that the liquidated damages was "valid", meaning

it was a reasonable attempt by Motors and its customers to estimate a difficult-to-determine future damage figure and was therefore not a penalty, so this is not an issue.)

At a minimum, if Motors could not recover the consequential damages, it might be able in quasi-contract at least to obtain the profit Jones made on his $1.10 contract on an unjust enrichment theory since his breach was willful.

Count 3

Punitive damages are generally not recoverable for breach of contract, even willful breach. Motors should lose on Count 3.

July 1985

QUESTION 1

Art and Betty own adjoining farms in County, an area, where all agriculture requires irrigation. Art bought a well-drilling rig and drilled a 400-foot well from which he drew drinking water. Betty needed no additional irrigation water, but in January 1985, she asked Art on what terms he would drill a well near her house to supply better tasting drinking water than the County water she has been using for years. Art said that because he had never before drilled a well for hire, he would charge Betty only $10 per foot, about $1 more than his expected cost. Art said that he would drill to a maximum depth of 600 feet, which is the deepest his rig could reach. Betty said, "OK, if you guarantee June 1 completion." Art agreed and asked for $3500 in advance, with any additional further payment or refund to be made on completion. Betty said, "OK," and paid Art $3500.

Art started to drill on May 1. He had reached a depth of 200 feet on May 10 when his drill struck rock and broke, plugging the hole. The accident was unavoidable. It had cost Art $12 per foot to drill this 200 feet. Art said he would not charge Betty for drilling the 'useless hole, but he would have to start a new well close by, and could not promise its completion before July 1.

Betty, annoyed by Art's failure, refused to let Art start another well and on June 1, she contracted with Carlos to drill a well. Carlos agreed to drill to a maximum depth of 350 feet for $4500, which Betty also paid in advance, but Carlos could not start drilling until October 1. He completed drilling and struck water at 300 feet on October 30.

In July, Betty sued Art seeking to recover her $3500, plus the $4500 paid to Carlos.

On August 1, County's dam failed, thus reducing the amount of water available for irrigation. Betty lost her apple crop worth $15,000. The loss could have been avoided by pumping from Betty's well if it had been operational by August 1. Betty amended her complaint to add the $15,000 loss.

In her suit against Art, what are Betty's rights and what damages, if any, will she recover? Discuss.

ANSWER A TO QUESTION 1

Was a Valid Contract Formed?

Betty's (B's) rights against Art (A) depend on whether a valid contract was formed between them, and whether it was breached and by whom. A and B clearly agreed on the subject matter (drilling a well) and price ($10 a foot) and time for performance (June 1 completion). These terms suffice to form a contract.

The contract did not have to be in writing. A writing to evidence a contract is required by the statute of frauds when land is transferred, but not for services to be performed, as here.

Betty would not have rights against A if the contract called only for drilling for water, but the subject matter here is clearly a completed well, not the mere act of drilling: B's interest (known to A) was in the water, and she asked him about drilling "to supply drinking water," and further asked for a guaranteed completion date. Thus A may be liable, if his performance was not excused.

Impossibility

A's performance under the contract might be excused by impossibility. Under the doctrine of impossibility of performance, however, performance is excused only if performance would not be possible by anyone: an objective standard applies. While A's drilling accident was "unavoidable," other drillers with different or better equipment, or drilling in another place, would still be able to perform (as shown by Carlos' performance). Art himself may have been able to perform in time after the accident, according to his statement that he couldn't promise performance by July 1. Thus A's performance cannot be excused by impossibility.

The doctrine of commercial impracticability would similarly be of no avail to A to excuse performance. First, the doctrine is available in commercial settings: A had never drilled a well before, and B wanted the water for drinking (although also for her farm). The impracticability doctrine also requires that performance would be so economically burdensome that it would be wasteful for the obligations to be performed. Here Art was willing to continue performance without any "additional further payment," and water was eventually found at 300 feet on only a second drilling, so the doctrine would not excuse A's performance.

Anticipatory Repudiation

If A breached the contract by anticipatory repudiation, B could legitimately go to Carlos for completion. If A completely, unequivocally repudiated the contract, B's further obligations under the contract would be excused.

But A did not so repudiate: he merely said he could not promise the contract's completion by July 1. This expression of doubt could not alter his obligation to perform by July 1, and he was not insisting that B modify their contract, since Betty refused to let him start another well. B had to wait until July 1 to see if he breached. Because A was willing to continue his performance, B was still bound by the contract: her performance was not excused.

B's Refusal

A covenant "implied in fact" in all contracts is the cooperation of the obligee in receiving an obligor's performance. A's further performance was excused when this condition arose by B's refusal to let Art start another well: breach of this covenant sets up a condition, which, unsatisfied, excuses his

further performance. But B's refusal constitutes breach of the contract on her part, so that B should be unable to collect damages from A if his anticipatory repudiation is not found.

If Art Breached

If Art did breach the contract by anticipatory repudiation because he said he couldn't guarantee completion by July 1, B would be entitled to damages based on gaining the benefit of her bargain.

She bargained for a well drilled at $10 a foot, and 300 feet of drilling were required. Thus she paid a total of $8,000 to A and Carlos, and would have paid $3,000 if nothing had gone awry. If Art breached, her action in going to Carlos may be proved to be reasonable to gain her bargain and she could collect $5,000 from A.

B would only be able to collect the additional $15,000 from A if such loss to the apple crop was foreseen by Art at the time they entered into the contract, under the rule of Hadley. Because A never drilled before and B was talking about drinking water rather than crops, such damages should probably be found not to have been within the reasonable expectations of A and B when they entered into the contract.

Finally, if Art's conduct was not an anticipatory breach and B breached the contract, Art should have a good claim under the contract for his work at $10 a foot, or for restitution for the reasonable value of his services (in quasi-contract) at $12 a foot.

ANSWER B TO QUESTION 1

Rights

It is fairly clear from the facts given that an effective contract has been formed so as to bind the parties. Betty asked Art to drill her a well; Art laid out price and the maximum depth to which he could drill. Then Betty asked for a guaranteed completion date and Art agreed, asking for an advance. Betty paid the advance -- thus manifesting her intent to be bound by all of the terms of the parties. Sufficient consideration is present since both parties incurred a legal detriment.

The real issue in this case involves the terms of performance and attempt at performing by Art. By the terms of the agreement, upon receipt of his advance, Art was to commence drilling a well for Betty up to a depth of 600 feet. He was to complete performance by June 1. Any balance was payable

on completion.

Art began performance and at 200 feet of depth he hit rock and his drill bit broke. The facts state that the accident was unavoidable. This raises the doctrine of impossibility. A performance under a contract is excused if the performance becomes objectively impossible, if no one in the world could complete the performance. From the facts given, it appears that drilling a well at this exact site is objectively impossible since the broken drill was unavoidable. Betty may claim that this does not render the performance impossible since Art could move and drill on a different site. The problem, though, is that Art cannot complete a new drill hole until July 1, a month after the deadline in the old contract.

Art will argue that the broken drill is a temporary impossibility and thus he should be allowed to continue his work. The modern trend among courts (and under the U. C. C., although that doesn't govern here) is to allow a reasonable time to "cure" performance if the time element in the contract is not crucial to the parties. Either under this doctrine or the doctrine of temporary impossibility, absent a showing of time being a crucial element of the contract, Art would be given an opportunity to reasonably complete his performance.

It must, of course, be determined whether or not time is truly of the essence to Betty. If time was of the essence so as to constitute a material alteration of the contractual agreement, then Betty may rescind the contract based on impossibility of performance, or she may attempt to rescind based on a mutual mistake of fact as to the ability to complete performance at the chosen site, and the court may try to unwind the transaction as far as possible, probably refunding to Betty $1500 as the difference in the agreed value of A's services and what Betty paid.

Betty may also try to show that Art had assumed the risk of not being able to complete performance at a given site. This would be especially helpful to Betty if she can show that Art picked the site to drill. (If Betty picked the site, she may have assumed the risk of impossibility). If the court finds that Art assumed the risk, which is common in building contracts, then it must once again determine if this breach of the time element is a material one or not. This is based on a consideration of the time element and whether failure to meet this element will impair Art's ability to substantially perform.

The original agreement guarantees a June 1 completion, but the well is only for drinking (as per the January conversation, which is admissible here since there is no written agreement by which to trigger the parole evidence rule). There are no facts which support the need for a June 1 completion.

Courts have held "time is of the essence" clauses inoperative where the clause was not supported by the facts. It is likely that the courts would not stringently enforce this June 1 completion date.

If it is determined that there has been no material breach, either by the doctrine of temporary impossibility, or the finding of non-material breach due to non-importance of the date, then Art has a right to go and complete performance. It is an implied-in-fact condition, however, that he have access to the land on which he is to drill. Betty has refused to let Art begin performance again. Her prevention of satisfaction of the implied-in-fact condition will excuse Art from any further performance. It will effectively put Betty in breach. This is the likely outcome of a court's resolution of the dispute. Art's performance will be excused due to Betty's prevention of Art's performing -- drilling the new well. This is a prevention of an implied-in-fact condition precedent to Art's performance, which excuses the performance.

Damages

If Art is found to have breached the contract due to a failure to conform to a "material provision as to time," then Betty can sue for damages under this breach.

The starting point for Betty is the cost of "cover". The cost of obtaining substitute performance -- here being the $4,500 paid to Carlos less the price she would have had to pay to Art for the job. This later figure would be $10 per foot times 300 feet which is where Art would have struck water. Betty would recover $4,500 less $3,000, or $1,500. Included in this is a refund of $500 from Art since he promised a refund. Betty will argue she should get more since Art said he wouldn't charge her for the useless hole, but Art would argue and the court would probably find that Art's statement was made as a condition of his continuing performance.

Betty would probably claim her loss as a result of the crop failure. This is an incidental damage. Damages in contract must be caused by the breach, must be foreseeable as per Hadley v. Baxendale, certain and unavoidable. Although the damages here may be certain and unavoidable, there are serious problems with causation the foreseeability. The causation is extremely remote here, although Betty may claim that but for Art's non-performance she would have had water for her crops. The greater problem is foreseeability. Under Hadley, contract damages must be those that a reasonable person would foresee or those damages that would be foreseen by communication by the innocent party to the breaching party.

There is no way to have foreseen that the County dam would fail, leaving Betty with no irrigation water. More important, Betty told Art that the water was for drinking, so he was not on notice of any special facts: quite to the contrary since Betty specifically said the well was for drinking water.

Betty would fail on her claim for these special damages from crop loss.

If the contract was not materially breached by Art and his performance was prevented by Betty, then the court would excuse Art and try to rescind the contract. Since the court can't rescind the contract to the starting point, they would likely give Art payment in the agreed-upon amount of his services, $2,000, and would ask him to refund the rest to Betty. This is the likely outcome.

The court may, if it finds Betty in breach, give Art the profit he would have made on the contract, "the benefit of his bargain," but this is not as likely as awarding him the value of services rendered with only the small refund to Betty.

February 2001

QUESTION 6

Owens, a homeowner, approached Carter, a licensed contractor, to discuss construction of a new garage attached to Owens' home. After several meetings, Owens and Carter signed the following contract.

> Carter will build a two-car garage, with overall dimensions of 30' (width) by 25' (depth). Included within the overall dimensions will be a storage area at the rear. Storage area to be 30' by 4', and divided from the remainder of the garage

by a wall containing a door. Wooden siding, paint, and roof will be matched to Owens' home. Carter will commence work on March 15 and will complete job no later than April 30. Owens agrees to pay $8,500 upon completion. The time for performance of these obligations shall be of the essence.

The contract was signed on January 15, and Carter arrived on the job site on March 15 to begin work. Several weeks later, Carter learned that roofing shingles of the exact type and color used on Owens' home were difficult to obtain. Therefore, he used shingles made of other material which were of even higher quality than those originally planned but which, although very close, did not precisely match those on the roof of Owens' home.

Carter completed the garage on May 10 and presented Owens with a bill in the amount of $8,500. Later on the same evening, Owens placed his car in the garage only to learn that the length of his car did not permit the garage door to close. Upon closer inspection he discovered that the storeroom at the back of the garage was 30' by 6', two feet deeper than planned. As a result, the garage parking area was only 19' in depth. While this would be sufficient for most automobiles, it was several inches too short to accommodate Owens' large car.

The cost of removing and relocating the dividing wall would be $800. The cost of removing and replacing the shingles with others matching Owens' home would be $2,200. Owens has refused to pay any part of Carter's bill, citing as reasons Carter's failure to (1) complete the job by April 30; (2) use matching shingles; and (3) build a garage and storeroom of the dimensions called for by the contract.

What are Carter's rights and liabilities? Discuss.

ANSWER A TO ESSAY QUESTION 6

I. Carter's liabilities and rights under the Contract

Carter's contract with Owens complied with all the formation requirements because it has mutual assent, consideration, and it was in writing, satisfying the Statute of Frauds. So the issue here involves the performance of such a contract by Carter. If Carter's contract with Owens had conditions, then Carter's compliance with those conditions will be at issue. Whether Carter's performance is excused is also determinative of his rights and liabilities. Finally, if Carter's performance duty is not excused, then whether his performance was a breach [sic].

A) Time of Essence Clause on Contract

The Contract specifically had a time of the essence clause at the end. Courts will construe these clauses strictly if they are intended by the contracting parties. Since it was expressly stated, the courts will not second-guess the intents of the parties and strictly construe this clause.

Since the clause will be strictly construed by the courts, then this clause will be viewed as a condition precedent to payment. If the party can't fully perform by the prescribed dates, then the condition precedent to payment hasn't been satisfied. As such, Owens need not pay Carter the $8,500 because the express condition of completing the construction by April 30 wasn't complied with. So Owens has a right to withhold payment because the condition wasn't satisfied as stated on the contract.

But to render the whole contract breached just because the time of the essence clause wasn't fully complied with will be too harsh on the breacher. Carter did tender substantial, if not full, performance by building the garage and the storage room. (The issues with the shingles and storeroom will be discussed separately in the next sections.) So the court may not strictly construe the time of the essence clause as an express condition. Instead, if the court construes the condition as a covenant instead, then Carter's failure to finish by April 30 will not be fatal.

Covenants are promises by the parties that they'll abide by them, and failure to do so will result in

damages to the aggrieved party. If the time of the essence clause is not an express condition precedent to payment, then Owens' obligations to payment is not excused.
He will only be able to claim dollar damages because Carter didn't comply with the covenant of the time of the essence clause.

B) Matching Shingles

The express terms of the contract have to be complied with by the parties because that reflects the parties' intent and their duties under the contract, since the contract expressly stated that the "shingles will be matched to Owens' home." Failure to do so will be a breach. The issue is whether the breach is a material one or a minor one.

In a minor breach, the aggrieved party is not excused from full performance of her duties. So Owen[s] should still pay the contract price to Carter minus the costs of the minor breach if the matching shingles is indeed considered minor. But if the failure to put matching shingles onto Owens' garage is a material breach, then the aggrieved party is excused from payment.

The matching of the shingles to the house is probably a minor breach. Whether singles match or not does not affect the construction of a garage and a storeroom. This only goes to an aesthetic issue. It is also subjective whether Owens thinks the shingles match with the house or not. So the failure to match is not a material breach since the substantial part of the contract was not to put shingles on but rather to build a garage and a room.

Carter may even argue the singles matched and so there wasn't even a minor breach. But Owens will counter by saying the contract expressly asked that they match his home and since they don't "precisely" match, there's a breach. Albeit the discrepancy may be minor, but courts, again, will construe the contract as the intent of the contracting parties.

Another way to get around the problem of not getting precisely matching shingles and so having breached in a minor way would be the concept of excuse. Carter may assert he's excused by impracticability because the perfect shingles weren't obtainable with ease. But for impracticability to be a viable excuse, the burden must be so severe for compliance to render the compliance impracticable. Here, the burden to look

harder for those matching shingles can't be severe. Although Carter did use better quality shingles, Owen[s] contracted for "matching," not "high quality" shingles. So Carter's assertion of impracticability to excuse his duty to get matching shingles can't prevail.

But Carter can assert that he's mitigated by using almost matching shingles. (Remedies section will discuss mitigation.)

C) Building of a Garage and Storeroom as Specified

Once again, the contract expressly stated duties and term for Carter to perform and abide by . So Carter's failure to comply will be a breach.

These breaches have a stronger argument to be material ones because the contract's essence is to build a garage and storeroom in a specified dimension. Since the contract expressly required Carter to build them in a certain size, the intent of Owen[s] was clear. So Carter's failure to perform as instructed will be a material breach because the dimensions of the garage and storeroom didn't follow the contract as stated.

As such, Owen[s] can be excused from performing because it's a material breach. However, if it's a minor breach, then the court will still require Owen[s] to pay Carter.

The failure to comply with the exact dimensions could be viewed as a minor breach because the garage and storeroom were completely built as directed with the design, materials, and overall dimensions roughly. The deviation from the dimensions are 2 inches only. So the breach could be minor. Since normal cars would fit, the purpose of the contract is not frustrated because Carter still built a garage usable by cars. It's just that Owen[s] has peculiarly long cars that don't fit without the extra 2 inches. However, Owens didn't communicate this to Carter, so Carter's failure to take heed in ensuring the dimensions are at least 30' by 4' and 30' by 25' couldn't be Carter's fault. Therefore, Carter's failure to follow precise directions could possibly be viewed as a minor breach. Then he'll still be entitled to the contract price minus the cost of fixing the breach.

II. Breacher's Remedies

A) Material Breach

If the court construes all the aforementioned breaches as material breaches, then Owen[s] is permitted to withhold payment. Owen[s] can also get the cost of completing the garage and storeroom and the replacement of the shingles from Carter. Those are his expected damages and Carter will be liable for them

However, under restitution, it'll be unfair for Owen[s] to get the entire garage and storeroom without paying Carter anything. So restitution allows Carter to get back the benefit conferred onto Owen[s] so that an unjust enrichment of Owen[s] wouldn't result. Owen[s] should disgorge the costs of the garage and storeroom minus any costs he'll incur for fixing the material breaches. Since the contract price was for $8,500 and Owens' cost of remedying the wall and shingles cost $3000, Carter can get $5,500 back on his restitution costs.

B) Minor Breach

If those breaches are minor, then Owen[s] should pay the $8500 to Carter since he did substantially perform and his breaches weren't willful. A breacher can still collect the contract price because he substantially performed. However, Carter must pay Owen[s] the costs for remedying the shingles and the wall removal so the car will fit. But Carter will argue that he need not pay $2,200 to Owen[s] because he substantially complied by providing better quality and closely matching shingles. Carter mitigated by using closely matching shingles. So Owen[s] needs to mitigate the damages from these non-matching shingles by not replacing them entirely. Carter should not be liable for the $2,200 for replacing all the shingles.

C) Specific Performance

Generally, courts are reluctant to grant specific performances because personal services contract[s] are hard to administer and will be imposing involuntary solitude. So if Owen[s] asked for specific performance by Carter to redo the garage and the replacement of the shingles, such a remedy will not be granted. Most important reason is that there is an adequate legal remedy in making Owen[s] whole. So specific performance will not be something Carter needs to do for his breaches.

ANSWER B TO ESSAY QUESTION 6

Owens (0) and Carter (C) entered into a valid construction contract, to which the common law of contracts applies. The determination of C's rights and liabilities depends upon an analysis of his performance of the terms of the contract and any breach thereof.

At common law, the duty to perform may be discharged by exact performance of the terms of the contract. A performance which does not conform to the terms of the contract does not discharge the duty and is a breach of the contract. A breach may either be minor or material. A material breach is one that so substantially affects the value of the contract (or the benefit of the bargain) that the duty to pay the contract price is discharged, while a minor breach occurs when substantial performance has been rendered. In the event of a material breach, the breaching party may not recover under the contract but may recover any benefit bestowed under quasi-contract (or quantum meruit) principles. For minor breaches, the breaching party may receive the contract price, less the amount by which the defective performance reduced the bargained-for benefit.

1. Breach of the "time is of the essence" clause

A "time is of the essence" clause serves to notify the parties that a failure to render performance by the specified date is a breach of a contractual term and may entitle the promisee to damages.

Here, C breached the time is of the essence clause, because he finished performance ten days late. There is no showing that this caused 0 any actual damages and so 0's remedy would be limited to nominal damages. Carter's liability for this (minor) breach is negligible.

2. Failure to use matching shingles

C has an argument that he did not breach the relevant term at all. It is unclear from the contract whether the term "matched" means: a) the siding, paint and roof on the garage shall be constructed from precisely the same materials as the corresponding pieces on the house; or b) the siding, paint and roof shall be of reasonably similar materials so that, as a totality, the house and garage match (to a reasonable person or even to 0's satisfaction). If customarily in construction contracts it means the latter, C will prevail, in the absence of contrary evidence of the parties' intentions. 0 could have (but did not) specifically bargain for exactly matching shingles. (It might have been wise to ask or notify 0 about the non-match earlier, though.)

Assuming that C loses the above argument on interpretation, he has failed to perform exactly and thus has breached. This breach does not go to the value of the bargained-for consideration - the roof is otherwise a perfectly good roof (and may be superior to the one bargained for!). 0 will not be able to obtain the cost of removal and replacement, but will only recover the difference in value, if any. Again, C may be liable only for nominal damages.

3. Failure to build the dividing wall

C's failure to put the wall in the right place is a more serious issue, because that failure does go to the suitability of the garage for O's intended use (i.e., to the value of the bargainedfor benefit). However, the cost of correcting this problem is less than 10% of the total contract price. This is likely to be considered a minor breach as well, with damages of $800.

C may file suit against 0 for $7,800; i.e., the contract price of $8,500 less the $800 to relocate the dividing wall. Unfortunately, the time of essence clause has the effect of cutting off the time of performance allotted to C, so C cannot correct his mistake and sue for the entire contract price.

February 2002

QUESTION 4

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

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

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

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

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

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

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

ANSWER A TO ESSAY QUESTION 4

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

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

Offer, acceptance, consideration.

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

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

Consideration

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

Promissory Estoppel/Detrimental Reliance

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

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

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

in the damages phase.

Statute of Frauds

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

Impossibility

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

Impracticability

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

Frustration of Purpose

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

Mistake

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

Good Faith

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

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

2. Damages

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

(1) The cost of listing her phone number:

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

(2) The champagne:

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

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

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

Probably she will recover because champagne is foreseeable. (3) Luggage

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

(4) Loss of her Job

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

(5) Value of Trip

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

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

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

ANSWER B TO ESSAY QUESTION 4

TRAVELCO'S DEFENSES

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

The first defense that Travelco will assert is that there is no valid contract for them to breach. The

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

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

Polly's second argument is that even though there was no consideration for the promise, she can claim contract rights by promissory estoppel. Here, the issue is whether Polly detrimentally relied on Travelco's promise to award a trip in a reasonable matter that would make it unjust for Travelco not to honor their promise. Polly can assert that she detrimentally relied on the promise in several ways. First, she listed her number in the phone book. Polly will claim that changing her number from unlisted to listed was a detrimental reliance. The detriment is that she will now be more likely to receive unwanted phone calls. Her second claim is that purchase of champagne. Her reliance will be the cost of the champagne. Third, she purchased golf clothes and luggage. Again, the lost purchase price is her reliance. Finally, she quit her job. Clearly this is a detrimental reliance.

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

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

<u>Impossibility</u>

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

POLLY'S DAMAGES RECOVERY

The purpose of damages is to put the plaintiff in the position they would have been in had the other party not breached. Damages include the compensatory, as well as incidental and consequential damages. Consequential damages must be foreseeable by the party at the time the contract was formed. Punitive damages are not typically awarded in contract cases unless the breach can be characterized as a tort (e.g. fraud or misrepresentation) and then punitive damages may be appropriate if the breach was intentional.

Phone Listing

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

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

Luggage, Clothing

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

Loss of Job

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

The Price of the Vacation

Here, Polly will argue that she should be awarded the cost of the promised vacation. This is the purpose of compensatory damages, to put Polly in the position she would have been in had Travelco not breached. The court will therefore award Polly the value of the vacation. Because

money damages are sufficient in this case, and there is no indication that Polly sought specific performance anyway, the court will not force Travelco to actually award the trip.

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

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

February 2005
Question 2

PC manufactures computers. Mart operates electronics stores.

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

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

On August 10, Mart responded with a fax stating:

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

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

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

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

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

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

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

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

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

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

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

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

Answer A to Question 2

2)

Uniform Commercial Code

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

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

Merchants

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

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

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

Offer

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

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

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

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

Merchant's Firm Offer Rule

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

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

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

Acceptance

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

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

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

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

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

Mart's November 2 letter was a valid acceptance.

Revocation

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

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

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

Consideration

Bargained[-]for exchange of legal detriment

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

sufficient consideration.

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

Statute of Frauds - Defense to Enforcement

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

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

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

Material Breach

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

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

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

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

Remedies

Cover

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

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

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

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

computers from Wholesaler?

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

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

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

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

Answer B to Question 2

Mart vs. PC

UCC Applies

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

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

Contract Formation

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

Offer

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

PC's August 1 Fax

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

Acceptance

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

August 10 Fax from Mart

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

Consideration

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

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

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

Defense to Formation/the Statute of Frauds

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

10 order would likely constitute a sufficient writing to satisfy the Statute of Frauds.

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

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

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

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

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

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

Mart's Remedies

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

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

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

Quasi-Contract/Unjust Enrichment

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

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