CHAPTER 1: ISSUES TESTED

Editor's Note 1: The Professor refers to specific page numbers throughout this lecture. The content does not always match these references due to formatting changes.

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B. Substantive Law

Exam Tip 1: Always start by discussing the Applicable Law in the question.

Applicable Law
The UCC governs all contracts involving the sale of goods, and common-law rules govern contracts involving services.

Mixed Contract: When a contract includes both goods and services, whichever one predominates will determine the governing law.

Exam Tip 2: Look for facts in the question that involve both goods and services. Explain why the UCC and the Common Law (CL) could both apply, then determine whether the goods or services are the main point of the contract.
Merchants: In addition, special rules apply to merchants under the UCC. A merchant includes not only a person who regularly deals in the type of goods involved in the transaction, but also any business person when the transaction is of a commercial nature.

Formation of Contract

Exam Tip 3: If the question states that there is a valid written contract, do not spend time analyzing whether a contract was formed. Focus on the other Contracts-related issues in the question.

A valid contract requires offer, acceptance, and consideration.

Offer

Exam Tip 4: If the question is testing formation of contract, you should discuss each potential offer in chronological order, until you find the actual offer. Do not omit the analysis of potential offers!

An offer requires a promise, terms, and communication to the offeree.

Promise: A promise a statement indicating a present intent to enter into a contract.

Terms

- Under the CL, all essential terms must be provided (parties, subject matter, price, quantity).
- Under the UCC, the essential terms are the parties, subject matter, and quantity. A court will “gap fill” any other missing terms.

Communication: The offer must be communicated to the offeree (s/he must know of the offer).

Exam Tip 5: Advertisements are generally not offers, unless they are specific and limit who may accept the offer. If an ad is presented in the facts, you must discuss it as a potential offer.

Unilateral or Bilateral Offer

[After you find the actual offer, discuss whether the offer is for a bilateral or unilateral contract].

- A bilateral contract is one in which parties exchange promises. It can be accepted by a promise OR by the beginning of performance.
- A unilateral contract is one in which the offeror makes a promise and the offeree must perform. It can only be accepted by complete performance.

Exam Tip 6: Look for exam facts that indicate a unilateral contract. The offeree must perform the contract with the intent to accept the contract, otherwise there will not be an acceptance. For example, if
the party does not know about the offer, or believe the offer, her performance will not be an acceptance.

Irrevocable Offers

Offers are generally revocable. However, an offer can be irrevocable under certain circumstances.

- Common Law, Option Contract: An offer where the offeror promises to hold the offer open for a certain period of time. The offeree must pay consideration to the offeror to hold the offer open.
- UCC Merchant’s Firm Offer: An offer in writing where the offeror promises to hold the offer open for a certain period of time (maximum time is 90 days). No consideration is required!

Termination of Offer

Exam Tip 7: Offers can be terminated in various ways; be sure to discuss all possible theories (based on the facts) for termination of the offer.

Revocation of Offer

- An offer can be terminated if the offeror revokes the offer prior to acceptance.
- Revocation is effective when received (a mailed revocation not effective until received).
- Offers can be irrevocable in certain circumstances:
  - Option/Firm Offer (see above)
  - Unilateral Contract: If the offeree has started to perform in a unilateral contract, the offeror cannot revoke the offer (offeree must be given a chance to complete the performance).

Rejection by Offeree: If the offeree rejects the offer, it will be terminated.

Counter-Offer by Offeree: If the offeree counter-offers, the original offer will be deemed to be terminated.

Lapse of Time: If an offer is not accepted within a reasonable amount of time, it will be deemed to be terminated.

Death: If the offeror dies before the offer is accepted, the offer will be terminated.

Acceptance

Acceptance is the objective manifestation by the offeree to be bound by the terms of the offer.

Bilateral or Unilateral K

- A bilateral contract can be accepted by a promise OR by the beginning of performance.
- A unilateral contract can only be accepted by complete performance.

Manner of Acceptance

- Any reasonable means of acceptance is allowed; unless the offer limits the means of acceptance
• Silence is generally not acceptance, unless the offeree has reason to believe that acceptance will constitute an acceptance.

**Counter-Offer and Mirror Image Rule**

- Mirror Image Rule (Common Law): The acceptance must mirror the terms of the offer; any changes/additions to the terms constitutes a rejection of the original offer and a counter-offer.
- UCC (no Mirror Image Rule)
  - If any party is a non-merchant: An acceptance with changes/additions will be a valid acceptance. The contract will not include the changes/additions unless the offeror agrees to them.
  - If both parties are merchants: An acceptance with changes/additions will be a valid acceptance. The contract will include the changes/additions unless they (1) materially alter the terms of the original offer, (2) the original offer limits acceptance to the terms of the offer, or (3) the offeror has previously objected, or objects to the changed/new terms.

**Mailbox Rule**

- Under the mailbox rule, an acceptance is valid when placed in the mail.
- Exception: If there is an option contract or firm offer, the acceptance is valid when received and must be received before the offer expires.

*Exam Tip 8:* A recent essay question involved facts where the acceptance was placed outside the home on the doorstep for the mailperson to pick up the next morning. The answer required you to discuss the arguments for why the acceptance could be viewed as “mailed” or not “mailed.”

**Consideration**

Consideration requires a bargained-for change in the legal position between parties. Most courts find consideration if there is a detriment to the promise, regardless of the benefit to the promisor. A minority of courts look to either a detriment or a benefit, not requiring both.

*Legal Detriment:* A legal detriment can take the form of a promise to do/not do something, or performance/refraining from performance.

*Adequacy of Consideration:* A court will not look at the adequacy of the consideration (for example, the monetary value of the items being exchanged).

**Consideration-Related Issues**
• Gift: A gift from one party is not supported by consideration (the receiving party is not suffering a legal detriment).

• Preexisting Duty Rule: A promise to perform a preexisting legal duty will not qualify as consideration because the promisor is already required to perform (no additional legal detriment is being incurred) by the promisor

  **Example 1:**  Bob and Owen enter into a valid contract for Bob to build Owen’s house. Bob is required to perform a duty (build the house). Owen is an anxious person, and one week later offers to pay additional money to Bob to ensure that the house is completed on time and Bob agrees. There will not be any consideration on Bob’s behalf because Bob has a preexisting duty to build the house on time and he is not suffering an additional legal detriment.

• Past Consideration: A legal detriment incurred in the past does not constitute consideration because it was not bargained for and it was not in exchange for a legal detriment in return.

  **Example 2:**  Based on a past bar essay: Paul is a patient of Doctor Matt. Doctor Matt has treated Paul for many years and only charged him $1 per visit. Paul wins the lottery and promises to pay Matt $1 million dollars for all of the medical services that Matt has provided in the past. Matt’s past medical services are past consideration and would not constitute consideration.

• Promissory Estoppel (Consideration Substitute): If a promise is made by a party, but there is not consideration provided by both sides, the promise will still be enforceable if certain conditions are met.

  The promise will be binding if:

  1) The promisor should reasonably expect the promise to induce action or forbearance;

  2) The promise actually induces action or forbearance; and

  3) Injustice can be avoided only by enforcement of the promise.

  The damages awarded under Promissory Estoppel are usually limited to reliance damages (money spent on reliance of the promise).

  **Example 3:**  Tom promises to give Dave his car as a gift for his birthday. In reliance on this, Dave builds a garage for the car and sells his old car. Tom decides to keep his car. Dave sues Tom for the car, but Tom argues that there is no consideration because he was making a gift of the car to Dave. Under Promissory Estoppel, even if there is no consideration (the car was a gift), the court will enforce Tom’s promise.
Defenses to Formation

Exam Tip 9: When a party asserts a Defense to Formation of Contract, she is asking the court to find that no Contract was formed between the two parties at all. You should discuss all relevant Defenses to Formation, based on the facts in the question.

Mistake

- Mutual: If both parties are mistaken as to an essential element of the contract, the contract is voidable.
  - Reformation: The parties can ask a court to reform the contract and rewrite it to reflect the correct element(s) of the contract.
- Unilateral: When one party is mistaken as to an essential element of the contract the mistaken party can void the contract if:
  - The mistake would make enforcement of the contract unconscionable, or
  - Non-mistaken party failed to disclose the mistake or caused the mistake.
  - Also, there must not be serious prejudice to the non-mistaken party if the contract is voided.

Misrepresentation

- Fraudulent: An intentional misrepresentation of a fact that the innocent party justifiably relies on. The misrepresentation can be affirmative (a lie) or through non-disclosure (omission).
- Non-Fraudulent: An unintentional (innocent or negligent) misrepresentation of a material fact that the innocent party justifiably relies on and induces the innocent party’s agreement to the contract.

Undue Influence: Occurs when a party unfairly persuades the other party to assent to a contract. This can occur in certain relationships where the innocent party is susceptible to persuasion.

Exam Tip 10: Undue Influence requires you to analyze the facts of the question and argue/counter-argue why the specific facts indicate unfair persuasion or not.

Duress: When a party is improperly threatened and has no meaningful choice but to agree to the contract. This is a subjective test, so the defendant must actually feel like s/he has no choice but to agree.
**Capacity:** Certain parties are considered to be incompetent to enter into a contract, including minors, mentally ill, and intoxicated people. Minors are still liable for necessities that they contract for (such as housing, food).

**Defenses to Enforcement**

**Exam Tip 11:** When a party asserts a Defense to Enforcement of Contract, she is NOT arguing that a contract was not formed. Instead, she is asking the court to find that the alleged contract is unenforceable between the two parties. You should discuss all relevant Defenses to Enforcement, based on the facts in the question.

**Illegality:** A court will not enforce a contract that has involves illegal consideration or performance.

**Unconscionability:** A court will not enforce a contract that is so unfair, no reasonable person would agree to it. If a court finds unconscionability, it can refuse to enforce the entire contract, or strike the unconscionable portion of the contract, or limit the unconscionable terms.

- Procedural Unconscionability occurs when the bargaining process leading to the formation of the contract is unfair; for example, if a party is in a superior position and takes advantage of this position.
- Substantive Unconscionability occurs when the actual terms of the contract are unfair; there must be a significant showing of unfairness in the contract to find this.

**Statute of Frauds**

**Exam Tip 12:** Statute of Frauds (SOF) is a frequently tested issue on the essay portion of the exam.

**Approach to SOF:**

- Determine whether the SOF applies to the contract.
- If the SOF applies, determine whether the requirements (written, signed by party to be charged) are met.
- If requirements are not met, discuss exceptions (part/full performance, estoppel).

**Types of Contracts:** The SOF applies to contracts involving marriage, suretyship, contracts (usually for services) that cannot be performed within one year of making, sale of goods (UCC) for $500 or more, and real property.
**Requirements:** There must be a writing signed by the person to be charged (the person against whom enforcement is sought) that contains the essential terms of the deal.

- The writing does not have to be a formal contract (it can be in the form of letters or receipts) and multiple writings can be put together to meet the requirements, as long as they reference each other.
- Important: The writing does not have to exist at the time of the promise. It can be created after the promises are made and still meet the SOF.

**Exceptions:** If the SOF is not met, a court will still enforce the contract in limited situations.

*Exam Tip 13:* Discuss all potential exceptions to the SOF that are relevant based on the facts.

- Contracts (usually for services) that cannot be performed within one year of making
  - Full performance has occurred by the party seeking to enforce the contract.
- UCC Sale of Goods for $500 or more only
  - If full performance has occurred by the party seeking to enforce the contract (the goods have been full delivered or fully paid for), the contract will be fully enforceable.
  - If part performance has occurred (part of the purchase price has been paid), the contract will be enforceable to the extent that the money has been paid.
  - No writing required if the contract involves specially manufactured goods for the buyer.
  - Confirmatory memo: both parties are merchants, one party sends a confirmatory memo to the other party who knowingly receives the memo and does not respond within 10 days; the contract is enforceable against the receiving party, even if it did not sign the memo.
- Sale of Land
  - Part Performance: If the contract involves the sale of land, the contract will be enforced if at least two of the following three acts have occurred:
    - The purchaser pays part or all of the purchase price;
    - The purchaser takes possession of the land; or
    - The purchaser substantially improves the property.
- Estoppel (applies to all contract types): If a party reasonably and detrimentally relies on a promise made by the party to be charged, a court may enforce the contract, despite the failure to meet the SOF requirement.
CHAPTER 3: SUBSTANTIVE LAW CONTINUED

Terms of the Contract

Modification: After a valid contract has been formed, any change to the terms of the contract is a modification. Both parties must agree to the modification.

- Common Law: Under the CL, a modification must be supported by consideration.
  - Caution: Watch out for exam facts where a party offers to pay more money to the other party to guarantee completion of the contract on time. Under the Preexisting Duty Rule, there is no additional consideration here because the other party already has a duty to perform the contract on time. The modification (additional money) will not be enforceable.

- UCC: A modification does not require additional consideration, as long as the modification is entered into in good faith by both parties.
  - A provision prohibiting oral modifications to a sales contract is valid under the UCC.

- Statute of Frauds: If the modified contract falls within the statute of frauds, it must be in writing (unless an exception applies, see above for exceptions to SOF).

Accord and Satisfaction: In limited situations, when there is a dispute over the validity of the contract or the amount owed, a party can agree to accept a different performance than what was agreed upon in the contract.

- The “Accord” is the new agreement where a party agrees to accept a different performance than what was agreed upon.
- The “Satisfaction” occurs when the different performance is completed by the other party, which discharges the original contract duties and the accord agreement duties.
- Consideration is found to support this type of agreement as follows: The party performing the different performance is incurring a legal detriment. The party that is agreeing to accept the different performance is giving up the right to dispute the original contract and sue for breach.

Parol Evidence Rule: Under the Parol Evidence Rule (PER), extrinsic evidence of oral or written communications prior to the written contract are generally inadmissible for contradicting the terms of the contract.

Exam Tip 14: Look for facts involving a party that is seeking to introduce evidence of prior negotiations or discussions that occurred before a valid written contract was formed. If a valid written contract exists, the PER will generally bar any evidence of the prior negotiations or discussions.
Integration: First a court will ask if the writing in question was intended to be the final agreement (does it integrate) the terms of the contract.

- If the contract is not an integration (not a final agreement), the PER does not apply.
- Total Integration: If the writing contains all of the terms of the agreement, it is a total integration and no Parol Evidence is admissible.
- Partial Integration: If the writing contains some of the terms of the agreement, it is a partial integration and Parol Evidence is admissible, as long as it is consistent with the writing (does not contradict any of the terms).
- Determining Total or Partial Integration: The court will look at the words in the contract to determine if the parties intended for it to be a total/partial integration.
  - Merger clause: If the contract has a “merger” clause stating that the contract is the final and complete understanding of the parties, it is likely to be a total integration.

Exceptions – Parol Evidence will be admissible in limited situations:

- Remember: the Parol Evidence Rule does not prohibit evidence of modifications or statements made AFTER the contract was written.
- Ambiguity and Interpretation: Evidence is admissible for purposes of interpreting or clarifying an ambiguity in the contract.
- Collateral Deal: Evidence of a separate deal between the parties is admissible, if the deal is not part of the written contract.
- UCC: Evidence of usual performance and dealing between parties is admissible.
- Condition Precedent: Evidence of a condition precedent to the existence of the contract is admissible.

Exam Tip 15: A recent bar exam question involved a party claiming that a condition precedent was agreed upon in the discussions prior to the writing of the contract. Evidence of this condition precedent was admissible as an exception to the PER.

Performance of the Contract

After determining the existence of a contract and the terms of the contract, the next issue is the performance of the contract.

Promise or Condition: When discussing the performance of the contract, determine whether the contract involves promise(s) and/or condition(s). When a contract is unclear, a court will usually find a statement to be a promise.

Exam Tip 16: Most Contracts essays involve promises between parties. Conditions are created by words such as “on condition that.”
Promises: In a contract, parties may exchange promises which require them to act or refrain from acting.

- **Standard of Performance:**
  - Under the Common Law, a party has a duty to substantially perform his part of the contract.
  - However, under the UCC, there must be “perfect” tender of the goods.

- **Breach of Contract:** If a party fails to meet the standard of performance, it will be in breach of contract. (See below for Breach of Contract section).

Conditions

A condition is an event that must occur before a party’s contractual rights or obligations are created, destroyed, or enlarged. (In other words, if a condition is not met, there may be no contract at all).

- **Conditions can be express or implied:**
  - Express: Conditions expressed (written) in the contract itself. Look for words such as “on condition that.”
  - Implied: Not written in the contract, but a court may find that an implied condition exists. For example, a court may imply that a builder has to substantially perform before the owner has duty to pay.

- **Timing of Conditions**
  - Condition Precedent – the condition must occur before the other party has an obligation to perform.
  - Condition Subsequent – if the condition occurs, the duty to perform will then be excused.

- **Standard of Performance**
  - Express conditions must be met fully.
  - Implied conditions require substantial performance.

- **Failure of Condition:** If a condition is not met, the other party’s duty to perform is excused completely.

- **Excuse of Conditions**
  - Waiver: A party can waive a condition by words or conduct, as long as the condition is not material to the contract. The waiving party would then have a duty to perform, because it waived the condition.
  - Wrongful Interference: If a party hinders the other party’s performance and interferes with the occurrence of the condition, the condition will be excused, and the wrongful party will have duty to perform.
  - Estoppel: If a party indicates that it will not enforce a condition, and the other party reasonably relies on this, the party will be estopped from later enforcing the condition.
Example of Promise versus Condition

**Example 4:** *(Promise):* Harold Homeowner asks Bob to build a house. Bob **promises** to install bamboo wood flooring. If Bob fails to use bamboo flooring, but uses a similar wood, he has substantially performed the contract and is entitled to payment from Harold.

**Example 5:** *(Condition):* Harold Homeowner asks Bob to build a house. Harold **expressly conditions** payment for the house on the installation of bamboo wood flooring. If Bob fails to use bamboo flooring, the condition has not been met and Harold’s duty to pay Bob for house has not been triggered.

**Note 1:** The result of a failed condition can be harsh (as seen in this hypo), so courts are hesitant to find a condition if the contract is unclear.

Discharge of Duty to Perform

In certain circumstances, a promisor party’s duty to perform will be discharged, regardless of whether there is a promise or condition involved. All relevant theories for discharging a promisor party’s duty to perform should be discussed.

*Impracticability:* An unforeseeable event occurs (such as a natural disaster) making the performance of the contract extremely difficult; the nonoccurrence of the event was a basic assumption at the time of the contract; and the party seeking discharge was not at fault. Note: Non-extraordinary increases in the cost of performance are not a sufficient basis for this defense.

*Impossibility:* An unforeseeable event occurs, making it objectively impossible for the party to perform.

*Frustration of Purpose:* If an unexpected event arises that destroy the party’s purpose for entering the contract, the party will be entitled to rescind the contract, even if the performance is still possible. Similar to Impracticability, the nonoccurrence of the event must have been a basic assumption at the time of the contract and the party seeking discharge was not at fault.

**Example 6:** *Frustration of Purpose: Gina agrees to rent an apartment in San Francisco for one day, so she can watch the Giants’ victory parade after winning the World Series. On the day of the parade, an earthquake occurs and the parade is canceled. Gina’s performance may be excused (paying rent) because the purpose of renting the apartment has been frustrated, even though she could still pay the rent.*
CHAPTER 4: SUBSTANTIVE LAW CONTINUED

Breach of the Contract

If a duty to perform does exist and has not been discharged, a party’s non-performance is a breach. If a party indicates prior to the time of performance that it intends to breach; this is an anticipatory breach/repudiation. Otherwise, when a party fails to perform on the date of performance, it will be in breach of contract.

*Anticipatory Breach/Repudiation:* Anticipatory breach or repudiation occurs when a promisor party indicates that it will not perform prior to the date that performance is due.

**Common Law**
- The promisor party clearly and unequivocally indicates through words/acts that it will not perform.
- The non-breaching party can:
  - Treat the repudiation as a breach of contract and sue immediately, or
  - Suspend its own performance and demand performance from the promisor, or
  - Cancel the contract, or
  - Wait for the breach to occur, and then sue for breach.
- Retraction: The promisor party can retract its repudiation of the contract until/unless the other party acts in reliance on the repudiation, accepts the repudiation, or has already filed an action for breach of contract.

**UCC**
- A buyer/seller unequivocally refuses to perform, or fails to provide adequate assurances within a reasonable time (must not exceed 30 days) of the other party demanding them.
- Requesting Assurances
  - Either party can demand assurances if it has reasonable grounds to be insecure about the other party’s ability to perform and may suspend performance until it receives assurances.
  - A failure to provide reasonable assurances within a reasonable time (must not exceed 30 days), can be treated as a repudiation.
- The non-breaching party can:
  - Treat the repudiation as a breach of contract and sue immediately, or
  - Suspend its own performance and demand performance from the promisor, or
  - Cancel the contract, or
  - Wait for the breach to occur, and then sue for breach.
• Retraction: The promisor party can retract its repudiation of the contract until/unless the other party has cancelled the contract or materially changed position on the basis of the repudiation.

Breach of Contract

Common Law

Material Breach: A material breach occurs when the non-breaching party does not receive the substantial benefit of the bargain. The non-breaching party can withhold any promised performance and pursue remedies for breach.

Minor Breach: A minor breach occurs when the breaching party has substantially performed, but not fully performed. The non-breaching party is entitled to pursue remedies for the minor breach, but it still must perform under the contract.

Exam Tip 17: If the facts are not clear on whether a material or minor breach occurred, you should discuss both issues/rules and present the arguments that the parties would make for both theories. Remember, you are not being scored on your conclusions, but rather your analysis!

UCC

Perfect Tender Rule: Under the UCC, the parties (including the seller) must strictly perform all duties under the contract, or they will be in breach.

Remedies

Remedies compensate the non-breaching party for actual economic losses.

Exam Tip 18: Discuss all relevant remedies, based on the facts presented in the question.

Expectation Damages:

• Expectation damages are damages directly resulting from the breach of the contract. They are intended to put the injured party in the same position as if the contract was performed.
• Expectation damages must be foreseeable and the non-breaching party must be able to prove the amount of damages with reasonable certainty.
• Amount: Calculating the amount of damages depends on the facts. Generally, the amount of damages will be based on the contract price for performance and the fair market value of performance.
Example 7: B builds a house for O. O refuses to pay. B is entitled to the amount agreed upon in the contract.

Example 8: B contracts with O to build O a house for $200,000, which is below the market value for a new house. B breaches and does not build the house. O finds another builder and pays $300,000 (fair market value) for a house to be built. O is entitled to $100,000 from B.

Exam Tip 19: When discussing expectation damages, you should use the specific dollar amounts provided in the facts and show the calculations that lead to the ultimate amount of damages awarded. The calculations are the same as analysis and they earn you points on the exam.

Consequential Damages

- Consequential damages are reasonably foreseeable damages other than expectation damages that are related to the breach of the contract (example, loss of profit).

Example 9: Restaurant enters a contract with Fisherman for the delivery of 1,000 pounds of crab for $10 per pound every week. Fisherman catches the crab but decides to sell it to another buyer instead. After a one-month delay, Restaurant is able to find another source for the crab for $12 per pound. Restaurant seeks expectation damages for the increased cost of the crab $2 per pound and consequential damages for lost business profits during the one month when it did not have crab on the menu.

- In order to recover consequential damages, three elements must be met:
  - Foreseeability: The damages must be natural and probable consequences of the breach or contemplated by the parties at the time the contract was formed.
  - Causation: Plaintiff must show that the damages were caused by the defendant’s breach; if the damages would have occurred without defendant’s breach, there can be no recovery.
  - Certainty: Plaintiff must prove the dollar amount with reasonable certainty. When the amount of money is too speculative (example: a new business), the court will not award consequential damages.

Reliance Damages: Damages that non-breaching party incurs in reasonable reliance upon the promise that the other party would perform. Note: a party cannot recover reliance and expectation damages; it must choose between reliance or expectation damages. [You should discuss both items of damages on the exam].

Example 10: Tom enters into a contract to buy Dave’s antique car. In reliance on the contract, pays an entry fee to enter the car into a car contest. Dave
sells the car to another buyer. Tom can seek reliance damages for the entry fee.

*Incidental Damages*: Damages that arise when the non-breaching party is trying to remedy the breach. For example, in a commercial contract, the cost of finding a replacement seller of goods.

**Mitigating Damages**

- The non-breaching party has duty to avoid or mitigate its damages, to the extent possible, by seeking replacements/substitutes for goods and/or services.
- The non-breaching party will be held to a standard of reasonable conduct.
- A failure to mitigate damages will reduce the damages recovered by the non-breaching party.

**Example 11**: Betty enters a contract to buy a freezer from Sally, with delivery of the freezer due April 1. On March 15, Sally informs Betty that she will not be able to deliver the freezer on April 1 (anticipatory breach/repudiation). On March 31, Betty orders a freezer from Adam, which included a $500 fee for one-day delivery on April 1. Sally then sues Betty for the non-delivery of the freezer and seeks damages including the $500 delivery fee. Betty would have a strong argument that Sally did not mitigate her damages because she waited until 1 day before she needed the freezer to purchase it.

**Restitution**

Restitution allows non-breaching *and* breaching parties to recover damages under an unjust enrichment theory (not based on the contract).

**Non-Breaching Party**

- Restitution usually arises when the non-breaching party has partially performed the contract and other party then breaches. The non-breaching party will then seek restitution damages for the benefit conferred to the breaching party. If the breaching party does not pay restitution damages, it will have been unjustly enriched by the non-breaching party’s performance.
- Important: A non-breaching party cannot seek restitution if it has performed all of its duties and the only performance due from the other party is the payment under the contract. The non-breaching party must seek expectation damages instead.
- A non-breaching party can seek damages based on the value of the benefit conferred on the other party.
• The amount is measured by the reasonable value of what it would cost the breaching party to obtain the benefit from another source, or the increase in the breaching party’s wealth (example increase in value of land) from having received the benefit.

**Breaching Party**

• If a party has not substantially performed, it will be in breach of contract, and cannot recover under the contract. However, if the non-breaching party has benefited from the breaching party’s performance, the breaching party can recover for the benefit conferred minus the damages the non-breaching party is entitled to.

**Quasi-Contract (Implied in Law Contract)**

In certain situations, where there is no enforceable contract, or a contract does not exist at all, a court will award restitution damages on the basis of quasi-contract.

The elements are:

• The plaintiff must confer a measurable benefit on the defendant;
• The plaintiff acted without gratuitous intent (s/he intended to be paid); and
• It would be unfair to let the defendant retain the benefit because the defendant had an opportunity to decline the benefit but did not do so, or the plaintiff had a reasonable excuse for not giving the defendant such an opportunity (example, an emergency arose and plaintiff could not consult with defendant).

**Specific Performance**

*Exam Tip 20:* Specific Performance is a frequently tested remedy on the exam; you should discuss all elements of the rule to earn full credit.

Under the remedy of Specific Performance, the non-breaching party can ask a court to order the breaching party to perform the contract. The following elements must be met:

• There must be a valid contract.
  o This requires you to discuss whether a valid contract (offer, acceptance, consideration) exists.

• The terms of the contract must be certain/clear enough to allow a court to make an order.
• The non-breaching party has satisfied any conditions precedent (or the condition has been excused), so the breaching party’s performance is now due.
• Money damages are inadequate (this usually means the item(s) involved in the contract are unique.
  o Examples of situations where money damages are inadequate: Land, pieces of art, antique cars.
• It is feasible for the court to enforce and supervise the breaching party’s performance.
  o Courts will not grant specific performance if it will be required to supervise the performance for a long period of time, or if it will be difficult to enforce.
  o Specifically, courts will not require people to perform service contracts (for example, employment) because it is not feasible to enforce/supervise a person’s service and forcing a person to work can rise to the level of indentured servitude under the 13th Amendment.

• No defenses exist: A court will not grant specific performance if the breaching party can assert defenses of Laches or Unclean Hands.
  o Laches: If the non-breaching party waited an unreasonably long time to seek specific performance and the delay prejudiced the breaching party, the court may deny specific performance.
  o Unclean Hands: If the non-breaching party itself engaged in unethical or immoral acts relating to the contract, the court may deny specific performance.

**Equitable Relief**

• Replevin—allows a plaintiff to recover the specific goods or items in dispute
  o Arises in context of unique goods until the court can determine the rights of the parties

• Injunction—orders a breaching party to stop doing something or not do something
  o Immediate and irreparable harm will occur without the injunction
  o There is no adequate remedy at law (unique)
  o Likelihood of success on the merits
  o Balance the equities
  o No defenses (laches, unclean hands)
CHAPTER 5: JULY 2008, QUESTION 3

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

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

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

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

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

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

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

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A. ISSUES CHECKLIST

1. Applicable Law

2. Contract Formation
   a. Offer
      1) May 1st Estimates
      2) May 2nd Message
   b. Acceptance by Silence
   c. Consideration

3. Remedies
   a. Expectation Damages
   b. Quasi-Contract

4. Accord and Satisfaction

5. Revocation
B. Sample Answer

Applicable Law

Contracts for the sale of goods are governed by Article 2 of the Uniform Commercial Code. All other contracts are governed by general common-law contract principles.

The contract at issue, assuming there is one, involves building a fence. This makes it a contract for personal services. Although Builder (B) may supply materials such as the wood for the fence, that does not convert it into a contract for the sale of goods because the materials are collateral to the primary purpose of the agreement, which is to provide the service of fence building. This contract will be governed by general common law contract principles.

Contract Formation

A binding contract is created through the process of mutual assent and consideration, when no valid defenses to contract exist. Mutual assent occurs upon acceptance of a valid offer to contract. In this case, there is no enforceable contract between the parties because they never had a meeting of the minds.

Offer

An offer is an objective manifestation of a willingness by the offeror to enter into an agreement that creates the power of acceptance in the offeree. In other words, it is a communication that gives power to the recipient to conclude a contract by acceptance.

May 1st Estimates

B may argue that the estimates he provided on May 1st were an offer. The estimate for the redwood fence was not an offer, however, because B did not objectively manifest an intent to be bound if Owner (O) accepted right there. B expressly said that he would have to verify that redwood was available. This suggests that he did not intend to be bound to the terms of these estimates until he verified the supply of the redwood. B stated that he would quickly ascertain the availability of the redwood and get back to O. The estimate for the cedar fence was not similarly conditioned, and so it may be construed as an offer, but this is also unlikely since the quote provided by B came in response to a request from O.

May 2nd Message

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

Offers have no effect, however, unless actually communicated to the identified offeree. B reasonably expected that his message would be heard by O since they had previously decided that B would call O.
with the availability of the redwood and since O’s message said that she would be checking her messages daily. O did in fact hear the message. Once she heard the message, the offer was effective.

Acceptance by Silence

An acceptance is an objective manifestation by the offeree to be bound by the terms of the offer. Generally, silence does not operate as an acceptance of an offer, even if the offer states that silence qualifies as acceptance, unless: (i) the offeree has reason to believe that the offer could be accepted by silence, was silent, and intended to accept the offer by silence; or (ii) because of previous dealings or pattern of behavior, it is reasonable to believe that the offeree must notify the offeror if the offeree intends not to accept.

In this case, there is no indication that B and have any such history. B will argue that, under the circumstances, O’s silence should be construed as assent. O had already told B that she needed the fence to be completed by June 1st in order to be finished in time for a charity event she was hosting. She had not informed him that the charity event scheduled for June 1st had been canceled. B was under the impression that O needed the fence done on time. Furthermore, her message said that she would be checking her messages daily and would return calls as soon as she could. Given this, and the fact that B waited twelve days for O’s response, B was reasonable in believing that O heard the message but was too busy to respond. Since he told her that he would start in a few days unless he heard back from her, it may have been objectively reasonable to believe that her silence meant that she wanted him to start but was too busy to respond.

On the other hand, O will argue that it would be unfair to hold her to an agreement that she had not assented to. After all, at the time, there were two outstanding offers: one for a cedar fence and another for a redwood fence. Moreover, on their last communication, O had told B that she liked the idea of a redwood fence but wanted to think about it before making a decision. Given that she could have decided on either, or none, O will state it was not objectively reasonable to interpret her silence as assent to the building of the redwood fence. O has the better argument here, particularly because courts are loathe to enforce an agreement when one party has not affirmatively manifested assent. Thus, there was no acceptance here and O is not bound to the contract by her silence.

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[END OF HANDOUT]