Contracts
MEE Practice Question: February 2017

Contracts MEE Practice Question (February 2017)

On June 15, a professional cook had a conversation with her neighbor, an amateur gardener with no business experience who grew tomatoes for home use and to give to relatives. During the conversation, the cook mentioned that she might be interested in "branching out into making salsa" and that, if she did branch out, she would need to buy large quantities of tomatoes. Although the gardener had never sold tomatoes before, he told the cook that, if she wanted to buy tomatoes for salsa, he would be willing to sell her all the tomatoes he grew in his half-acre home garden that summer for $25 per bushel.

Later on June 15, shortly after this conversation, the cook said to the gardener, "I'm very interested in the possibility of buying tomatoes from you." She then handed a document to the gardener and asked him to sign it. The document stated, "I offer to sell to [the cook] all the tomatoes I grow in my home garden this summer for $25 per bushel. I will hold this offer open for 14 days."

The gardener signed the document and handed it back to the cook.

On June 19, the proprietor of a farmers' market offered to buy all the tomatoes that the gardener grew in his home garden that summer for $35 per bushel. The gardener, happy about the chance to make more money, agreed, and the parties entered into a contract for the gardener to sell his tomatoes to the proprietor.

On June 24, the cook, who had not communicated with the gardener since the June 15 conversation, called the gardener. As soon as the cook identified herself, the gardener said, "I hope you are not calling to say that you want my tomatoes. I can't sell them to you because I have sold them to someone else." The cook replied, "You can't do that. I called to accept your offer to sell me all your tomatoes for $25 per bushel. You promised to hold that offer open for 14 days. I accept your offer!"

Is the gardener bound to sell the cook all the tomatoes he grows that summer for $25 per bushel? Explain.

Contracts

MEE Practice Question Analysis: February 2017

FEBRUARY 2017 CONTRACTS ANALYSIS

This February 2017 analysis for the MEE was provided to bar examiners to assist in grading the examination. It addresses all the legal and factual issues raised in the question. While it is illustrative of the discussions that might have appeared in excellent answers to the question, it is more detailed than examinee responses were expected to be. **Note that any changes to the relevant law since this analysis was prepared may affect its substantive accuracy.**

ANALYSIS

Legal Problems:

(1) What body of contract law governs the dealings between the gardener and the cook?

(2) Was the gardener entitled to revoke his offer before the cook accepted it?

(3) Did the gardener revoke that offer before the cook accepted it, thereby preventing the formation of a contract?

DISCUSSION

Summary

Because tomatoes are "goods," the gardener-cook transaction is within the scope of Article 2 of the Uniform Commercial Code (UCC), although common law principles remain applicable to the extent that they are not displaced by the UCC. The gardener made an offer to the cook to sell the cook his tomatoes for $25 per bushel and promised to hold that offer open for 14 days. That promise was not supported by consideration, however, and it is not binding on the gardener because no exception in the UCC overrides the requirement of consideration in order to make such a promise binding. The gardener revoked that offer before the cook accepted it when he informed the cook that he had sold his tomatoes to the proprietor of the farmers' market before the cook told the gardener that she accepted the offer. Thus, the gardener's revocation is effective and the gardener is not bound to sell the tomatoes to the cook.

Point One (10%)

Tomatoes are "goods," and, therefore, the transaction between the cook and the gardener is governed by Article 2 of the UCC. Further, the document signed by the gardener was an "offer" for a contract under the UCC.

UCC Article 2 governs "transactions in goods." UCC § 2-102. The term "goods" includes, among other things, growing crops (such as tomatoes). UCC § 2-105(1). Thus, the transaction in question is a transaction in goods that is governed by Article 2 of the UCC. Common law principles remain applicable, though, to the extent not displaced by the UCC. UCC § 1-103(b). The document signed by the gardener, which was capable of being accepted, constituted an "offer" for a contract under UCC § 2-206. *See also Restatement (Second) of Contracts* § 24.

Point Two (60%)

Generally, an offer to buy or sell goods may be revoked at any time before acceptance unless the offeror promised to hold the offer open and that promise is supported by consideration, or revocation of the offer is barred by UCC § 2-205.

A person makes an offer when the person communicates to another a statement of "willingness to enter into a bargain, so made as to justify" the other person "in understanding that his assent to that bargain is invited and will conclude it." *Restatement (Second) of Contracts* § 24; *Nordyne, Inc. v. Int'l Controls & Measurements Corp*., 262 F.3d 843 (8th Cir. 2001). Here, the gardener's statement in the document that he signed was an offer because it expressed the gardener's willingness to enter into a bargain in a way that justified the cook in understanding that assent would create a contract.

Under the common law of contracts, an offer may be revoked by the offeror at any time before acceptance unless an option contract is created limiting the power of revocation. *Restatement (Second) of Contracts* §§ 25, 87. No option contract is created here because there was no consideration for the gardener's promise to keep the offer open, and there was no writing reciting a purported consideration. *Id*. § 25, cmt. c, and § 87(1)(a). As a result, the promise to hold the offer open is not enforceable under the general rule requiring consideration for such a promise.

As the Restatement notes, a promise to hold an offer open may also be made binding by statute. *Id.* § 87(1)(b). Because the tomatoes constitute goods, Article 2 of the Uniform Commercial Code is the relevant statute. In some circumstances, the "firm offer" rule in UCC § 2-205 makes a promise to hold open an offer to buy or sell goods binding even in the absence of consideration. UCC § 2-205 does not apply in this situation, however, because it applies only to an offer by a "merchant." The term "merchant" is defined in UCC § 2-104(1) as "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction . . ." Here, the gardener is an amateur gardener with no business experience who has never sold tomatoes. Under these facts, the gardener is not a merchant. As a result, UCC § 2-205 does not make the gardener's promise to hold the offer open binding in the absence of consideration.

In some cases, "an offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract." *Restatement (Second) of Contracts* § 87(2). There is nothing in these facts, however, that would justify application of this rule.

In sum, the gardener was not bound by his promise to hold the offer open for 14 days and could revoke it at any time.

[NOTE: Even if the gardener were a merchant, UCC § 2-205 would not prevent revocation of this offer. This is because the promise to hold the offer open was on a form supplied by the cook (the offeree) and UCC § 2-205 requires that, when the term of assurance is on a form supplied by the offeree, that term of assurance must be "separately signed" by the offeror. There is no indication that the promise to hold the offer open was separately signed by the gardener (such as by placing his initials next to that sentence).]

[NOTE: Nonetheless, an examinee should receive credit if he or she concludes that the gardener had become a merchant by virtue of the sale of all of his tomato crop and then goes on to discuss the gardener's liability to the cook under a theory of promissory estoppel.]

Point Three (30%)

<u>The gardener revoked his offer to sell all his tomatoes to the cook for $25 per bushel when he told her that he could not sell the tomatoes to her because he had sold them to someone else before the cook told him that she accepted his offer.</u>

An offer is revoked when the offeree "receives from the offeror a manifestation of an intention not to enter into the proposed contract." *Restatement (Second) of Contracts* § 42; *Normile v. Miller*, 326 S.E.2d 11 (N.C. 1985) ("notice of the offeror's revocation must be communicated to the offeree to effectively terminate the offeree's power to accept the offer"). Here, the gardener told the cook that he could not sell her tomatoes because he had sold them to the proprietor of the farmers' market. The gardener's statement is a clear manifestation of an intention not to enter into the proposed contract and is a revocation of the gardener's offer to sell his tomatoes to the cook. The revocation occurred before the cook accepted the gardener's offer. Thus, the cook's power to accept the offer and create the contract was terminated before her acceptance and there is no contract between them with respect to the tomatoes. *See Restatement (Second) of Contracts* § 36(1)(c).

Contracts
MEE Practice Question: July 2016

Contracts MEE Practice Question (July 2016)

A homeowner and his neighbor live in houses that were built at the same time. The two houses have identical exteriors and are next to each other. The homeowner and his neighbor have not painted their houses in a long time, and the exterior paint on both houses is cracked and peeling. A retiree, who lives across the street from the homeowner and the neighbor, has complained to both of them that the peeling paint on their houses reduces property values in the neighborhood.

Last week, the homeowner contacted a professional housepainter. After some discussion, the painter and the homeowner entered into a written contract, signed by both of them, pursuant to which the painter agreed to paint the homeowner's house within 14 days and the homeowner agreed to pay the painter $6,000 no later than three days after completion of painting. The price was advantageous for the homeowner because, to paint a house of that size, most professional housepainters would have charged at least $8,000.

The day after the homeowner entered into the contract with the painter, he told his neighbor about the great deal he had made. The neighbor then stated that her parents wanted to come to town for a short visit the following month, but that she was reluctant to invite them. "This would be the first time my parents would see my house, but I can't invite them to my house with its peeling paint; I'd be too embarrassed. I'd paint the house now, but I can't afford the going rate for a good paint job."

The homeowner, who was facing cash-flow problems of his own, decided to offer the neighbor a deal that would help them both. The homeowner said that, for $500, the homeowner would allow the neighbor to take over the homeowner's rights under the contract. The homeowner said, "You'll pay me $500 and take the contract from me; the painter will paint your house instead of mine, and when he's done, you'll pay him the $6,000." The neighbor happily agreed to this idea.

The following day, the neighbor paid the homeowner $500 and the homeowner said to her, "The paint deal is now yours." The neighbor then invited her parents for the visit that had been discussed. The neighbor also remembered how annoyed the retiree had been about the condition of her house. Accordingly, she called the retiree and told him about the plans to have her house painted. The retiree responded that it was "about time."

Later that day, the homeowner and the neighbor told the painter about the deal pursuant to which the neighbor had taken over the contract from the homeowner. The painter was unhappy with the news and stated, "You can't change my deal without my consent. I will honor my commitment to paint the house I promised to paint, but I won't paint someone else's house."

There is no difference in magnitude or difficulty between the work required to paint the homeowner's house and the work required to paint the neighbor's house.

1. If the painter refuses to paint the neighbor's house, would the neighbor succeed in a breach of contract action against the painter? Explain.

2. Assuming that the neighbor would succeed in the breach of contract action against the painter, would the retiree succeed in a breach of contract action? Explain.

3. If the painter paints the neighbor's house and the neighbor does not pay the $6,000 contract price, would the painter succeed in a contract claim against the neighbor? Against the homeowner? Explain.

Contracts
MEE Practice Question Analysis: July 2016

JULY 2016 CONTRACTS ANALYSIS

This July 2016 analysis for the MEE was provided to bar examiners to assist in grading the examination. It addresses all the legal and factual issues raised in the question. While it is illustrative of the discussions that might have appeared in excellent answers to the question, it is more detailed than examinee responses were expected to be. **Note that any changes to the relevant law since this analysis was prepared may affect its substantive accuracy.**

ANALYSIS

Legal Problems:

(1) May a contractual right to the performance of services be assigned without the obligor's consent, giving the assignee the right to enforce the contract, when the assignment would not change the obligor's duty in any material respect?

(2) If the obligor does not perform, may a third party who would have benefitted from performance enforce the contract?

(3) If the obligor performs the services for the assignee pursuant to the assigned contract, is the assignee liable for payment? Is the assignor liable for payment?

DISCUSSION

Summary

The homeowner's rights against the painter can be assigned to the neighbor because the substitution of neighbor for homeowner will not materially change the painter's duty or increase the painter's burden. Because those rights have been assigned, the neighbor can enforce them against the painter. The retiree cannot enforce those rights because he is not a party to the contract (either initially or by assignment) and does not qualify as a third-party beneficiary of it. The assignment of rights to the neighbor does not relieve the homeowner of his payment obligation; if the painter paints the neighbor's house and the neighbor does not pay the painter, the painter will have causes of action against both homeowner and neighbor.

Point One (45%)

The homeowner's rights against the painter are assignable because the substitution of neighbor for homeowner does not materially change the painter's duty or materially increase the burden imposed on the painter, and would not materially increase the painter's risk or chance of obtaining return performance, or materially reduce the value of the contract to him.

While contract rights are generally assignable, a contract is not assignable if the assignment (i) would materially change the duty of the obligor (here, the painter), (ii) would materially increase the burden or risk imposed on the obligor, (iii) would materially impair the obligor's chance of obtaining return performance or materially reduce the value of that return performance to the obligor, (iv) is forbidden by statute or precluded by public policy, or (v) is validly precluded by contract. RESTATEMENT (SECOND) OF CONTRACTS § 317(2). In this case, there is no indication of a statute or public policy that would forbid or preclude the assignment, and no contractual provision prohibiting assignment. Thus, the only questions are whether the assignment would

materially change the duty of the painter or increase the burden imposed on the painter, and whether the assignment would materially impair the painter's chance of obtaining return performance or materially reduce the value of that return performance to the painter.

Under these facts, which specify that there is no difference in magnitude or difficulty between the work required to paint the homeowner's house and the work required to paint the neighbor's house, the assignment from the homeowner to the neighbor does not materially increase the painter's duty or risk. The facts specify that the exterior of the neighbor's house is identical to the exterior of the homeowner's house, that both are peeling, and that the labor to paint each house would be comparable in magnitude and difficulty. Moreover, the neighbor's house is next door to the homeowner's house, so no additional travel burden would be placed on the painter by painting the neighbor's house rather than the homeowner's house. Thus, a court would likely conclude that the assignment from the homeowner to the neighbor would neither materially change the painter's duty nor materially increase the burden imposed on the painter.

There is no indication under these facts that the assignment would materially impair the painter's chance of obtaining return performance (the agreed $6,000 payment), or materially reduce the value of the contract to the painter. *Id.* § 317(2)(a). None of these factors is present here, particularly in light of the fact that the assignor (here, the homeowner) remains liable to pay the painter if the painter fulfills his obligation and the assignee (here, the neighbor) will be liable as well. (*See* Point Four below.)

All that is generally necessary for an effective assignment is (a) that the assignor manifest his or her intent to transfer the right to the assignee, without reserving any right to confirm or nullify the transfer (RESTATEMENT (SECOND) OF CONTRACTS § 324), and (b) that the assignee manifest assent to the assignment. *Id.* § 327(1). Here, both conditions are satisfied by the conversation between the homeowner and the neighbor. No action or manifestation of assent is required from the obligor. No particular form is required for the assignment. With minor exceptions not relevant here, the relevant manifestations of assent may be made either orally or in writing. *Id.* § 324.

If the painter does not paint the neighbor's house, the neighbor has a cause of action against the painter. *Id.* § 317(1) (by virtue of the assignment, "the assignor's right to performance by the obligor is extinguished . . . and the assignee acquires a right to such performance").

[NOTE: Some examinees might argue against assignability of the contract because there are inevitable differences between the paint jobs, such as the relative ease of dealing with the homeowners. If well-reasoned, such analysis should receive credit.]

Point Two (20%)

<u>The retiree is neither an assignee of the contract nor a third-party beneficiary of the painter's promise; accordingly, the retiree cannot enforce the painter's obligations.</u>

The retiree has no cause of action for the painter's breach. The homeowner's rights under the contract have been assigned to the neighbor, not to the retiree; therefore, the retiree may not enforce the contract as an assignee. Moreover, the retiree does not qualify as a third-party beneficiary who can enforce the contract. While the retiree would benefit from the painter's

performance of his obligations, not all who benefit from performance of a promise may enforce it. Rather, contract law distinguishes between "incidental" beneficiaries and "intended" beneficiaries, and only the latter can enforce a promise of which he or she is not the promisee. The retiree is not an intended beneficiary inasmuch as there is no indication that benefitting him was in the contemplation of any of the parties when the contract was entered into. *See* RESTATEMENT (SECOND) OF CONTRACTS § 302 and comment *e* and Illustration 16.

Point Three (35%)

The painter's right to be paid for the completed paint job is enforceable against the delegatee (the neighbor) and also against the original/delegator (the homeowner).

The transaction between the homeowner and the neighbor is not only an assignment to the neighbor of the homeowner's rights against the painter, but also a delegation to the neighbor of the homeowner's obligation to the painter. This is shown by the fact that the neighbor assented to the homeowner's idea of the neighbor paying the painter. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 328(1) (assignment in general terms includes "a delegation of [the assignor's] unperformed duties under the contract"). As a result, if the painter completes the paint job and is not paid in accordance with the terms of the contract, then he has a cause of action against the neighbor, even though the neighbor was not a party to the original contract.

The homeowner's delegation to the neighbor of the duty to pay the painter does not, however, relieve the homeowner of that payment responsibility in the absence of the painter's agreement to the discharge of the homeowner. *See id.* § 318(3). As a result, if the painter is not paid in accordance with the terms of the contract, then the painter retains a cause of action against the homeowner as well.

Contracts
MEE Practice Question: July 2015

Contracts MEE Practice Question (July 2015)

A seller and a buyer both collect antique dolls as a hobby. Both live in the same small city and are avid readers of magazines about antique dolls. The seller placed an advertisement in an antique doll magazine seeking to sell for $12,000 an antique doll manufactured in 1820.

On May 1, the buyer saw the advertisement and telephoned the seller to discuss buying the doll. During this conversation, the seller and the buyer agreed to a sale of the doll to the buyer for $12,000 and also agreed that the seller would deliver the doll to the buyer's house on May 4, at which time the buyer would pay the purchase price.

The next day, May 2, the buyer changed his mind and decided not to buy the doll. He signed and mailed a letter to the seller, which stated in relevant part:

> I have decided not to buy the 1820 doll that we agreed yesterday you would sell to me.

The seller received the letter on May 3, immediately telephoned the buyer, and said, "I consider your letter of May 2 to be the final end to our deal. I will sell the doll to someone else and will hold you responsible for any loss."

On May 4, the seller received a telephone call from another antique doll collector. The collector had seen the seller's advertisement for the doll and expressed interest in buying it. After some discussion, the seller and the collector agreed to a sale of the doll to the collector for $11,000. Because the collector lived in a distant part of the state, the agreement provided that the seller, at her expense, would arrange for delivery of the doll by an express delivery service. The express delivery service that they selected charges $150 for deliveries of this type. The sale, the method of delivery, and the fee were all commercially reasonable. The seller acted in good faith in entering into this agreement with the collector.

On May 5, the buyer telephoned the seller and said, "I made a mistake when I sent the letter, and I will buy the doll from you on the terms we agreed to. Come to my house tomorrow—I'll have the $12,000 for you." The seller replied, "You're too late. I've already sold the doll to someone else." The seller then took the doll to the delivery service and paid the $150 delivery fee. The delivery service delivered the doll to the collector, who immediately wired the $11,000 payment to the seller. Two weeks later, the seller sued the buyer for breach of contract.

1. Is there a contract for the sale of the doll that is enforceable against the buyer? Explain.
2. Assuming that there is a contract enforceable against the buyer, did the buyer breach that contract? Explain.
3. Assuming that there is a contract enforceable against the buyer and that the buyer breached that contract, how much can the seller recover in damages? Explain.

Contracts
MEE Practice Question Analysis: July 2015

JULY 2015 CONTRACTS ANALYSIS

This July 2015 analysis for the MEE was provided to bar examiners to assist in grading the examination. It addresses all the legal and factual issues raised in the question. While it is illustrative of the discussions that might have appeared in excellent answers to the question, it is more detailed than examinee responses were expected to be. **Note that any changes to the relevant law since this analysis was prepared may affect its substantive accuracy.**

ANALYSIS

Legal Problems:

(1) Is an oral contract for the sale of goods for a price of $500 or more enforceable against a buyer who later sends a signed letter that indicates that the contract exists?

(2) If a party sends a letter stating a clear intention not to perform in accordance with a contract, but later tries to withdraw that statement, may the other party bring an action for breach of contract?

(3) What is the measure of damages if a buyer breaches a contract for the sale of goods and the seller resells the goods?

DISCUSSION

Summary

The parties' agreement created a contract for the sale of goods governed by Article 2 of the Uniform Commercial Code (UCC). Under the statute-of-frauds provision in Article 2 of the UCC, a contract for the sale of goods for a price of $500 or more is not enforceable unless there is a writing signed by the party against whom enforcement is sought that is sufficient to indicate that a contract for the sale of goods has been made between the parties. Although the writing need not state all the terms of the contract, the quantity must be stated.

The buyer's signed letter to the seller, indicating that he would not buy in accordance with the agreement between them, is sufficient to indicate that a contract for the sale of goods was made, and the letter clearly indicates that the agreement was for only one doll, so the quantity requirement is satisfied. As a result, the contract is enforceable against the buyer.

The buyer's letter was also a repudiation of the contract. When a party repudiates, the other party may await performance or immediately resort to any remedy for breach. While a repudiating party may sometimes "retract" its repudiation, the buyer's attempt to do so here was unsuccessful because the seller had materially changed her position in reliance on the repudiation and had indicated that she considered the repudiation to be final.

Because the seller resold the doll to the collector for $1,000 less than the contract price with the buyer, the seller is entitled to that $1,000 difference plus the additional delivery costs of $150 incurred by the seller.

Point One (30%)

The parties entered into a contract for the sale of goods governed by Article 2 of the Uniform Commercial Code. Because the contract price was $500 or more, the contract would not be enforceable against the buyer unless the buyer signed a writing sufficient to indicate that a contract for the sale of goods had been made (or an exception to that rule was applicable). The buyer's letter stating his intention not to perform the contract is sufficient to indicate that a contract was made. Therefore, the contract is enforceable against the buyer.

Article 2 of the Uniform Commercial Code applies to transactions in goods. UCC § 2-102. "Goods" are "things moveable" at the time of identification to the contract. UCC § 2-105(1). The doll was clearly moveable at the time of identification, so the transaction is governed by Article 2.

Under UCC Article 2, a contract may be formed in any manner sufficient to show agreement. UCC § 2-204(1). The telephone conversation between the seller and the buyer clearly satisfies this requirement and created a contract to sell the doll to the buyer.

However, a contract for the sale of goods for a price of $500 or more is not enforceable against a party unless there is a writing signed by that party sufficient to indicate that a contract for sale has been made (or an exception to this rule applies). UCC § 2-201(1). Here, the contract price for the doll was $12,000, so this writing requirement is applicable. The writing need not contain all the terms of the contract, but the contract is not enforceable against the party beyond the quantity of the goods shown in writing. *Id.* (This rule is generally interpreted as indicating that a writing does not suffice unless it contains a quantity term. *See* UCC § 2-201, comment 1 paragraph 3.)

Although the contract was oral, the letter the buyer sent to the seller on May 2 was signed by the buyer and is sufficient to indicate that a contract for sale was made between them. After all, it states that the parties "agreed" to the sale of the doll. As to the quantity requirement, the letter refers to "the" 1820 doll, clearly indicating that the contract was for the sale of only one doll. Hence, the buyer's letter to the seller is sufficient to satisfy the requirements of the Article 2 statute of frauds. Accordingly, the contract is enforceable by the seller against the buyer.

Point Two (40%)

The buyer repudiated the contract, and his attempt to retract that repudiation was unsuccessful. Therefore, the seller has a cause of action against the buyer for breach of the contract.

UCC § 2-610 provides that if "either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other" the aggrieved party may for a reasonable time await performance by the repudiating party or resort to any remedy for breach. Although Article 2 does not define "repudiation," Comment 1 to UCC § 2-610 states that repudiation "centers upon an overt communication of intention or an action which renders performance impossible or demonstrates a clear determination not to continue with performance."

Here, the buyer's letter said: "I have decided not to buy the 1820 doll that we agreed yesterday you would sell to me." That positive and unequivocal statement that the buyer will not perform "demonstrates a clear determination not to continue with performance." In addition, the buyer's

failure to buy the doll would clearly "substantially impair the value of the contract" to the seller. Thus, the buyer's action constituted repudiation and would entitle the seller to pursue remedies for breach.

A repudiating party may, under some circumstances, retract its repudiation. UCC § 2-611(1). On May 5, the buyer indicated that he would perform when he said, "I made a mistake when I sent the letter, and I will buy the doll from you on the terms we agreed to." But the power to retract a repudiation terminates when the aggrieved party has done any of the following: (1) cancelled, (2) materially changed his position, or (3) otherwise indicated that he considers the repudiation to be final. UCC § 2-611(1).

Here, the seller materially changed her position in reliance on the buyer's repudiation when she agreed to resell the doll to the collector, because the seller committed herself to a substitute transaction inconsistent with performing the contract with the buyer. Moreover, the seller clearly indicated to the buyer on May 3 that she considered the buyer's letter to be "the final end" to their deal. Therefore, the buyer lost the ability to retract the repudiation no later than May 3, two days before the buyer attempted to retract his repudiation. Hence, the buyer's attempted retraction of his repudiation was ineffective.

Point Three (30%)

The seller resold the doll and, accordingly, is entitled to damages equal to the $1,000 difference between the contract price and the resale price plus incidental damages of $150.

The purpose of remedies under the UCC is to put the aggrieved party "in as good a position as if the other party had fully performed." UCC § 1-305(a). This is another way of stating the "expectation" principle of contract remedies. Here, if the buyer had performed, the seller would have sold the doll to the buyer for $12,000 and would have incurred no additional delivery costs (other than the negligible costs of driving to the buyer's home in the same city). After the buyer's breach, the seller sold the doll for only $11,000 and incurred an additional cost of $150 to transport the doll to the collector.

Under UCC Article 2, when a buyer breaches or repudiates, the seller has several remedies, including the remedy of reselling the goods. UCC § 2-703(d). If the resale is made in good faith and in a commercially reasonable manner, the seller can recover the difference between the contract price and the resale price plus incidental and consequential damages. UCC § 2-706(1). If the resale is by private sale (as opposed to, say, by a public auction), this remedy is available only if the seller gives the buyer reasonable notification of the seller's intention to resell. UCC § 2-706(3). Here, the facts indicate that when the seller sold the doll to the collector, the seller acted in good faith and in a commercially reasonable manner. Moreover, the seller told the buyer on May 3 that she intended to resell the doll and hold the buyer responsible for any damages, thus providing the buyer with notice of the seller's intention to resell the goods.

Accordingly, the seller is entitled to recover the $1,000 difference between the contract price ($12,000) and the resale price ($11,000). The seller is also entitled to recover "incidental damages," which include "any commercially reasonable charges [or] expenses . . . incurred . . . in connection with return or resale of the goods." UCC § 2-710. Here, the seller incurred $150 in

commercially reasonable transportation costs in connection with the resale of the doll to the collector, and as a result, the seller's incidental damages would be $150. There are no facts indicating that the seller suffered any consequential damages. Hence, the seller's total damages would be $1,000 + $150, for a total of $1,150.

Contracts
MEE Practice Question: July 2014

Contracts MEE Practice Question (July 2014)

A music conservatory has two concert halls. One concert hall had a pipe organ that was in poor repair, and the other had no organ. The conservatory decided to repair the existing organ and buy a new organ for the other concert hall. After some negotiation, the conservatory entered into two contracts with a business that both repairs and sells organs. Under one contract, the business agreed to repair the existing pipe organ for the conservatory for $100,000. The business would usually charge a higher price for a project of this magnitude, but the business agreed to this price because the conservatory agreed to prepay the entire amount. Under the other contract, the business agreed to sell a new organ to the conservatory for the other concert hall for $225,000. As with the repair contract, the business agreed to a low sales price because the conservatory agreed to prepay the entire amount. Both contracts were signed on January 3, and the conservatory paid the business a total of $325,000 that day.

Two weeks later, before the business had commenced repair of the existing organ, the business suffered serious and unanticipated financial reversals. The chief financial officer for the business contacted the conservatory and said,

> Bad news. We had an unexpected liability and as a result are in a real cash crunch. In fact, even though we haven't acquired the new organ from our supplier or started repair of your existing organ, we've already spent the cash you gave us, and we have no free cash on hand. We're really sorry, but we're in a fix. I think that we can find a way to perform both contracts, but not at the original prices. If you agree to pay $60,000 more for the repair and $40,000 more for the new organ, we can probably find financing to finish everything. If you don't agree to pay us the extra money, I doubt that we will ever be able to perform either contract, and you'll be out the money you already paid us.

After receiving this unwelcome news, the conservatory agreed to pay the extra amounts, provided that the extra amount on each contract would be paid only upon completion of the business's obligations under that contract. The business agreed to this arrangement, and the parties quickly signed documents reflecting these changes to each contract. The business then repaired the existing organ, delivered the new organ, and demanded payment of the additional $100,000.

The conservatory now has refused to pay the business the additional amounts for the repair and the new organ.

1. Must the conservatory pay the additional $60,000 for the organ repair? Explain.

2. Must the conservatory pay the additional $40,000 for the new organ? Explain.

Contracts
MEE Practice Question Analysis: July 2014

JULY 2014 CONTRACTS ANALYSIS

This July 2014 analysis for the MEE was provided to bar examiners to assist in grading the examination. It addresses all the legal and factual issues raised in the question. While it is illustrative of the discussions that might have appeared in excellent answers to the question, it is more detailed than examinee responses were expected to be. **Note that any changes to the relevant law since this analysis was prepared may affect its substantive accuracy.**

ANALYSIS

Legal Problems:

(1) In the case of a service contract (governed by the common law of contracts), is a modification enforceable when a party agrees to pay more for the same performance than was originally promised?

(2) In the case of a contract for the sale of goods (governed by Article 2 of the UCC), is a modification enforceable when a party agrees to pay more for the same goods than was originally promised?

(3) May a party avoid an agreement on the basis of economic duress?

DISCUSSION

Summary

There are two arguments that the conservatory can make to support the claim that it is not bound to pay the higher prices: lack of consideration and economic duress.

The organ repair contract is governed by the common law of contracts. Under the common law, the business would have difficulty recovering the additional $60,000 for the organ repair because, under the "preexisting duty rule," the agreement of the conservatory to pay the extra price was not supported by consideration. However, the business might argue that the modification is enforceable under an exception to the preexisting duty rule for fair and equitable modifications made in light of unanticipated circumstances.

The organ sale contract is governed by Article 2 of the Uniform Commercial Code. The business would likely recover the additional amount under that contract because Article 2 provides that consideration is not required for a modification to be binding.

In both cases, the conservatory could seek to avoid its agreement on the grounds of economic duress, but that argument is not likely to succeed.

Point One (45%)

The business probably cannot recover the additional $60,000 for the organ repair because the conservatory's promise to pay more money was not supported by consideration.

The general rule is that, to be enforceable, a promise must be supported by consideration. Under RESTATEMENT (SECOND) OF CONTRACTS § 71, a promise is supported by consideration if it is bargained for in exchange for a return promise or performance. However, under the "preexisting duty rule" (exemplified in RESTATEMENT (SECOND) OF CONTRACTS § 73 and *Alaska Packers' Ass'n v. Domenico*, 117 F. 99 (9th Cir. 1902)), promise of performance of a legal duty already owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration.

If the business had promised the conservatory anything new or different in exchange for the agreement to pay the additional $60,000 (such as, for example, repairing the pipe organ more quickly or using better parts), that would constitute consideration, especially in light of the principle that courts do not inquire into the adequacy of consideration. Here, however, the business already had a legal duty under the original contract and did not agree to do anything else in exchange for the conservatory's promise to pay $60,000 more.

However, an exception to the preexisting duty rule is sometimes applied in situations of unanticipated changed circumstances. Under RESTATEMENT (SECOND) OF CONTRACTS § 89, followed in many jurisdictions, a promise modifying a duty under a contract not fully performed on either side is binding even if not supported by consideration, if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made.

If a court applies the rule in Restatement § 89, the critical issues will be whether the modification was in fact "fair and equitable" and whether it can be justified in light of unanticipated circumstances. In many cases in which modifications have been upheld, a party encountered difficulties or burdens in performing far beyond what was knowingly bargained for in the original contract, with the result bordering on impracticability, such as having to excavate solid rock instead of soft dirt, or having to remove garbage far in excess of the amounts contemplated. The conservatory would argue that the business's performance difficulties were not of this sort at all—nothing about repairing the pipe organ itself was any different from or more difficult than originally contemplated, except that the business itself encountered financial distress unrelated to its burdens in performing its obligations under these contracts.

Even if the business satisfies that element of the rule in Restatement § 89, the business must also demonstrate that the circumstances that gave rise to the need to modify the contract were "unanticipated" at the time the original contract was made. Here, the facts suggest that when the business entered into the original contract, it expected that the price paid by the conservatory would enable it to perform. However, any evidence that the business knew or had reason to know at the time of execution that it would need more money from the conservatory to be able to perform would mean that the request to modify was not "unanticipated."

[NOTE: Some cases, such as *Schwartzreich v. Bauman-Basch, Inc.*, 231 N.Y. 196, 131 N.E. 887 (1921), find that if the parties mutually agreed to rescind the original contract and then, after rescission, entered into an entirely new contract for a higher price, the new contract is supported

by consideration. There is no evidence that such a rescission followed by a new contract took place here.]

Point Two (45%)

The business can recover the additional $40,000 for the new organ because no consideration is required under Article 2 of the UCC for good-faith contract modifications.

The contract to buy a new organ is a contract for the sale of goods and therefore is governed by Article 2 of the Uniform Commercial Code. UCC § 2-102. Under Article 2, unlike the common law, an agreement modifying a contract needs no consideration to be binding. UCC § 2-209(1). Section 2-209(1) thus obviates the preexisting duty rule entirely in contracts for the sale of goods.

Even though consideration is not required, modifications governed by § 2-209 must satisfy the obligation of good faith imposed by the UCC. UCC § 1-304. *See also* Official Comment 2 to UCC § 2-209. Good faith means "honesty in fact and the observance of reasonable commercial standards of fair dealing." UCC § 1-201(b)(20). In this context, the obligation of good faith means that "[t]he effective use of bad faith to escape performance on the original contract terms is barred, and the extortion of a 'modification' without legitimate commercial reason is ineffective as a violation of the duty of good faith." Official Comment 2 to UCC § 2-209. Here, because the business's financial reversals were serious and apparently unanticipated at the time that the business entered into the contract with the conservatory, and commitment of the extra money was needed to enable the business to perform, a court would likely find that the business acted in good faith. Thus, a court would likely uphold the enforceability of the conservatory's promise to pay the additional $40,000.

Point Three (10%)

The conservatory is unlikely to be able to defend against enforcement of its promises to pay additional money under the theory of economic duress, because the business probably did not make an improper threat.

Under the common law of contracts, parties may raise the defense of duress. This common law defense also applies to contracts governed by UCC Article 2. *See* UCC § 1-103(b).

A contract is voidable on the ground of economic duress by threat when it is established that a party's manifestation of assent is induced by an improper threat that leaves the party no reasonable alternative. *See* RESTATEMENT (SECOND) OF CONTRACTS § 175. *See also, e.g., Austin Instrument Inc. v. Loral Corp.*, 272 N.E.2d 533 (N.Y. 1971) (a threat to withhold essential goods can constitute duress). In order to void its agreement to pay the additional sum because of economic duress, the conservatory must demonstrate that (1) the business made a threat to the conservatory, (2) the threat was "improper" or "wrongful," (3) the threat induced the conservatory's manifestation of assent to the modification, and (4) the threat was sufficiently grave to justify the conservatory's assent.

Here, it appears that three of the four elements are likely satisfied. The business plainly made a threat. Moreover, the threat induced the conservatory's assent to the modification, and the threat

was sufficiently grave to justify that assent. If the conservatory had not agreed to pay the business the extra amounts, the conservatory would have lost its entire $325,000 investment. In light of this potential loss, a court could easily conclude that the conservatory had no reasonable alternative.

However, the business has a strong argument that its threat (indicating that it would breach the contracts unless the prices were increased) was not wrongful or improper, but was instead nothing more than a communication of the reality of its own perilous situation to the conservatory.

A mere threat to breach a contract is not, in and of itself, improper so as to support an action of economic duress or business compulsion. Something more is required, such as a breach of the duty of good faith and fair dealing, as was present in *Austin Instrument Inc., supra*. Because the business could not perform the original contract without the requested modification, the economic duress claim for the conservatory would likely fail for much the same reason that the business would be able to enforce the modification. At the time the modification was requested, the business was not trying to extort a price increase because of the conservatory's vulnerability, but instead was simply stating the reality that the business could not perform without more money.

Contracts
MEE Practice Question: July 2013

Contracts MEE Practice Question (July 2013)

On May 1, a manufacturer and a chef met at a restaurant trade show. The manufacturer showed the chef some carving knives that were on sale for $100 each. After examining the knives, the chef said, "I love these knives! I'll take 10 of them. Please send them to my restaurant within the month. As soon as I receive them, I'll send you a check for $1,000." The manufacturer said, "I'll ship the 10 knives to your restaurant in a few weeks," and he took the chef's address for shipping purposes.

On May 15, the manufacturer sent six knives to the chef. Enclosed in the shipping box was a document on the manufacturer's letterhead that stated in its entirety: "It is a pleasure to do business with you. Enclosed, pursuant to our agreement, are six knives. Please remit $600 at your earliest convenience."

On May 17, the chef sent the manufacturer a check for $600 and included in the envelope an unsigned note to the manufacturer, handwritten on plain paper, requesting the remaining four knives. The manufacturer did not respond to the note.

The knives were particularly well-suited for the chef's uses, and the $100 price was a bargain, so the chef was very eager for the manufacturer to deliver the remaining four knives. On June 17, the chef wrote to the manufacturer claiming that the manufacturer was contractually bound to sell the chef 10 knives and that the manufacturer had breached that contract by furnishing only 6 knives. The manufacturer did not reply to the chef's letter.

Is there an enforceable contract against the manufacturer that binds him to sell 10 knives to the chef? Explain.

Contracts
MEE Practice Question Analysis: July 2013

JULY 2013 CONTRACTS ANALYSIS

This July 2013 analysis for the MEE was provided to bar examiners to assist in grading the examination. It addresses all the legal and factual issues raised in the question. While it is illustrative of the discussions that might have appeared in excellent answers to the question, it is more detailed than examinee responses were expected to be. **Note that any changes to the relevant law since this analysis was prepared may affect its substantive accuracy.**

ANALYSIS

Legal Problems:

(1) Is there a contract between the manufacturer and the chef for the purchase and sale of 10 knives?

(2) Is enforceability of the contract between the manufacturer and the chef subject to the statute of frauds?

(3) Does the document sent by the manufacturer to the chef satisfy the applicable statute of frauds?

(4) Is the chef's handwritten note to the manufacturer a "record in confirmation" of the contract sufficient to satisfy the statute of frauds?

(5) Does the manufacturer's shipment of 6 knives and the chef's acceptance of those 6 knives establish the existence of a contract sufficiently to allow its enforcement as to all 10 knives?

DISCUSSION

Summary

The manufacturer and the chef clearly entered into a contract pursuant to which the manufacturer agreed to sell 10 knives to the chef for $1,000. Because it is a contract for the sale of goods, the contract is governed by Article 2 of the Uniform Commercial Code. Even though the contract exists, a contract for the sale of goods for a price of $500 or more is not enforceable against a party unless there is a writing sufficient to indicate that a contract has been made that is signed by that party (or unless an exception applies).

Here, the contract price is more than $500, so a writing signed by the manufacturer is required in order to enforce the contract against it unless an exception applies. The document included with the knives is a writing sufficient to indicate that a contract has been made, but it is not clear whether that writing has been "signed" by the manufacturer. If the document constitutes a writing signed by the manufacturer, the contract is enforceable against the manufacturer for only six knives—the quantity mentioned in that writing—and not for the remaining four knives. Even if the document does not constitute a writing signed by the manufacturer, the fact that the manufacturer delivered, and the chef paid for, six knives would make the contract enforceable for the six knives but not the remaining four knives.

Point One (20%)

The manufacturer and the chef entered into a contract at the trade show when they agreed that the chef would buy 10 knives from the manufacturer for $100 each.

Because the knives are goods (*see* UCC § 2-105(1)), the situation presented by these facts is governed by Article 2 of the Uniform Commercial Code. UCC § 2-204(1) provides that "[a] contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." The conversation between the manufacturer and the chef clearly shows an agreement pursuant to which the manufacturer would sell, and the chef would buy, 10 knives at $100 each. Thus, UCC § 2-204 is satisfied and there is a contract for the chef to buy 10 knives from the manufacturer.

Point Two (15%)

The contract between the manufacturer and the chef is a contract for the sale of goods for a price of $500 or more and therefore is subject to the statute of frauds in Article 2 of the Uniform Commercial Code.

UCC § 2-201(1) provides that "a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought . . . ." Here, the contract between the manufacturer and the chef was for the sale of goods (the knives) for a price of $1,000. Therefore, it is subject to the writing requirement of UCC § 2-201(1) unless an exception applies.

Point Three (25%)

The document enclosed in the shipping box with the knives is sufficient to indicate that a contract has been made, but it is not clear that it has been "signed" by the manufacturer—the party against whom enforcement is sought. If it is a sufficient writing, it makes the contract enforceable, but only to the quantity of goods stated in the writing: six knives.

UCC § 2-201(1) requires that, for a contract within its scope to be enforceable, there be a writing sufficient to indicate that a contract for sale has been made that is signed by the party against whom enforcement is sought. The facts indicate that the document enclosed with the six knives that were shipped to the chef stated in its entirety: "It is a pleasure to do business with you. Enclosed, pursuant to our agreement, are six knives. Please remit the balance due of $600 at your earliest convenience." This document is a writing. *See* UCC § 1-201(b)(43). Further, its contents clearly indicate that a contract for sale has been made: it states that the knives are enclosed "pursuant to our agreement" and expresses "pleasure to do business with" the chef.

In order for the contract to be enforceable against the manufacturer under UCC § 2-201(1), the document must be "signed" by the manufacturer. The facts do not state that the document bore a signature (in the conventional sense of that term) of the manufacturer, but they do state that the document was on the manufacturer's letterhead. As the term "signed" is used in § 2-201(1), the meaning is broader than simply bearing a conventional signature. "'Signed' includes using any

symbol executed or adopted with present intention to adopt or accept a writing." UCC § 1-201(39). The Official Comment to UCC § 1-201 states that "in appropriate cases [the symbol] may be found in a billhead or letterhead." Accordingly, some cases have held that a document on company letterhead can constitute a signed writing as long as the requisite intent is present. *See, e.g., Automotive Spares Corp. v. Archer Bearings Co*., 382 F. Supp. 513 (N.D. Ill. 1974). Thus, it is possible, but not certain, that the requirement of a signed writing is satisfied by the document, depending on whether the letterhead was used "with a present intention to adopt or accept" the document.

Although the writing referred to in UCC § 2-201(1) need not contain detailed information about the contract, "the contract is not enforceable . . . beyond the quantity of goods shown in such writing." Here, the document included by the manufacturer with the knives that were shipped showed a quantity of only 6 knives. Accordingly, even if the document qualifies as a writing signed by the manufacturer, the document is not sufficient to make the contract enforceable beyond 6 knives. Thus, this writing alone does not provide a basis for the chef to enforce the manufacturer's obligation to ship the remaining 4 knives pursuant to the oral agreement for a sale of 10 knives.

[NOTE: Some examinees may mention that the manufacturer's shipment of only 6 knives (when 10 knives were ordered) violates the perfect tender rule and that the chef could have rejected those knives. That is true, but irrelevant. The chef was entitled to accept a less than perfect tender, and such acceptance will not preclude the chef from enforcing the contract for the full amount—if the chef can overcome the statute of frauds problem.]

Point Four (20%)

<u>The chef's note is arguably a letter of confirmation of a contract for the sale of 10 knives. If it is, then it satisfies the statute of frauds because the manufacturer failed to object to it within 10 days. However, because the note was unsigned, it is unlikely to be given this effect.</u>

The statute of frauds can be satisfied in a contract between merchants if the party seeking enforcement of the contract has sent the other party a confirmation of the contract that would itself satisfy the statute of frauds against the enforcing party. In other words, if the chef sends a written contract confirmation to the manufacturer that would bind the chef, the confirmation will also bind the manufacturer if the manufacturer does not object to it promptly (i.e., within 10 days). *See* UCC § 2-201(2).

Here, both the chef and the manufacturer are merchants. The manufacturer deals in goods of the kind at issue, and the chef's occupation is such that he would have "knowledge or skills peculiar to the . . . goods involved in the transaction" (restaurant-quality carving knives). *See* UCC § 2-104(1).

However, in all likelihood, no confirmation that would satisfy the statute of frauds was sent by the chef on these facts. Although the chef sent a note to the manufacturer requesting the remaining four knives, that note must have been signed in order to satisfy the statute of frauds. While the note was handwritten and accompanied by a signed check, the note itself was not "signed" by the chef as that term is defined in UCC § 1-201(39). It did not contain any "symbol executed or adopted with present intention to authenticate" the writing. A creative examinee

might argue that the chef's decision to handwrite the note indicates an intent to authenticate by using handwriting alone, but the UCC definition of "signed" seems clearly to contemplate some authenticating symbol in addition to the content of the writing itself.

Point Five (20%)

The chef's acceptance and payment for six knives eliminates the statute-of-frauds problem as to those six knives, but does not make the contract enforceable as to the remaining four knives.

A contract that does not satisfy the statute of frauds is nonetheless enforceable as to "goods for which payment has been made and accepted or which have been received and accepted." *See* UCC § 2-201(3)(c). In this case, however, payment has been made for only six knives, and only six knives have been received and accepted. Thus, this exception would not enable enforcement of the contract for the remaining four knives but, rather, only for the six knives already delivered.

[NOTE: There are other exceptions to the statute of frauds that are not at issue on these facts, but that might be discussed by some examinees. One of those exceptions applies if the goods are specially manufactured for the buyer and are not suitable for sale to others. *See* UCC § 2-201(3)(a). Here, there is no indication that the knives are specially manufactured.

Another exception applies if the party against whom enforcement is sought admits in pleading, testimony, or otherwise in court that a contract was made. *See* UCC § 2-201(3)(b). Here, there is no indication of such admission by the manufacturer.

Some examinees may also note that the Uniform Electronic Transactions Act (UETA) and/or the federal Electronic Signature in Global and National Commerce Act (E-SIGN) allow the writing requirement of UCC § 2-201 to be satisfied by an electronic communication. This is true, but it does not change the answer or the analysis, as there is no electronic communication that would satisfy the requirements of UCC § 2-201.]

Contracts
MEE Practice Question: February 2013

Contracts MEE Practice Question (February 2013)

On January 2, a boat builder and a sailor entered into a contract pursuant to which the builder was to sell to the sailor a boat to be specially manufactured for the sailor by the builder. The contract price was $100,000. The written contract, signed by both parties, stated that the builder would tender the boat to the sailor on December 15, at which time payment in full would be due.

On October 15, the builder's workers went on strike and there were no available replacements.

On October 31, the builder's workers were still on strike, and no work was being done on the boat. The sailor read a news report about the strike and immediately sent a letter to the builder stating, "I am very concerned that my boat will not be completed by December 15. I insist that you provide me with assurance that you will perform in accordance with the contract." The builder received the letter on the next day, November 1.

On November 25, the builder responded to the letter, stating, "I'm sorry about the strike, but it is really out of my hands. I hope we settle it soon so that we can get back to work."

Nothing further happened until December 3, when the builder called the sailor and said, "My workers are back, and I have two crews working overtime to finish your boat. Your boat is task one. Don't worry; we'll deliver your boat by December 15th." The sailor immediately replied, "I don't trust you. As far as I'm concerned, our contract is over. I am going to buy my boat from a shipyard." Two days later, the sailor entered into a contract with a competing manufacturer to buy a boat similar to the boat that was the subject of the contract with the builder.

The builder finished the boat on time and tendered it to the sailor on December 15. The sailor reminded the builder about the December 3 conversation in which the sailor had announced that "our contract is over," and refused to take the boat and pay for it.

The builder has sued the sailor for breach of contract.

1. What was the legal effect of the sailor's October 31 letter to the builder? Explain.

2. What was the legal effect of the builder's November 25 response to the sailor's October 31 letter? Explain.

3. What was the legal effect of the sailor's refusal to take and pay for the boat on December 15? Explain.

Contracts
MEE Practice Question Analysis: February 2013

FEBRUARY 2013 CONTRACTS ANALYSIS

This February 2013 analysis for the MEE was provided to bar examiners to assist in grading the examination. It addresses all the legal and factual issues raised in the question. While it is illustrative of the discussions that might have appeared in excellent answers to the question, it is more detailed than examinee responses were expected to be. **Note that any changes to the relevant law since this analysis was prepared may affect its substantive accuracy.**

ANALYSIS

Legal Problems:

(1) What was the legal effect of the sailor's October 31 letter to the builder?

(2)(a) What was the legal effect of the builder's November 25 response to the sailor's October 31 letter?

(2)(b) What was the legal effect of the sailor's refusal to take and pay for the boat on December 15?

DISCUSSION

Summary

This is a sale of goods governed by the Uniform Commercial Code. Because the sailor had reasonable grounds for insecurity about the builder's ability to deliver the boat in a timely manner when the sailor learned about the strike on October 31, the sailor was legally justified in sending the letter to the builder seeking adequate assurance of the builder's performance pursuant to the contract. The builder's failure to provide such assurance within a reasonable time operated as a repudiation of the contract. However, the builder was free to retract the repudiation before the sailor either cancelled the contract or materially changed position in reliance on the builder's repudiation. The builder retracted the repudiation when he informed the sailor that the workers were back and that the boat would be delivered by the date stipulated in the parties' contract. Because the sailor had taken no action in response to the original repudiation, he no longer had the right to cancel the contract with the builder. The sailor's subsequent statement that "our contract is over" may have constituted repudiation by the sailor. In any event, when the sailor failed to perform on December 15, that constituted breach.

Point One (35%)

Because the sailor had reasonable grounds for insecurity with respect to the builder's performance, the sailor's letter to the builder was a justified demand seeking assurance of the builder's performance under the contract; failure of the builder to provide such assurance within a reasonable time constituted repudiation of the contract.

The sailor was legally justified in sending the letter to the builder on October 31. Contract parties are entitled to expect due performance of contractual obligations and are permitted to take steps to protect that expectation. UCC § 2-609 states that "[w]hen reasonable grounds for insecurity

arise with respect to the performance of either party, the other may in writing demand adequate assurance of due performance . . . .” Here, the sailor learned on October 31 that the builder’s workers were on strike. This gave the sailor reasonable grounds for insecurity about the builder’s ability to complete performance on time and thus gave the sailor the right to seek adequate assurance from the builder. Because the sailor’s demand for assurance was justified, the builder was required to provide assurance that was adequate under the circumstances within a reasonable time (not to exceed 30 days) or be held to have repudiated the contract. UCC § 2-609(4).

Point Two(a) (30%)

The builder did not, within a reasonable time, provide the sailor adequate assurance of due performance; this failure to provide assurance constituted a repudiation of the contract.

Because the sailor, with legal justification (*see* Point One), demanded from the builder assurance of due performance, the builder’s failure to provide such assurance within a reasonable time was a repudiation of their contract. *See* UCC § 2-609(4) (“After receipt of a justified demand[,] failure to provide within a reasonable time not exceeding thirty days . . . assurance of due performance . . . is a repudiation of the contract.”). On October 31, the sailor requested that the builder provide adequate assurance regarding the completion of the boat by December 15. The builder did not respond to the sailor’s letter until November 25—nearly a month later. Even if that response had been given in a reasonable time, it nonetheless did not provide assurance of due performance. It simply stated, “I’m sorry about the strike, but it is really out of my hands. I hope we settle it soon so that we can get back to work.” Therefore, the builder’s November 25 response did not provide adequate assurance in response to the sailor’s justified request. Thus, the builder had repudiated the contract.

Point Two(b) (35%)

Although the builder repudiated the contract with the sailor, the builder probably retracted that repudiation on December 3 and the sailor was no longer entitled to cancel their contract. Thus, the sailor’s failure to perform the sailor’s obligations under the contract constituted a breach.

The builder’s failure to provide adequate assurance of performance constituted a repudiation of their contract (*see* UCC § 2-609(4)), but the builder was free to retract that repudiation until the sailor cancelled the contract or materially changed his position or indicated by communication or action that the sailor considered the repudiation to be final. *See* UCC § 2-611(1) (“Until the repudiating party’s next performance is due, he can retract his repudiation unless the aggrieved party has since the repudiation cancelled or materially changed his position or otherwise indicated that he considers the repudiation final.”).

Here, the facts state that before the builder’s December 3 telephone call to the sailor, the sailor did nothing in response to the builder’s repudiation, such as contracting with a third party for a boat. The builder’s December 3 call, informing the sailor that the boat would be timely delivered, probably constituted a retraction of the repudiation because it clearly indicated to the sailor that the builder would be able to perform. UCC § 2-611(2). Thus, after being so informed, the sailor did not have the right to treat their contract as cancelled. UCC § 2-611(3). Accordingly, the sailor’s failure to perform the sailor’s obligations under the contract by taking the boat and paying for it constituted a breach of the contract.

Contracts
MEE Practice Question: February 2012

Contracts MEE Practice Question (February 2012)

GreenCar owns a fleet of 10 identical energy-efficient, electric "green" cars that it rents out for special events. GreenCar is the only company that has such specialized cars available for rental. GreenCar needed all 10 of its cars to fulfill a contract to provide 10 identical green cars to carry dignitaries in the local Earth Day parade on April 22, but each of the cars needed repair to be operable for the parade.

In order to have all 10 cars repaired in time for the parade, GreenCar entered into a contract with RepairCo pursuant to which RepairCo promised to "repair all 10 cars and return them to GreenCar no later than April 21 for $1,000 per car, $10,000 total."

On April 21, RepairCo had completed repairs on only 6 of the 10 cars and returned those 6 cars to GreenCar. When RepairCo delivered the 6 cars, it informed GreenCar that the remaining 4 cars were not ready because RepairCo workers had walked off the job when salary negotiations broke down. RepairCo also explained to GreenCar that it planned to give its workers the raises they wanted, but it first wanted "to teach them a lesson." RepairCo estimated that the remaining 4 GreenCar cars (all still inoperable) would be repaired by April 30.

GreenCar demanded that RepairCo return the remaining 4 unrepaired cars immediately. RepairCo did so. GreenCar refused to pay RepairCo for any repairs to the other 6 cars.

RepairCo sued GreenCar, alleging that GreenCar's refusal to pay anything was a breach of contract.

Is RepairCo entitled to any payment from GreenCar, and if so, under what theory or theories? Explain.

Contracts
MEE Practice Question Analysis: February 2012

FEBRUARY 2012 CONTRACTS ANALYSIS

This February 2012 analysis for the MEE was provided to bar examiners to assist in grading the examination. It addresses all the legal and factual issues raised in the question. While it is illustrative of the discussions that might have appeared in excellent answers to the question, it is more detailed than examinee responses were expected to be. **Note that any changes to the relevant law since this analysis was prepared may affect its substantive accuracy.**

ANALYSIS

Legal Problems:

(1) Did RepairCo substantially perform its contractual obligations by the contract due date?

(2) Can RepairCo recover some portion of the contract price on the theory that the contract was divisible?

(3) Can RepairCo recover some portion of the contract price as restitution for part performance?

DISCUSSION

Summary

RepairCo neither fully nor substantially performed its contractual obligations. Therefore, RepairCo is not entitled to recover the full contract price. However, RepairCo may be entitled to recover some portion of the contract price if the contract is divisible. If the contract is not divisible, RepairCo may be entitled to restitution for part performance.

Point One (50%)

RepairCo did not substantially perform its contractual obligations when it repaired only 6 of the required 10 cars by the contract due date.

RepairCo did not fully perform its contractual obligations. However, RepairCo might argue that it substantially performed its obligations under the contract and therefore is entitled to recover on that contract. Substantial performance is present when a party completes its contractual obligations with "no uncured material failure." RESTATEMENT (SECOND) OF CONTRACTS § 237. Whether a failure to perform is material depends on several factors, including (1) the extent to which the injured party will be deprived of the benefit he reasonably expected, (2) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived, (3) the extent to which the other party failing to perform or to offer to perform will suffer forfeiture, (4) the likelihood that the party failing to perform will cure his failure, and (5) the extent to which the behavior of the party failing to perform comports with standards of good faith and fair dealing. *Id.* § 241.

Here, because its failure to perform was a material breach, RepairCo did not substantially perform. First, it repaired only 6 of the 10 vehicles, thereby denying GreenCar a material portion of the benefit GreenCar reasonably expected. GreenCar could not make other arrangements to obtain that lost material benefit (the use of 4 "green" cars on April 22) because it was the only company with the specialized cars, and GreenCar was not aware until April 21 that only 6 of the 10 cars had been repaired. Second, while GreenCar might be compensated in damages for some of the harm caused by not having a full fleet of vehicles for the Earth Day parade, it could not be compensated for such non-economic harms as lost reputation. Third, RepairCo will not suffer forfeiture—it will not have to undo any work done and might recover some amount for the work it completed (*see* Points Two and Three). Fourth, RepairCo cannot cure its failure because the contract required it to deliver 10 cars on April 21, which it did not and cannot do. Finally, RepairCo's failure to perform likely did not comport with standards of good faith and fair dealing. This is because it allowed the work stoppage to continue so that it could teach its workers a lesson, rather than accepting their terms, as it intended to do eventually, and completing the contract.

Because RepairCo failed to substantially perform its contractual obligations, GreenCar is excused from its obligation to pay on the contract. "Where a contract is made to perform work and no agreement is made as to payment, the work must be substantially performed before payment can be demanded." *Stewart v. Newbury*, 115 N.E. 984, 985 (N.Y. 1917). Here, the facts do not indicate that progress payments or periodic payments were negotiated or agreed to. Thus, RepairCo is not entitled to recover on the entire contract on the theory of substantial performance.

Point Two (25%)

<u>If RepairCo establishes that the contract with GreenCar is divisible, RepairCo may be entitled to recover an amount less than the full $10,000 contract price.</u>

If RepairCo's performance is divisible, RepairCo may be entitled to some payment. *See Gill v. Johnstown Lumber Co.*, 25 A. 120 (Pa. 1892). A contract is said to be divisible if the performances to be exchanged can be divided into corresponding pairs of part performances in such a way that a court will treat the elements of each pair as if the parties had agreed they were equivalents. E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 8.13 (3d ed. 2004). Here, RepairCo could argue that although the contract stated one total contract price ($10,000), the contract also stated an amount per vehicle. Thus, the total payment could easily be divided among the 10 very similar vehicles, which required similar work, with each car repair corresponding to $1,000 of GreenCar's payment. RepairCo could argue, therefore, that it is entitled to 6/10 of the $10,000, or $6,000, less any additional incidental or consequential losses resulting from its failure to repair the remaining 4 cars on April 21.

GreenCar could argue, however, that the contract is not divisible. GreenCar needed all 10 cars to meet its contractual obligation to supply 10 cars for the local Earth Day parade. "[T]here is no set formula which furnishes a foolproof method for determining in a given case just which contracts are severable and which are entire." *John v. United Advertising*, 439 P.2d 53, 56 (Colo. 1968). Thus, it is possible, but far from certain, that RepairCo could recover some part of the contract price from GreenCar on the theory that the contract is divisible.

Point Three (25%)

Even if the contract is not divisible, RepairCo may be entitled to restitution from GreenCar for the benefit it conferred in part performance.

Even if the contract is not divisible and RepairCo cannot recover on the contract, RepairCo may be entitled to some recovery from GreenCar as restitution for part performance so that GreenCar is not unjustly enriched. A party "is entitled to restitution for any benefit that he has conferred by way of part performance…in excess of the loss that he has caused by his own breach." RESTATEMENT (SECOND) OF CONTRACTS § 374(1); *Lancellotti v. Thomas*, 491 A.2d 117 (Pa. Super. Ct. 1985). RepairCo partially performed by delivering 6 of GreenCar's vehicles with the work done on the contract due date. Thus RepairCo may be entitled to restitution for the work done on those cars, less any additional incidental or consequential losses resulting from its failure to repair the remaining 4 cars on April 21. [NOTE: An examinee might properly refer to this form of possible recovery as either unjust enrichment or *quantum meruit*.]

Contracts
MEE Practice Question: February 2011

Contracts MEE Practice Question (February 2011)

Designer and Retailer entered into a legally binding contract for Designer to maintain Retailer's website. Under the terms of the written contract, Retailer was to pay Designer $20,000 per year. Retailer made timely payments for two years.

Eight months before the third year's payment was due, Designer learned of an investment opportunity. Designer called Retailer and said, "I need cash quickly to make an investment that will enable me to make a $35,000 profit. I know that you owe me $20,000, but if you promise now to pay me $15,000 in cash by the 25th of this month, I will accept that payment as satisfying your obligation under our contract for this year."

Retailer responded, "Thanks. That's a good deal. I don't have the cash to pay you now. I'll do it if I can get a loan."

"That will be great," responded Designer.

Because Designer assumed that Retailer would provide the cash Designer needed, Designer did not try to raise the cash from another source.

Retailer, however, was busy with other matters. He visited two banks and picked up loan applications, but he never bothered to submit them. Retailer did not take any other action to obtain a loan before the 25th of the month had passed.

When the 25th of the month passed without payment from Retailer, Designer telephoned Retailer. The moment that Retailer heard Designer's voice saying "Hello," Retailer quickly said, "Sorry, but I can't take you up on your offer to accept early payment."

Designer was shocked and angered. He had counted on that money. He can prove that he would have gained $35,000 had he been able to make the planned investment.

Designer has sued Retailer for actual damages plus punitive damages.

1. Is Retailer liable for breach of contract? Explain.

2. Assuming that Retailer is liable, can Designer recover his actual damages from Retailer? Explain.

3. Assuming that Retailer is liable, can Designer recover punitive damages? Explain.

Contracts
MEE Practice Question Analysis: February 2011

FEBRUARY 2011 CONTRACTS ANALYSIS

This February 2011 analysis for the MEE was provided to bar examiners to assist in grading the examination. It addresses all the legal and factual issues raised in the question. While it is illustrative of the discussions that might have appeared in excellent answers to the question, it is more detailed than examinee responses were expected to be. **Note that any changes to the relevant law since this analysis was prepared may affect its substantive accuracy.**

ANALYSIS

Legal Problems:

(1)(a) Was a contract formed when Designer offered Retailer a discounted payoff in exchange for early cash payment; Retailer responded, "Thanks. That's a good deal. I don't have the cash to pay you now. I'll do it if I can get a loan"; and Designer replied, "That will be great"?

(1)(b) If a contract was formed, did Retailer breach that contract by making only minimal efforts to obtain the necessary cash?

(2) If Retailer breached the contract, is Retailer liable for Designer's loss caused by Designer's inability to make a planned investment that would have netted a $35,000 gain for Designer?

(3) If Retailer breached the contract, is Retailer liable for punitive damages?

DISCUSSION

Summary

Retailer and Designer entered into a new, modified contract which Retailer breached. Designer's opening statement was an offer. However, because Retailer's response added a condition, his need to take out a loan to obtain the cash to pay early, the response did not constitute acceptance of Designer's offer. Rather, Retailer's response was a counteroffer, which Designer accepted, thereby creating a contract. That contract contained Retailer's implied promise to make a good-faith effort to borrow the needed cash. Retailer did make some efforts to get the cash, but these efforts were not sufficient to constitute good faith. Therefore, Retailer breached the contract by not acting in good faith.

The ordinary measure of damages in a contract action is expectation damages, which aim to put the nonbreaching party in the position he expected to be in following full performance. Here, if Retailer had not breached, Designer would have had $15,000 to make an investment that would have netted a $35,000 gain. Because these losses were foreseeable and reasonably certain, Designer will be able to recover his actual damages.

Designer will not be able to collect punitive damages because Retailer's conduct was not tortious.

Point One(a) (40%)

Designer made an offer to Retailer to modify their existing contract. Retailer did not accept the offer. Instead, Retailer made a counteroffer, which Designer then accepted, forming a modified contract.

Designer's statement "I need cash quickly to make an investment. . . . [I]f you promise now to pay me $15,000 in cash by the 25th of this month, I will accept that payment as satisfying your obligation under our contract for this year" was an offer to enter into a new, modified contract. Retailer did not accept this offer. Instead, Retailer said, "Thanks. That's a good deal. I don't have the cash to pay you now. I'll do it if I can get a loan." This response, impliedly making Retailer's obligation to perform conditioned upon his getting a loan, contained an additional term and was, therefore, a counteroffer. *See* RESTATEMENT (SECOND) OF CONTRACTS § 59. Designer's response, "That will be great," indicated assent to the terms of Retailer's counteroffer even though it did not include specific words of acceptance. There was consideration for the modified contract under the bargained-for-exchange test because Designer agreed to accept a reduced payment and Retailer agreed to pay early if he could get a loan. *See id*. § 71.

It might be argued that Retailer's response did not constitute a counteroffer because Retailer did not explicitly state that his performance was conditioned upon getting a loan. However, Retailer's response made it clear that Retailer could not complete the contract unless Retailer obtained a loan, and Designer certainly understood this. Therefore, the parties entered into a contract on the terms offered by Retailer.

[NOTE: An examinee may discuss this issue in terms of an amendment to the existing contract. Such an analysis should receive full credit.]

Point One(b) (30%)

Retailer breached the contract by failing to make good-faith efforts to obtain the necessary loan.

Retailer might argue that because he did not get the loan, his obligation to pay never arose and he was not in breach. In fact, the language used only suggested that Retailer's obligation to perform would be subject to a condition precedent, that is, his getting the loan.

However, the contract contained an implied obligation to make good-faith efforts to obtain a loan. Without such an implied obligation, the contract would be illusory because Retailer would have no obligation. *See Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917); *Mezzanotte v. Freeland*, 200 S.E.2d 410 (N.C. Ct. App. 1973).

To satisfy the requirement of making good-faith efforts, Retailer must have taken reasonable steps to obtain the necessary cash. Here, Retailer did no more than pick up two loan applications which he did not even submit. His actions were not sufficient to constitute a good-faith effort to obtain the loan. Retailer therefore breached the contract.

Point Two (20%)

Designer is entitled to recover from Retailer his actual damages, which would include the gain that he would have realized on the investment he intended to make.

The normal measure of damages for breach of contract is expectation damages, which aim to give the nonbreaching party the benefit of his bargain. *See* FARNSWORTH, CONTRACTS § 12.1 (3d ed. 2004). Expectation damages must be foreseeable, *see Hadley v. Baxendale*, 156 Eng. Rep. 145 (1854), and proved with reasonable certainty, *see* FARNSWORTH, *supra*, § 12.1.

Here, when Designer made the initial offer, he stated that he needed cash quickly to make a potentially profitable investment. On these facts, it is foreseeable that Designer would not be able to make the investment when Retailer failed to make timely payment. It is not necessary that the profitability of the investment be foreseeable at the time of the breach. It is enough that the fact of the investment is foreseeable, and here it was, because Designer told Retailer that Designer needed the cash to make an investment, making the damages foreseeable. The facts state that Designer can prove that he would have made $35,000 on the investment, making the damages reasonably certain. Therefore, Retailer is liable for Designer's actual damages.

Point Three (10%)

Designer is not entitled to recover punitive damages because such damages are not ordinarily recoverable in a contract action.

Punitive damages are not generally recoverable as an element of damages in a breach of contract action "unless the conduct constituting the breach is also a tort for which punitive damages [can be recovered]." RESTATEMENT (SECOND) OF CONTRACTS § 355. The facts do not indicate any conduct on the part of Retailer that would constitute a tort compensable through punitive damages. Therefore, Designer is not entitled to recover punitive damages.

Contracts
MEE Practice Question: July 2009

Contracts MEE Practice Question (July 2009)

Sam was walking down the sidewalk when he heard shouts coming from a burning house. Sam immediately called 911 on his cell phone and rushed into the house. Inside the house, Sam discovered Resident trying to coax Resident's frightened dog from behind a couch. Sam, at great risk to his safety, crawled behind the couch and pulled the dog from its hiding place. Sam, carrying the dog, and Resident then safely made their way outside.

Once outside, Resident thanked Sam and asked Sam about his work. Sam told Resident, "I was hoping to start training as a paramedic in the fall, but I don't think I'll be able to afford the cost of the program."

Resident responded, "We need all the good paramedics that we can get! If you are going to start paramedic training, I want to help you. Also, my dog means everything to me. I want to compensate you for your heroism. Give me your address, and I will send you a check for a thousand dollars."

Sam said, "Thank you so much! Here is my address. I'll apply to the paramedic program tomorrow."

Sam applied to the paramedic training program but was denied admission. Sam then applied for and was accepted into a cosmetology training program and owes that program $1,000. Sam cannot pay the $1,000 he owes because when Resident learned Sam was not attending the paramedic program, he refused to give Sam the $1,000.

Sam sued Resident to recover the $1,000.

What theories could Sam assert to recover all or some portion of the $1,000, and what is the likelihood of success on each theory? Explain.

Contracts
MEE Practice Question Analysis: July 2009

JULY 2009 CONTRACTS ANALYSIS

This July 2009 analysis for the MEE was provided to bar examiners to assist in grading the examination. It addresses all the legal and factual issues raised in the question. While it is illustrative of the discussions that might have appeared in excellent answers to the question, it is more detailed than examinee responses were expected to be. **Note that any changes to the relevant law since this analysis was prepared may affect its substantive accuracy.**

ANALYSIS

Legal Problems:

(1) Was Resident's promise to pay Sam $1,000 supported by consideration?

(2) In the absence of bargained-for consideration, can Sam enforce Resident's promise under the material benefit (moral consideration) rule?

(3) In the absence of bargained-for consideration, can Sam enforce Resident's promise under the theory of promissory estoppel?

DISCUSSION

Summary

Sam cannot recover the $1,000 under the theory that Resident's promise was supported by consideration as there is no evidence of a bargained-for exchange. Sam may be able to recover if the material benefit (or moral consideration) rule applies because Resident made the promise to pay $1,000 in recognition of a benefit received. Sam may also be able to recover under the theory of promissory estoppel if he acted in reasonable reliance on Resident's promise. However, Sam may recover less than the full $1,000 under both the material benefit rule and the theory of promissory estoppel.

Point One: (25–35%)

Sam cannot recover under the theory that Resident's promise was supported by consideration because that promise was not part of a bargained-for exchange.

To be legally enforceable, a promise generally must be supported by consideration, which is shown through bargained-for exchange. This means that the promisor must have sought and received something of legal value in exchange for the promise. *See* RESTATEMENT (SECOND) OF CONTRACTS § 71. Here, there was no bargained-for exchange.

Sam might argue that his action in rescuing the dog and/or Sam's promise to apply for paramedic training constitutes consideration for Resident's promise to pay $1,000. However, neither of those arguments will prevail. Resident's promise to pay the $1,000 was not made in exchange for Sam's rescue of the dog, but instead was made in recognition of that prior action. With regard to Sam's promise to apply for paramedic training, Resident did not seek that promise in exchange

for the promise to pay the $1,000. Resident's promise was not part of an exchange and therefore the consideration necessary to make Resident's promise legally enforceable is absent.

Point Two: (15–25%)

Sam may be able to recover if the material benefit (moral consideration) rule applies, but possibly may not receive the full $1,000 Resident promised him.

Some states recognize an exception to the past consideration limitation in cases in which the promise is made after receipt of a significant benefit. This exception is set out in the Restatement (Second) of Contracts § 86 (the material benefit rule) and encapsulates cases in which moral consideration was found to provide a basis for recovery. The material benefit rule states that a promise not supported by consideration may be enforceable if it is "made in recognition of a benefit previously received by the promisor from the promisee . . . ." RESTATEMENT (SECOND) OF CONTRACTS § 86(1); *see Webb v. McGowin*, 168 So. 196 (Ala. 1935). Here, Resident promised to give Sam $1,000 in recognition of Sam's act of saving Resident's dog. Thus, it could be argued that the material benefit rule applies because Resident received a benefit from Sam and made the promise to give Sam $1,000 in recognition of that benefit.

However, the material benefit rule does not apply (and the promise is not enforceable) if the promisee conferred the benefit as a gift, or to the extent that the value of the promise is disproportionate to the benefit conferred. RESTATEMENT (SECOND) OF CONTRACTS § 86(2). Here, it is unclear whether Sam intended to confer a gift upon Resident. He may have been acting out of pure selflessness when he rescued the dog, or he may have believed that his heroic action would result in a financial reward.

Even if it is determined that Sam did not intend to confer a gift (and that Resident's promise is therefore enforceable), a court might limit recovery to something less than the full $1,000 if it finds that $1,000 is disproportionate to the value of the rescue of the dog.

Point Three: (35–45%)

Sam may be able to recover some or all of the $1,000 if the doctrine of promissory estoppel applies. Promissory estoppel requires that the promisee show that a promise existed, that a detrimental change in position was made in reasonable reliance on the promise, and that enforcement of the promise is the only way to avoid injustice.

The doctrine of promissory estoppel allows the enforcement of gratuitous promises to avoid harm to individuals who have relied on those promises. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90. In order to establish a promissory estoppel claim, all of the following must be shown: (1) the promisor, when making the promise, should have reasonably expected that the promisee would change his position in reliance on the promise; (2) the promisee did in fact change position in reliance on the promise; (3) the change in position was to the promisee's detriment and injustice can be avoided only by enforcing the promise. *Id*.

Here, the facts state that Resident promised to pay $1,000. Sam did change his position in reliance on that promise by incurring a $1,000 debt. Resident might argue that Sam's applying to the cosmetology program was not reasonable reliance because the promise was specific to a

different program—Resident said, “If you are going to start paramedic training, I want to help you.” However, Resident also said, “I want to compensate you for your heroism,” and Sam could reasonably interpret that remark as indicating that Resident’s promise to give him $1,000 was a promise to compensate him for rescuing Resident’s dog and was not conditioned on his career choice. Thus, it is possible that Sam could recover that portion of the $1,000 promised by Resident that is determined to be the amount required to avoid injustice.

Contracts
MEE Practice Question: July 2008

Contracts MEE Practice Question (July 2008)

Rancher conducts cattle roping clinics in various locations around the country. Rancher thought it would be more profitable to buy his own land and conduct the clinics there.

In March, Rancher bought the Bar-X Ranch (Ranch) with a large pasture on which Rancher could hold the roping clinics.

In April, before Rancher had offered any roping clinics on the property, Rancher agreed to allow Gasco, an oil and natural gas company, to explore for gas reserves on Ranch. Before the parties signed a contract, Gasco executives drove around Ranch, and Rancher pointed out to them the pasture where he planned to hold his roping clinics. Rancher told the Gasco executives, "I can't wait to start holding my clinics here so that I won't have to go on the road anymore. Every summer that I travel with my clinics costs me $50,000. It will cost me only $10,000 to work from Ranch."

In July, Rancher and Gasco signed a contract in which Gasco agreed to complete its gas exploration and restore Ranch to its pre-exploration condition by March 31 of the following year. Gasco immediately began exploring for gas on Ranch.

By March 31 of the following year, Gasco had completed its exploration but chose not to restore Ranch to its pre-exploration condition. Because of Gasco's failure to restore Ranch, the pasture was not usable, and Rancher had to cancel his plans to conduct roping clinics on Ranch that summer.

Rancher sued Gasco for breach of contract. At trial, an expert for Rancher testified that because of Gasco's failure to promptly restore Ranch to its pre-exploration condition, it would cost $500,000 and take three years to restore Ranch. Furthermore, during that time Ranch could not be used for roping clinics.

An expert for Gasco testified that Ranch was worth only $20,000 less in its unrestored condition than if it had been restored to its pre-exploration condition. There was no other expert testimony.

Rancher testified that Ranch could not be used for roping clinics for the next three summers. Rancher estimated that 50 people would have attended the roping clinics each year, and each person would have paid a fee of $2,000, for a total of $100,000 per year. Therefore, Rancher seeks $300,000 for his losses.

The trial court found that there was an enforceable contract between the parties and that Gasco had breached the contract by failing to restore Ranch. The court awarded Rancher $500,000 for the cost of restoring Ranch to its pre-exploration condition and $300,000 for his losses.

1. Did the court err in awarding Rancher the cost of restoring Ranch to its pre-exploration condition? Explain.

2. Did the court err in awarding Rancher $300,000 for damages resulting from Rancher's inability to conduct roping clinics on Ranch for three years? Explain.

Contracts
MEE Practice Question Analysis: July 2008

JULY 2008 CONTRACTS ANALYSIS

This July 2008 analysis for the MEE was provided to bar examiners to assist in grading the examination. It addresses all the legal and factual issues raised in the question. While it is illustrative of the discussions that might have appeared in excellent answers to the question, it is more detailed than examinee responses were expected to be. **Note that any changes to the relevant law since this analysis was prepared may affect its substantive accuracy.**

ANALYSIS

Legal Problems:

(1) Should Rancher's damages for harm to Ranch be measured by the cost of completion ($500,000) or by the difference in value ($20,000)?

(2) Were Rancher's losses from the roping clinics foreseeable?

(3) Were Rancher's losses from the roping clinics ascertainable with reasonable certainty?

(4) Should the award of damages for Rancher's losses from the roping clinics take into account expenses he avoided?

(5) Did the damage award properly account for losses Rancher could reasonably have avoided by mitigation?

DISCUSSION

Summary

Under basic principles of contract law an injured party is entitled to a damage award that will put him in the position he would have been in had the contract been performed. Here, with regard to the harm to Ranch, the question is whether the proper measure of damages is the cost of completion or the difference in value. Although the answer is not certain, the court probably did not err in awarding the cost of completion. With regard to the roping clinics, damages for Rancher's inability to conduct the clinics are recoverable only if foreseeable and reasonably certain. Here, while the damages are likely foreseeable, it is less clear that they are sufficiently certain. Even if the loss from the inability to conduct the clinics was foreseeable and certain, damages should have been reduced by any amount saved due to not conducting the clinics. Further, damages should be reduced by any amounts that could have been avoided through mitigation.

Point One (40–50%)

Rancher is entitled to cost-of-completion damages because the breach appears to be willful and only cost-of-completion damages will enable Rancher to use Ranch for its intended purpose.

For breach of contract, the injured party may be entitled to expectation damages. These damages

are intended to put the injured party in the same position as if the contract had been performed. *See* E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.8, at 190 (2004). Since Ranch was not restored to its pre-exploration condition, Rancher is entitled to damages. One measure of damages is the cost of restoration—here, $500,000. Id. § 12.13. However, where an award might be wasteful, such as when the cost to restore (here $500,000) would greatly exceed the difference in value (here $20,000), damages may be measured by the difference in value. *See Jacob & Youngs v. Kent*, 129 N.E. 889 (N.Y. 1921). But when the breach appears to be willful, as is the case here, and only completion of the contract will enable the non-breaching party to use the land for its intended purposes, the cost of completion is considered the appropriate damage award. *See American Standard, Inc. v. Schectman*, 439 N.Y.S.2d 529 (App. Div. 1981). Therefore, the court probably did not err in awarding Rancher the cost of returning Ranch to its pre-exploration condition.

Point Two (5–10%)

Rancher's losses based on his failure to conduct roping clinics were foreseeable.

Contract damages must be foreseeable to be recoverable. FARNSWORTH ON CONTRACTS § 12.14. Damages are foreseeable if a reasonable person in the position of the breaching party would have known at the time the contract was made that the damages were likely to occur as a result of the breach. *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Ex. 1854). Here, it is likely that Gasco would have known that if it did not restore Ranch, Rancher would not be able to hold his roping clinics. In fact, Rancher specifically told Gasco of his plans to hold the clinics on Ranch. Because of this direct communication, the damages caused by Rancher's inability to conduct the roping clinics were foreseeable.

Point Three (5–10%)

Rancher can recover foreseeable losses from his inability to conduct the roping clinics only if those losses also were sufficiently certain.

Contract damages must be proved with reasonable certainty to be recoverable. FARNSWORTH ON CONTRACTS § 12.15. Here, Rancher faces the problem of a "new business." Although Rancher had conducted clinics on the road in the past, Rancher had not conducted clinics on Ranch. While most states no longer apply a per se rule denying recovery to all new businesses, courts still are reluctant to award lost profits to new businesses, because such profits "are regarded as being too remote, contingent and speculative to meet the standard of reasonable certainty." *Western Publ'g Co. v. Mind Games, Inc.*, 944 F. Supp. 754, 756 (E.D. Wis. 1996).

Here, it is a close call whether there is sufficient certainty to award Rancher his lost profits from the roping clinics. On one hand, there is no reasonable certainty that the clinics would have been a success, or that 50 people would have attended each year. On the other hand, Rancher has run roping clinics in the past and so has some track record on which to base a damage award. *See Fun Motors of Longview v. Gratty, Inc.*, 51 S.W.3d 756 (Tex. Civ. App. 2001) (experience of the person involved relevant in determining certainty of damages).

Point Four (10–20%)

Rancher's award should have been reduced by the expenses Rancher would have incurred in conducting the roping clinics.

Contract damage awards must take into account costs avoided because of the breach. FARNSWORTH ON CONTRACTS § 12.9, at 209. Here, even if Rancher's claimed damages of $300,000 were foreseeable and certain, that amount represents the gross amount that Rancher would have received. In order to receive that amount, Rancher would have incurred expenses. Gasco's breach saved him those expenses. Therefore, even if the award of $300,000 was foreseeable and reasonably certain, it should be reduced to the net amount Rancher would have earned after expenses. *See, e.g., Lieberman v. Templar Motor Co.*, 140 N.E. 222, 225 (N.Y. 1923).

Point Five (10–20%)

It is uncertain whether Rancher's award should have been reduced by the amount of loss Rancher could have avoided by going on the road with his roping clinics.

The $300,000 award of damages may be reduced by the amount Rancher could have earned by mitigating his loss. Mitigation requires the injured party to take reasonable steps to reduce the damages. FARNSWORTH ON CONTRACTS § 12.12, at 232. Here, Rancher offered clinics on the road before he bought Ranch. After the breach Rancher could have resumed these activities as mitigation, as that alternative may not be viewed as substantially different from or inferior to the clinics he planned to offer on the ranch. *Id*. However, the need to travel might make this alternative inferior. *See Parker v. Twentieth Century-Fox Film Corp.*, 474 P.2d 689 (Cal. 1970). Therefore, it is uncertain whether Rancher's award should be reduced by the amount he could have earned by offering the roping clinics on the road.

Contracts
MEE Practice Question: July 2007

Contracts MEE Practice Question (July 2007)

Baker is a renowned pastry chef. Café, a sole proprietorship, is a well-known restaurant in need of hiring a pastry chef. Baker and Café's Owner had extensive conversations regarding Baker coming to work at Café. On May 1, a week after those conversations occurred, Baker sent Café a signed letter dated May 1 stating: "I will work for Café as head pastry chef for two years for an annual salary of $100,000."

On the morning of May 7, Café's Owner telephoned Baker and said: "The $100,000 is pretty stiff. Could you possibly consider working for less?" Baker replied: "I am a renowned pastry chef. I will not work for any less!"

Later that morning, Café's Owner sent Baker a signed letter by regular mail stating: "You obviously think you are too good for my restaurant. I am no longer interested in hiring you to work at Café."

Later that afternoon, Café's Owner had a change of heart and sent Baker a registered, express-mail signed letter stating: "Okay, if you really won't work for less, I agree to pay you the $100,000 a year you demand to work as head pastry chef at Café for two years."

On May 10, the registered, express-mail letter was delivered to Baker's office. The regular-mail letter containing the rejection was still on its way. Baker accepted delivery of the registered, express-mail letter from the postal carrier and placed it on his desk without opening it.

On May 11, before Baker read the registered, express-mail letter on his desk, he accepted an offer to work for Restaurant. As a courtesy, Baker called Café's Owner and said, "Sorry, I just took a job at Restaurant. Too bad you couldn't afford me." Café's Owner responded, "You can't work for Restaurant, I already accepted your offer to work at Café for $100,000 a year."

Does Café have an enforceable contract with Baker? Explain.

Contracts

MEE Practice Question Analysis: July 2007

JULY 2007 CONTRACTS ANALYSIS

This July 2007 analysis for the MEE was provided to bar examiners to assist in grading the examination. It addresses all the legal and factual issues raised in the question. While it is illustrative of the discussions that might have appeared in excellent answers to the question, it is more detailed than examinee responses were expected to be. **Note that any changes to the relevant law since this analysis was prepared may affect its substantive accuracy.**

ANALYSIS

Legal Problems:

(1)(a) Did Baker's letter of May 1 constitute an offer?

(1)(b) Did Café Owner's oral response on the morning of May 7 constitute a counteroffer?

(2) Did Café accept Baker's offer?

(3) Did the contract between Baker and Café satisfy the Statute of Frauds?

DISCUSSION

Summary

A valid contract requires an offer, an acceptance and, when as here, the contract cannot be performed within one year, a writing that satisfies the Statute of Frauds. Here, Baker made an offer to work for Café that was accepted when Café's Owner sent an acceptance by express mail to Baker. It is irrelevant that Baker did not read the acceptance. The fact that an earlier rejection was mailed is also irrelevant because a rejection, unlike an acceptance, is effective only upon receipt, and Baker did not receive the rejection before receiving the acceptance. When both a rejection and an acceptance are sent, whichever is received first is effective. Lastly, the writings, being signed, satisfy the requirements of the Statute of Frauds. Therefore, Café has an enforceable contract.

Point One(a) (20-30%)

Baker's signed letter of May 1 to Café agreeing to work as a pastry chef for Café is a valid offer.

A person makes an offer when the person communicates to another a statement of "willingness to enter into a bargain, so made as to justify" the other person who hears the statement "in understanding that his assent to that bargain is invited and will conclude it." RESTATEMENT (SECOND) OF CONTRACTS § 24 (1981). Here, Baker's letter of May 1 to Café was an offer because an objective recipient of the letter, such as Café, would reasonably conclude that assent would create a contract.

An offer cannot ripen into a contract by acceptance unless its terms are reasonably certain. *Id*. § 33(1). Here, the terms were clear and certain and identified the parties, the subject matter, and the price.

Point One(b) (20-30%)

Café Owner's phone call to Baker on the morning of May 7 asking if he would possibly work for less was not a counteroffer but merely a request for changed terms.

A counteroffer is a statement from the offeree to the offeror, relating to the same subject matter as the original offer but suggesting a substituted bargain from the original terms. *Id*. § 39(1). Generally, if an offeree makes a counteroffer, the offeree can no longer accept the original offer. *Id*. § 39(2). Here, Café's Owner said to Baker "The $100,000 is pretty stiff. Could you possibly consider working for less?" This utterance is not a counteroffer because it did not offer substitute terms to Baker and did not indicate any unwillingness to conclude the bargain on Baker's terms if Baker would not accept an alternative salary. All Café's Owner did was ask Baker if he could possibly work for less. Café's Owner proposed no alternative salary. Because Café's Owner's call to Baker was not a counteroffer, but merely a request for unspecified changed terms, it did not preclude Café's later acceptance of Baker's offer.

Point Two (25-35%)

Although Café's Owner initially rejected Baker's offer in writing, he later accepted the offer. Because Baker received the acceptance before he received the rejection, Baker's offer is deemed accepted.

A rejection is a manifestation of intent not to accept an offer. *Id*. § 38(2). A rejection terminates the offeree's power to accept an offer. *Id*. § 38(1). However, a rejection does not extinguish the offeree's right to accept an offer until the rejection is received by the offeror. *Id*. § 40. Here, Café's Owner's letter stating "I am no longer interested in hiring you" clearly manifests an intent not to go forward with the bargain and constitutes a rejection of Baker's offer.

However, Café's Owner's second letter, in which Café agreed to Baker's terms, was an acceptance because it was a manifestation of assent to the terms of an offer made in a manner invited by the offer. *Id*. § 50(1). The question then becomes which of the two letters sent by Café's Owner is effective, the rejection or the acceptance.

An acceptance is effective upon dispatch under the so-called "mailbox rule." *Id*. § 63. A rejection is effective only upon receipt. But when an acceptance is sent after a rejection (that is, both the acceptance and the rejection are sent), whichever gets to the recipient first is effective. *Id*. § 40. Here, Café's letter of acceptance was received by Baker first, while the letter containing the rejection was still on the way to Baker. *See id*. § 68 (a communication is received when it comes into the possession of the person to whom it is addressed). The fact that Baker did not read the letter does not alter this result. Because the acceptance was the first communication received, it is effective. Therefore, Café accepted Baker's offer to work for Café, and a contract was created.

Point Three (25-35%)

If a contract cannot be performed within a year, it must meet the requirements of the Statute of Frauds. Here the contract satisfies that statute and, therefore, is enforceable.

A contract must satisfy the Statute of Frauds if it cannot be fully performed within one year. *Id.* § 130. Here, the two-year employment requirement cannot be completed in one year, and therefore the contract is within the purview of the Statute of Frauds and must satisfy the requirements of the Statute of Frauds to be enforceable.

A contract within the Statute of Frauds satisfies that statute and is enforceable if it is evidenced by a writing signed by "the party to be charged," which (a) reasonably identifies the subject matter of the contract; (b) is sufficient to indicate that a contract has been made; and (c) "states with reasonable certainty the essential terms" of the contract. *Id*. § 131.

Here, each party signed a writing that is sufficient under these criteria as it identifies the position, person, term, and salary. Therefore, the Statute of Frauds is satisfied and the employment contract is enforceable. Because this is a personal services contract, if Baker refuses to work for Café, Café can sue Baker for damages, but cannot get specific performance.