

Exam Name: Formation
Grader Name: Dr. breffni
Overall Score: 65

Student Answer

Did a good job of arguing both sides in many places. Try to do this throughout.

Third party rights, obligation, assignment are the tougher contract issues. Make sure you're quite clear on them. Of the people who fail the bar, this is a common soft spot in their knowledge.

- (1) Most duties are delegable
 - (a) Exception: Where the obligor has unique skills, training or experience, then performance by another person would vary materially the performance rendered to the obligee (e.g., personal service contracts);
 - (b) Exception: contract prohibitions always recognized.
- (2) After an effective delegation, the delegatee is directly liable to the obligee (who becomes a third party creditor beneficiary).
- (3) Note: although the delegatee is primarily liable, the delegator remains secondarily liable as surety for proper tender of performance.
- (4) If delegatee defaults, the delegator can seek specific performance (in equity), or if the delegatee's breach has caused the obligee to seek damages from the delegator, for money damages incurred.

1. Mart v. PC

Mart will assert that PC breached its contract with Mart by not allowing Mart to purchase the Model X computer for \$1,500. Mart must prove that a valid contract existed, that PC breached that contract, and that Mart suffered damages. **good**

Applicable Law

this is an 'ok' header, but on a law exam, reader could be pretty sure there would be a header called 'applicable law'.

TO IMPROVE

Use headers with subject verb object(in that order or OVS) that are more specific

UCC Article 2 governs

The U.C.C. governs contracts for the sale of goods. Goods are anything that is tangible and moveable. Common law governs service contracts. The U.C.C. is the applicable law here because the Model X is a computer, a tangible movable good, and the dispute between Mart and PC arised out of the sale of the Model X computer. **good**

Moreover, merchant rules apply when the parties in dispute are merchants; companies who ordinarily deal with the type of goods that are the subject of the transaction. Here, PC manufactures computers and Mart operates electronic stores. Accordinly, both are merchants under the UCC because both ordinarily deal with computers; PC manufactures the computers and Mart sales **sells** them. Thus, merchant rules apply to this transaction.

use code section if you can remember it ; 2-104

Formation - Valid Contract?

A contract is valid if there is mutual assent (valid offer and acceptance) and consideration.

Offer

An offer is a (1) manifestation of a present intent to be bound by contract, (2) stated in certain and definite terms, (3) that is communicated to an offeree. **good**

When PC sent a fax on official PC letterhead to Mart stating that it agreed to fill any of Mart's orders for the Model X computer within the next six months, it manifested a present intent to be bound by contract because the faxed letter created a power of acceptance by Mart. Mart was free to either accept or reject. Moreover, PC's faxed letter contained certain and definite terms in that is provided the quantity (maximum of 4,000 Model X computers), Terms (6 months), identified the parties (PC and Mart), contained the price (\$1,500), and subject matter (sale of Model X computers). These terms were more than sufficient to satisfy the certain and definite requirement under the U.C.C. because the U.C.C. only requires that an offer containe quantity to be definite and PC's faxed letter containd much more. **good** Lastly, PC's letter was faxed to Mart and Mart responded to the fax. As such, PC's letter was communicated to Mart. **good**

Thus, PC's faxed letter to Mart was a valid offer.

Merchant Firm Offer

A merchant's firm offer is a signed written promise to hold an offer open for a stated period

of time. However, the period of time cannot exceed 3 months.

PC is a merchant as discussed in the applicable law section. PC's faxed letter to Mart stated that it would allow Mart to purchase the Model X computers at the \$1,500 price. The facts do not state whether or not PC's faxed letter to Mart was signed but the fact that the letter was placed on "official letterhead" may add to the officialness of the letter and show that PC intended the letter to be a firm offer. Although PC's letter stated that it would keep the offer open for 6 months, the U.C.C. will shorten the offer period to 3 months since the U.C.C. will not allow a firm offer to be valid for longer than 3 months.**good**

Thus, PC's letter to Mart is a firm offer that can only be held open for 3 months.

Revocation

A revocation is evidence by words or conduct of the offeror terminating the offer. An offer can also be revoked by a lapse of time.

PC's faxed letter to Mart on November 3, which informed Mart that it must place all future orders with Wholesaler, may not serve as an effective rejection because it was sent after Mart dispatched its order (acceptance letter) on November 2. According to the mailbox rule, acceptance is effective upon dispatch unless rejection is sent first (**in which case there is nothing to accept**). In this case, Mart sent its acceptance/order letter on November 2, which is one day before PC sent its rejection letter on November 3. Under the mailbox rule Mart's acceptance was effective and PC did not have the power to revoke the offer.**good**

However, PC will assert that its offer to Mart, which allowed Mart to purchase up to 4,000 Model X computers, was revoked by a lapse of time. Specifically, the merchant firm offer rule only allows an offer to remain open for 3 months max. According to the facts, PC's offer was made on August 1 and should have expired on November 1, which is 3 months after the offer was made. Here, Mart dispatched its order on November 2, 1 day after the offer lapsed, and no longer had a power of acceptance.

Thus, PC's offer was revoked as of November 1 and Mart's November 2 order was properly revoked.

Acceptance

An acceptance Under the U.C.C. acceptance can be made in any manner authorized by the offer or any reasonable manner. **good** Moreover, the mailbox rule allows acceptance to be effective upon dispatch unless a rejection was sent first.

Mart's August 10 fax to PC stating that it accepts PC's proposal is a reasonable communication of acceptance because it clearly expresses Mart's intent to be bound by the terms in PC's offer. Mart's September 10 order to PC for 1,000 Model X computers complied with PC's offer since the offer was for Model X computers and allowed Mart to order up to 4,000 computers. Although PC's offer did not specifically outline how Mart was

to communicate its acceptance, Mart's mailed order to PC was reasonable because PC subsequently delivered the Model X computers to Mart and, thus, understood the order to be an acceptance of its offer.

However, as stated in the revocation section above, Mart's November 2 order/acceptance was not effective because it was communicated after the merchant's firm offer had lapsed.

Thus, Mart's September 10 order is effective acceptance and Mart's November 2 order is not effective.

Consideration

Maybe a good idea to put the contract formation elements in one place and contract destruction elements (revocation) in another place

Consideration is a bargained for exchange of legal detriment or legal benefit.

Consideration is present here because PC bargained to sell Mart up to 4,000 Model X computers in exchange for Mart paying \$1,500 for each computer. Moreover, Mart suffered a legal detriment by incurring advertising costs, something that it was not legally obligated to do, in reliance on PC's offer.

Thus, Consideration is present and sufficient.

There is mutual assent and consideration for the PC fulfilling Mart's September 10 order but mutual assent may be lacking for Mart's November 2 order. As such (? refers to? means? This (As such) is a term that should be avoided), the September 10 order is a valid and enforceable contract but the same cannot be said for the November 2 order.

Defenses to Formation/Statute of Frauds

According to the Statute of Frauds ("SOF") all contracts for the sale of goods, with a value of \$500 or more, must be evidenced by a writing and signed by the party to be charged. The merchant's confirmatory memo, under the U.C.C., will allow the SOF to be satisfied so long as quantity is specified and no response within 10 days after writing is sent.

Here, Mart's September 10 mailing, a writing, will comply with the statute of frauds if it was signed by Mart. The facts do not state whether Mart's fax was signed. However, since both PC and Mart are merchants, the U.C.C. will allow the SOF to be satisfied under the merchant's confirmatory memo rule since the mailing specified a quantity (1,000) units and PC did not object to the order within 10 days. Instead, PC fulfilled the order.

Try to hit damage harder. Mention the different types - restitution, reliance, incidental, expectation, consequential, liquidated, punitive. If they don't apply (liquidated, punitive), say so.

Thus the SOF has been satisfied and will not bar the enforceability of the contract.

Breach of Contract

If the court finds that the PC/Mart agreement was not revoked before Mart's November 2 order, PC's unwillingness to supply Mart with the 2000 Model X computers at \$1,500 will be deemed a material breach. This is a material breach because Mart will be forced to pay a \$40,000 ((\$1700 price at Wholesaler - \$1500 price agreed upon with PC) X 2000) price difference and is sure to drastically effect its profits. **As such**, Mart may be able to sue immediately for breach of contract and treat its duties under the contract as discharged.

Remedies

Damages - Cost of Cover

Under the U.C.C., cover damages is where a buyer purchases substitute goods and recovers the difference between the price of the substitute goods and the contract price.

Mart's damages includes the \$40,000 (calculated in breach above) difference in price if it will be forced to purchase the goods from Wholesaler than if it were allowed to purchase the goods from PC.

Thus, Mart's cover damages are \$40,000.

Incidental and Consequential Damages

If **In** the case of a breach, Mart may recover all incidental and consequential damages included costs for advertisements and other foreseeable costs of PC's breach.

Thus, Mart may recover the \$200 price differential from PC.

Duty to Mitigate

As the non-breaching party, Mart will have a duty to mitigate damages. Since Wholesaler is the exclusive distributor of the Model X computers, Mart will have **to** purchase the computers from Wholesaler. Also, as the exclusive distributor, Wholesaler will most likely have the best prices which further obligates Mart to purchase from Wholesaler in an effort to mitigate damages. **good**

2. Mart v. PC - November 15 Order

Mart and PC will try to raise the same arguments as in question 1. Mart will attempt to argue that the contract should have been held open for 6 months and PC will argue that the merchant firm offer rule will not allow the offer to be held open for longer than 3 months. If the court takes Mart's side and finds that the offer was good for 6 months, then Mart's November 15 order will be a valid acceptance of PC's offer and PC will be obligated to sell

Mart the additional 1,000 units of Model X at \$1,500. However, if the court finds that PC's offer was revoked due to lapse of time, discussed in revocation section in question 1, or due to direct revocation as of PC's November 3 fax, also discussed in revocation section in question 1 above, then PC will not be obligated to fulfill its end of the bargain. **good**