



California First-Year Law Students' Examination

**Essay Questions
and
Selected Answers**

November 2020



**ESSAY QUESTIONS AND SELECTED ANSWERS
NOVEMBER 2020
CALIFORNIA FIRST-YEAR LAW STUDENTS' EXAMINATION**

This publication contains the four essay questions from the November 2020 California First-Year Law Students' Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

<u>Question Number</u>	<u>Subject</u>
1.	Criminal Law
2.	Contracts
3.	Torts
4.	Contracts

November 2020
ESSAY QUESTION 1 OF 4
Answer All 4 Questions



California

First-Year Law Students'

Examination

Answer all 4 questions.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

You should answer according to legal theories and principles of general application.

QUESTION 1

Dave and Ed were partners in D&E's Delicious Donuts (D&E's). Ed was the baker in the back of the store and Dave waited on customers in the front. Dave would routinely enter less than the actual amount paid by customers into the cash register and keep the difference.

Dave noticed that every Friday morning at 9:00 a.m. Jayne would go to the bank across the street, withdraw funds, and then come over to D&E's. Every time Jayne came into the store, she would walk up to the counter to order a donut and a cup of coffee, talk to Dave for a few moments, and then sit at a table. From his conversations with Jayne, Dave knew that she withdrew \$250 on Friday mornings to cover her personal expenses for the following week.

One Thursday, Dave suggested to Bob, a regular customer, that when Jayne came into the store on Friday, he should grab her purse and run away. Dave said that he and Bob could later split the money. Bob said that he would think about it.

The next day, Jayne came into D&E's as usual, ordered a donut and a cup of coffee, and set her purse down on a table. Bob walked past her table, took Jayne's purse and ran toward the door. Another customer, Phil, saw what was happening and tried to block the door, but Bob knocked Phil over and ran outside. While Bob was running down the street and looking back to see if anyone was following him, he collided with Arlene, knocking her to the ground where she hit her head on the sidewalk and died.

1. With what crimes could Dave be reasonably charged? Discuss.
2. With what crimes could Bob be reasonably charged? Discuss.

QUESTION 1: SELECTED ANSWER A

State v. Dave

EMBEZZLEMENT

Embezzlement is the unlawful conversion of property of another by one who is in lawful possession.

When Dave took money from customers and entered less than the actual amount paid, he took property that belonged to D&E (partnership) and exercised dominion and control over the money, which is unlawful conversion. Because he did so volitionally and without informing his partner, he demonstrated a specific intent to deprive D&E of the funds.

Because Dave is partner (high-level employee) he is deemed to have possession of the money rather than custody.

Dave is guilty of Embezzlement.

SOLICITATION

Solicitation is asking someone to commit a crime with the specific intent they commit it.

When Dave suggested to Bob that when Jayne came into the store on Friday, he could grab her purse and run away, Dave asked Bob to commit a crime (larceny) with the intent that Bob complete the larceny.

Dave has committed solicitation.

CONSPIRACY

Conspiracy is an agreement between two or more people to specifically engage in

crime or to do a legal action in a criminal manner. Under the common law, conspiracy requires only an agreement. Under the modern law, most states require an overt act in furtherance of the conspiracy by one of the co-conspirators. Under the Pinkerton rule, each co-conspirator is chargeable for all crimes committed by the members of the conspiracy that are foreseeable and in furtherance of the conspiracy.

When Bob walked past Jayne's table, took Jayne's purse, and ran toward the door, he did perform an overt act in furtherance of the crime (larceny of the purse) in agreement with Dave's request they steal the purse. The act of snatching the purse establishes a specific intent to deprive Jayne of the purse because a reasonable person would not snatch a purse if he did not intend to steal it.

Bob's act, while not a verbal agreement, satisfies entering into the agreement because an agreement can be entered into by conduct.

Bob's act of stealing the purse, thus, completes a conspiracy between Dave and Bob.

Dave will be liable for conspiracy under common law and also under modern law.

ACCOMPLICE

Assisting, encouraging, or helping the completion of a crime with the specific intent it be completed.

Here, when Bob took the purse, he assisted Dave to complete the crime of larceny of the purse. The purse was taken by Bob under the encouragement of Dave. Thus, Dave is an accomplice to Bob on the Larceny.

Dave is an accomplice and as a result will be liable for all crimes committed by Bob in connection with the larceny.

Bob will be deemed to be an accomplice of Dave, too.

MERGER

Lesser included crimes will merge into major crimes. Conspiracy will not merge into the completed crime.

The solicitation charge will merge into the completed larceny.

VICARIOUS LIABILITY

Dave will be vicariously liable as an accomplice, and also as a co-conspirator for the crimes of Bob.

I. State v. Bob

LARCENY

Trespassory taking and carrying away of personal property of another with intent to steal.

When Bob took Jayne's purse (property of another) and ran toward the door (taking and carrying away) he took the purse without permission and with the intent to permanently deprive Jayne of the purse because a reasonable person would not snatch a purse from a stranger and run away if it was not their intent to permanently deprive them of the purse.

Because there was no use of force or threat of force, the crime was not robbery.

Thus, Bob is guilty of larceny.

BATTERY (Phil)

Unlawful application of force resulting in harmful or offensive contact.

When Bob knocked down Phil, who saw what was happening and was trying to stop

him, Bob applied force to Phil that was at the minimum offensive because Bob knocked down Phil.

BATTERY (Arlene)

Unlawful application of force resulting in harmful or offensive contact.

When Bob knocked down Arlene on the sidewalk it was an unlawful application of force and thus a battery.

The battery, however, will merge with the homicidal charge (see below) because it is a lesser included crime.

MURDER

Murder homicide committed with malice aforethought.

HOMICIDE

Killing of a human being by another human being.

Here, Arlene is a human being and has died.

A homicide has occurred.

ACTUAL CAUSE

"But for" Arlene getting knocked on the ground and hitting her head on the sidewalk, she would not have died.

Actual cause is established.

PROXIMATE CAUSE

Natural and foreseeable consequence.

It is foreseeable that getting knocked to the ground and hitting one's head on the

sidewalk would result in death.

Proximate cause is established.

MALICE

Malice is established when the defendant kills with (1) intent to kill, (2) intent to inflict serious bodily harm, (3) with a depraved heart, or (4) in the commission of an inherently dangerous felony (Felony Murder).

Felony murder requires a statute. In most jurisdictions it requires an enumerated inherently dangerous felony or a felony committed in an inherently dangerous manner.

Here, Bob did not intentionally run into Arlene. Thus, there will not be intent to kill/serious bodily harm.

Running down the street is not likely to satisfy after committing a larceny not likely to be considered depraved heart.

A larceny is not one of the classically considered inherently dangerous felonies for felony murder.

Thus, in most jurisdictions there will not be malice.

COMMON LAW MURDER

With no malice established, there will not be a murder.

INVOLUNTARY MANSLAUGHTER

A homicide committed without malice as a result of criminal negligence or engaging in a malum in se misdemeanor or non-dangerous felony.

Here, Bob's larceny will serve as a non-dangerous felony for an involuntary manslaughter charge.

Bob will be guilty of involuntary manslaughter.

CONSPIRACY

Supra.

Accomplice

Supra.

VICARIOUS LIABILITY

Bob will be liable as an accomplice and as a co-conspirator by the crimes of Dave.

QUESTION 1: SELECTED ANSWER B

With what crimes could Dave be reasonably charged? Discuss.

CRIMES OF DAVE

LARCENY

Larceny is the trespassory taking and carrying away of the property of another with intent to permanently deprive.

Dave is noted to routinely enter less than the actual amount paid by customers and pocket the difference. The money is not his, but belongs to the business, though, he will assert that, as a partner, he is entitled to a little off the top and it wouldn't be noticeable. However, by placing the money in his pocket, he "carries" away from the register and demonstrates that he has the intent to keep the money for himself.

Dave can be charged with larceny from the register.

EMBEZZLEMENT

Embezzlement is the crime of taking that property which has been entrusted to a person lawfully and converting it for own purposes.

Here, Dave is a partner in the business who takes care of the register. He is entrusted with the receipts taken in on products sold. He will assert that the money is rightfully his as a partner. The State will show that, while Dave is a high-level employee and is entrusted with the money, he is not within his rights to convert the proceeds to his own use.

Therefore, Dave can be charged with embezzlement of the money from the register. He cannot be charged with larceny and embezzlement, however. The court is likely to find

that Dave has committed embezzlement as one who was entrusted with the proceeds paid by customers and as a higher level "employee" of the business.

SOLICITATION

Solicitation is the urging or asking of another to commit an unlawful act. It is a specific intent crime and can be merged with conspiracy or with the completed crime.

Dave worked the front of the donut store and notes that Jayne comes in every Friday after withdrawing \$250 from the bank across the street. Dave suggests to Bob, a regular customer, that he should grab her purse and run away.

Dave can be charged with solicitation of Bob.

CONSPIRACY

Conspiracy is the agreement between two persons to commit an unlawful act or a lawful act unlawfully. It requires intent to commit the crime and, modernly, an overt act in furtherance is required.

Bob has been asked to take Jayne's purse when she comes into the shop on Friday. Dave is aware that she goes to the bank prior to her visit and that she has \$250 in her purse from her withdrawal for personal expenses. Dave suggests to Bob that they can later split the money indicating his intent to deprive Jayne of the money by larceny. Bob, however, initially states that he will think about it. Because Bob walks past Jayne's table on the next day with intent to take her purse, he has indicated his agreement with Dave. Conspiracy may be inferred circumstantially--i.e. Bob's act of walking past Jayne's table and taking the purse.

Dave can be charged with conspiracy.

PINKERTON RULE

In Pinkerton, the co-conspirator in a crime is vicariously liable for the crimes committed by other co-conspirators that are foreseeable and in furtherance of the target crime.

Dave suggests that Bob take the purse and that they will split the money later. Dave will, therefore, be liable for the larceny of the purse and the money therein. Since Bob also remains in the res gestae of the crime when he assaults Phil and knocks him out of the way, he will be liable for assault and battery of Phil. He will also be liable for the assault and battery of Arlene and the homicide of Arlene and burglary.

ACCOMPLICE LIABILITY

An accomplice is one who knows of the crime and aids, abets, encourages, or assists the principal in the crime.

In this case, Dave may be considered an accomplice before the fact by providing the information to Bob regarding the purse and the contents of the purse. We do not have facts as to the possibility that Bob reached a place where he and Dave could split the money that is in the purse, but, if so, he could also be considered as an accomplice after the fact though it is more likely that, given the conspiracy, Dave will not be found to be an accomplice beyond the information he gave to Bob.

Dave may be charged with accomplice liability

CRIMES OF BOB

CONSPIRACY

See rule, supra.

Bob will attempt to show that he did not agree to take the purse or to split the money,

but it will be shown that he walked past the purse, took it and ran. The overt act in furtherance is one of Bob entering the shop with the walking past the purse that was known to have the \$250 in it.

Bob will be charged with conspiracy.

PINKERTON RULE

See rule, supra.

Here, Bob will be vicariously liable for the crimes of Dave that are both foreseeable and in furtherance of the target crime.

ACCOMPLICE LIABILITY

See rule, supra.

Here, Bob participates in the larceny of the purse of Jayne based on the information that he received from Dave. However, Dave is not shown in the fact pattern to have committed additional crimes in furtherance.

Bob is not likely to be charged as an accomplice.

BURGLARY

Burglary under the common law is the breaking and entering of the dwelling house of another at night with the intent to commit a felony.

Here, there is no breaking, as Bob entered the store during business hours. It is a store and not a dwelling house of another and it takes place during the day. However, modernly, the nighttime is dropped and the dwelling is replaced by any structure and the crime can be any crime. There does not have to be a breaking. Therefore, Bob has entered the store with the intent to commit a crime and meets the element of entry for a

criminal purpose. He is planning to take the purse, which is larceny, and meets the element of a crime.

Therefore, Bob will not meet the elements of common law burglary but will meet the elements of modern burglary and can be charged with that.

LARCENY OF THE PURSE

See rule, supra.

Bob walks by the purse that is lying on the table, takes it and runs. By taking the purse that is Jayne's and running, Bob has satisfied the elements of trespassory taking (Jayne's property), carrying away (running) with the intent to permanently deprive (the agreement to take the purse and split the money with Dave).

Therefore, Bob will be charged with larceny of the purse.

ASSAULT OF PHIL

Assault is the apprehension of a battery or attempted battery.

Bob runs out the door with the purse and Phil, who has seen what is happening, stands in his way and blocks the door. It is reasonable to expect that Phil said that Bob was running toward him and would have been apprehensive that Bob would, in fact, run into him. Bob will assert that Phil was interfering and that he should have gotten out of the way. However, this will not be a viable excuse.

Bob will be charged with assault of Phil.

BATTERY OF PHIL

Battery is the use of force for harmful or offensive touch that may cause bodily injury.

Bob knocked Phil over as he stood in the way of Bob's egress of the store. Knocking

someone over would be considered both an offensive touch and likely harmful with the potential for bodily injury. Bob will assert that he merely moved Phil out of the way. However, this will not be a viable excuse.

Therefore, Bob will be charged with battery of Phil.

ASSAULT OF ARLENE

See rule, supra.

Bob is not looking and collides with Arlene. If Arlene was looking and saw that Bob was running in her direction and not looking, it is likely that she was aware of the potential for being hit or knocked over. Bob is moving quickly and not looking. Since assault is a specific intent crime and one engages in it with the reasonable expectation that the resulting harm will occur--Bob may have an argument that he did not intend to hit Arlene. However, Bob is running and out in the street where there are likely to be people who are moving along the sidewalks. Bob would be expected to know that he is likely to contact someone.

Therefore, Bob can be charged with the assault of Arlene. This is a lesser included crime and will merge with the battery and the homicide.

BATTERY OF ARLENE

See rule, supra.

Bob collides with Arlene and knocks her to ground where she hits her head. This is harmful and causes serious bodily injury. Bob will have no further argument beyond that fact that he did not see her and did not intend to run into her, but would have had to know that the street would be occupied by people that he could contact while running.

Bob will be charged with battery of Arlene.

HOMICIDE OF ARLENE

Homicide is the unlawful killing another.

Arlene is a person who is knocked to the ground by Bob, hits her head and dies. Therefore, there is a homicide.

CAUSATION

ACTUAL CAUSE

Actual cause is the "but for" the actions of the D, the harm would not have resulted.

Here, Bob has stolen a purse and is running from the store that he has committed the crime in. He collides with Arlene, whom he will argue that he did not see, but who is knocked to the ground and dies. But for the running that Bob is doing to escape the scene of the crime, Arlene would not have been knocked to the ground and died.

Therefore, Bob is the actual cause of the death of Arlene.

PROXIMATE CAUSE

Proximate cause is the natural and foreseeable consequence of the actions of D without intervening acts that would break the causal chain.

Here, Bob is running from the store. It is foreseeable that the street would be filled with people and that he would contact one or more of them in the course of running without looking. Bob will argue that he did not see Arlene and could not avoid her. He will attempt to show that she should have moved and did not. However, it is likely that this will not present a viable intervening event.

Bob will be the actual and proximate cause of the death.

MURDER

Murder is the unlawful killing of another with malice aforethought.

Here, Arlene is knocked to the ground and dies as the result of Bob running into her.

MALICE

Malice can be implied or expressed in intent to kill, intent to inflict seriously bodily injury, depraved heart killing, or in the commission of a felony.

INTENT TO KILL/INTENT TO INFLICT SERIOUS BODILY INJURY

Intent to kill and intent to inflict serious bodily injury may be inferred with the use of a deadly weapon or an act that is known, or that the D is substantially certain, will cause the death.

Bob is running after stealing a purse. He is unarmed and is not looking as he flees the scene. He will assert that he did not see Arlene and had no intent to harm or to cause any injury. The evidence here shows that Bob did not have the intent or the intent to inflict serious bodily injury, but that he was simply fleeing the scene.

Therefore, there is no intent to kill or intent to inflict serious bodily injury.

DEPRAVED HEART

Depraved heart killing is the reckless disregard for the value of a human life.

Here, it can be shown that by running down a street during business hours, fleeing the scene of a larceny, that Bob displayed a reckless disregard for the persons who were on the street. However, it is unlikely that this degree of reckless behavior would rise to depraved heart killing of Arlene.

Therefore, Bob is not likely to be charged with depraved heart.

FELONY MURDER

Felony murder is one that takes place during the commission of an inherently dangerous crime such as burglary, rape, robbery, or arson.

Here Bob takes a purse with reportedly \$250 dollars in it. This is likely a larceny and not a robbery, as there is no force that was applied. Therefore, the crime of the death of Arlene will not meet felony murder.

DEGREE OF MURDER

Murder in the first degree is one with premeditation and deliberation or in the commission of an enumerated felony.

Here, Bob takes the purse and runs but there is not a felony. He hits Arlene as he is running and did not apply deliberation or premeditation.

Therefore, it is likely that Bob will be charged with second degree.

MITIGATION

A person may mitigate murder to manslaughter with imperfect self-defense, mistaken justification.

INVOLUNTARY MANSLAUGHTER

Involuntary manslaughter is the unintentional killing of another with recklessness or criminal negligence or during the commission of a misdemeanor.

Here, Bob hits Arlene as he is carelessly running down the street. He will admit that he was reckless in running down the street without looking, but that he was not so reckless as to meet the elements of depraved heart. He will also assert that he took a purse that didn't have much money in it, it was his first offense and that he hit Arlene accidentally in his fear of being caught. The State will likely show that the crime was not a felony

and that this murder will fall under the misdemeanor murder rule.

The killing of Arlene was likely unintentional and reckless, and Bob will be charged with involuntary manslaughter for her death.

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ESSAY QUESTION 2 OF 4

Answer All 4 Questions



California First-Year Law Students' Examination

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

You should answer according to legal theories and principles of general application.

QUESTION 2

Martha is a college student living in a condominium (“condo”) owned by her uncle, John. On various occasions, John promised Martha that he would give her the condo when she graduates, which she will do in a few months.

Martha had suggested to John that the condo needed repainting. Recently, John saw his friend Karl, a painter, and offered him \$3,000 if Karl would “within the next three weeks, repaint the interior walls of my small condo where my niece Martha lives.” John said that he would supply Karl with all the paint. Karl orally agreed to do the painting, thinking that the condo was in the same city where both John and Karl lived. In fact, the condo was 250 miles away.

Two weeks later, Karl’s painting truck with all his equipment was destroyed in an accident that was not Karl’s fault. When Karl called John to tell him that he would not be able to paint the condo as scheduled, he learned for the first time that the condo was 250 miles away. Karl told John that he very much doubted that he would be able to replace his truck and equipment quickly. Karl also told John that, even then, he would not be able to paint a condo 250 miles away for \$3,000 unless John paid all his travel and lodging expenses. John told Karl, “Let’s forget about the whole thing.”

Martha was disappointed to hear that John was not going to have the condo repainted, so she told him that she would pay someone else \$3,000 to have it done. At her painting contractor’s suggestion, she paid him an additional \$12,000 to install a new kitchen floor, new kitchen appliances, and new bathroom fixtures.

After Martha graduated, John told her that he could no longer afford to give her the condo and instead would be selling it.

1. What claim or claims can Martha bring against Karl, if any? Discuss.
2. What defense or defenses can Karl assert against Martha, if any? Discuss.
3. What claim or claims can Martha bring against John, if any? Discuss.
4. What defense or defenses can John assert against Martha, if any? Discuss.

QUESTION 2: SELECTED ANSWER A

1. *What claim or claims can Martha bring against Karl, if any?*

Martha v. Karl

Governing Law:

The Uniform Commercial Code (UCC) governs any contract which deals with the retail of goods as defined as moveable tangible objects at the time of sale. Any contract not governed by UCC would be governed by Common Law (CL).

Here, the contract in question is a service contract. The service being Karl painting the condo where Martha lives by contract with John, Martha's uncle. The paint would be supplied by John (J) and therefore the sale of goods (paint) would not be part of the contract between J and Karl (K).

Therefore, the governing law is CL.

Contract:

A contract is a promissory agreement between two or more parties such that there is remedy for breach or an obligation becomes a duty when parties are bound. An enforceable contract requires a valid offer, acceptance, and consideration without defenses.

Mutual Assent:

Mutual assent is a valid offer and acceptance.

Offer:

An offer is an outward manifestation of present contractual agreement communicated to

another party such that upon acceptance, the parties are bound. Under CL, an offer must contain definite terms including quantity, time for performance, identity of parties, price, and subject matter.

Here, J (one party) communicated to K (second party) that he would pay \$ 3000 (price) for K to "repaint the interior walls of my small condo where my niece Martha lives" (quantity is 1 apartment, subject matter pertains to J's specific condo) "within the next three weeks" (time for performance). The short timeframe indicates present contractual intent.

Therefore, there is a valid offer.

Acceptance:

Acceptance is an outward manifestation of assent communicated to the offeror. Under CL, the acceptance must be a mirror image of the offer.

Here, K orally agreed to do the painting. This indicates that K was agreeing to do the painting of the condo for the aforementioned price within the timeframe.

Therefore, there is a mirror image acceptance which is a valid acceptance under CL.

Therefore, there is mutual assent.

Consideration:

Consideration is the bargained for exchange such that there is detriment to the offeror or benefit to the offeree.

Here, K, in exchange for \$3000 (detriment to J), will paint the condo for J.

Therefore, there is valid consideration.

Therefore, there is a valid contract.

Defenses to Formation:

Statute of Frauds (SOF):

SOF enforces that certain contracts dealing with the subject matter of marriage, cannot be completed within a year, land sale, executorship, sale of goods equal to or greater than \$500, and suretyship require sufficient writing in order to be enforceable.

Here, the contract does not deal with any of the subject matters to which SOF applies.

Therefore, SOF will not bar enforceability of the contract.

Terms:

Ambiguity:

Ambiguity is when there is a term which is not clearly defined, and the parties may not know what the other meant.

Here, M will argue that K should have asked for more specific information prior to agreeing to repaint the condo. K will argue that the term "the small condo where my niece lives" was ambiguous. K will argue that it was not clear that the condo was not 250 miles away. K will argue that this ambiguity caused him to agree to a price without all of the information.

Therefore, there is ambiguity to the terms.

Third Party Beneficiary (TPB):

Third Party Beneficiary is when the benefit of the contract is a third party, not party to the contract.

Incidental or Intended Beneficiary:

Incidental Beneficiary is one who is not named in the contract and is just tangentially

benefitting from the agreement between two other parties. An Intended Beneficiary is one who is expressly named in the contract of the other parties and who the contract was intended to benefit.

Here, Martha (M) was named in the contract as "my niece" when naming the condo where "my niece" lives. While K may argue that J may have more than one niece, the facts indicate that only M lives at this condo.

Therefore, M is an intended beneficiary.

Creditor or Donee Beneficiary:

A Creditor Beneficiary is one where the duty was owed by one of the parties and the TPB established to extract the duty owed to the TPB. A Donee Beneficiary is one where the purpose is to extract a gift from one of the parties of the contract.

Here, K will argue that there is no duty owed to M, as M merely suggested to J that the condo needed repainting. K will argue that J was merely bestowing a gift on M.

Therefore, M is a donee TPB.

Performance:

Discharge by Impossibility:

Discharge by impossibility is when there is an event that was not foreseen which renders the performance of the contract impossible.

Here, K will argue that the painting of the truck and equipment destruction in the accident made it impossible for him to complete the contract. M will argue that K could have found a different truck and borrowed equipment in order to complete within the timeframe.

Therefore, there is no discharge by impossibility.

Discharge by Impracticability:

Discharge by impracticability occurs when there is an unforeseen event which renders the performance impracticable without severe burden to the performer.

Here, K will argue that the accident will render his performance impracticable, as replacement of his truck and equipment or alternatively rental of, would require significant financial burden to him.

Therefore, there may be discharge based on impracticability.

Frustration of Purpose:

Frustration of purpose occurs when an event occurs that was unforeseen that renders the purpose of the contract non-existent.

Here, there is no frustration of purpose because the accident did not render the condo's need for repainting void.

Therefore, there is no frustration of purpose.

Mistake:

Unilateral mistake is when there is a single party that is in mistake that is material to the contract. The contract may be voided if the mistaken party is not the breaching party.

Here, K will argue that he was in mistake as to the location of the condo. K will argue that this is material to the contract because it would have impacted the price that he would have charged as it would have required travel and lodging expenses.

Therefore, there may be unilateral mistake.

Anticipatory Repudiation:

Anticipatory repudiation occurs when one party announces prior to time for completion that they will not be performing. The non-offending party may sue for total breach immediately.

Here, K announces that he will not be able to replace the truck in time to complete the painting.

Therefore, K anticipatorily repudiated and can be sued for total breach.

Discharge by Accord and Satisfaction:

This occurs when there is a modification of terms that occurs afterwards that the other party agrees to and is satisfied upon performance. This requires additional consideration. This will discharge party from original duty.

Here, K argues to modify the terms of the agreement by including expenses for travel and lodging. K will argue that the new knowledge that the condo was 250 miles away was sufficient new consideration, as it was not expressly part of the original contract satisfying new consideration. J, though, decides not to agree.

Therefore, there is no discharge by accord and satisfaction, as there was no accord and no performance to satisfy.

Rescission:

This occurs when both parties agree to not move forward with the contract.

Here, K will argue that he was not going to move forward with the contract due to the destroyed truck and equipment as well as ambiguous term of location of condo and J also says, "Let's forget about the whole thing".

Therefore, there is rescission of contract and both parties are relieved of duty.

Breach:

Breach occurs when a party fails to perform.

Major Breach:

Major breach occurs when the beneficiary of the contract fails to receive substantial benefit.

Here, M will argue that K did not substantially perform, as he failed to perform at all.

Therefore, there was a major breach.

Damages/Remedies:

Here, M will argue that she is entitled to specific performance of K painting the condo or expectation damages of the price of the contract of \$3000.

However, as M is a donee TPB, she is not entitled to sue K. Additionally, K was relieved from duty as analyzed supra.

Therefore, M will not recover from K.

2. What defenses can K assert against Martha?

As analyzed supra, K can assert discharge by impracticability, ambiguity, mistake, and rescission.

3. What claim or claims can Martha bring against John?

Governing Law:

Defined supra.

Here, this pertains to the sale of real property.

Therefore, the governing law is CL.

Contracts:

Defined supra.

Mutual Assent:

Defined supra.

Offer:

Defined supra.

Here, M will argue that J offered the condo to her. J will argue that there was no offer, as there was no price associated.

Therefore, there was no offer.

Acceptance:

Defined supra.

Here, M will argue that she accepted J's offer by continuing to live there. J will argue that there was no offer so therefore, there could be no mirror image acceptance.

Therefore, there is no acceptance.

Therefore, there is no mutual assent.

Consideration:

Defined supra.

Here, M will argue that there was consideration of her being a good niece. J will argue that past performance does not satisfy consideration.

Therefore, there is no consideration.

Therefore, there is no valid contract.

Promissory Estoppel:

Promissory estoppel is when one party is in reliance of performance of another and acts in reliance of that promise.

Here, M will argue that she acted in reliance on J's promise on "multiple occasions" that he would give her the condo when she graduated. J will argue that this was a gratuitous gift and therefore not enforceable. M will argue that she acted in reliance of this promise when she paid for the painting as well as the kitchen floor, kitchen appliances and bathroom fixtures.

Therefore, J would be unjustly enriched if not held to the promise and there is promissory estoppel.

Defenses to Formation:

SOF

Defined supra.

Here, J will argue that there was no writing, and this dealt with the sale of land.

Therefore, J will argue that there was no enforceable contract.

Breach:

Defined supra.

Here J did not give the condo.

Therefore, there is breach.

Damages/Remedies:

Specific Performance:

M will argue that J should give her the condo.

Compensatory Performance:

Reliance Damages - recover payments

M may recover \$15000 that she spent in reliance of J's promise.

4. ***What defenses can J assert?***

Analyzed supra. in question 3.

QUESTION 2: SELECTED ANSWER B

WHAT CLAIM OR CLAIMS CAN MARTHA BRING AGAINST KARL IF ANY?

MARTHA V. KARL

APPLICABLE LAW

The Uniform Commercial Code governs contracts for the sale of tangible, moveable goods. All other contracts fall under the Common Law.

The subject matter between Martha and Karl is painting a condo. Although painting would generally include providing paint, which is a tangible, moveable good, the predominant purpose of this painting agreement was for the service of having the condo painted. In addition, John, not Karl, was providing the paint. Thus, this agreement falls under the common law.

APPLICABLE STANDARD

The parties will be held to the standard of good faith.

STATUTE OF FRAUDS

Contracts which are not capable of being performed within one year, contracts for an interest in land, contracts in consideration of marriage, suretyship contracts and contracts for the sale of goods over \$500 fall within the Statute of Frauds and must be in writing in order to be enforceable.

This contract was for the painting of a condo which does not fall in any of these categories. Thus, it is enforceable regardless of whether it is oral or written.

CONTRACT BETWEEN JOHN AND KARL

Martha is trying to enforce the contract as a third party. Thus, first it must be established that there was an enforceable contract between the contracting parties, Karl, and John.

I. *FORMATION*

Offer

An offer is an outward manifestation of present contractual intent, clear and definite in its terms, communicated to the offeree and creating in the offeree a reasonable expectation that the offeror intends to be bound by the terms of the offer.

Here, John offered Karl \$3000 if Karl would, "within the next three weeks, repaint the interior walls of my small condo where my niece Martha lives."

For an offer to be sufficiently definite under the common law, it must include quantity, time of performance, identity of parties, price, and subject matter.

Here John included quantity (1 condo), time of performance (within the next three weeks), identity of parties (John and Karl), price (\$3000), and subject matter (painting the condo).

This was a valid offer under the common law.

Acceptance

A legal acceptance is an unqualified assent to the terms of an offer.

Here, the facts say Karl "orally agreed to do the painting." This was an unqualified assent. Thus, it appears there is a legally valid offer.

Mutual Assent/Meeting of the minds

However, Karl thought the condo was in the same city where he lived. Karl will argue that this means there was no mutual assent, because there was no meeting of the minds as to the subject matter of the contract.

Under the **objective theory of contracts**, generally the parties are judged under a reasonable interpretation of their communications. There was no statement as to where the condo was in the offer or acceptance. Thus, it appears that it was not reasonable to assume its location.

However, Karl will argue that a reasonable interpretation of the parties' communications would not indicate a long-distance painting job. Most people hire painters locally.

Courts err on the side of finding a contract in cases of doubt. It is likely that a court would find a reasonable interpretation of the parties' communications, would find mutual assent, and that a contract was formed.

Consideration

A bargained for exchange of legal benefit and legal detriment.

Here, John was to pay \$3000 and paint and gain a freshly painted condo. Karl was to provide his labor and gain \$3000.

Thus, there was valid consideration on both sides.

II. Third Party Rights

A third-party beneficiary is someone who has rights under a contract and whom the contracting parties intended to benefit at the time of formation.

Privity

Although Martha was not in privity to the painting contract, the third-party beneficiary contract privity requirement has been abolished under *Lawrence v. Fox*.

Intent to Benefit

Here, John contracted for painting the "small condo where my niece Martha lives."

Martha will argue that she is named in the contract and thus is intended as a beneficiary of the contract.

Karl will argue that it was merely an identification of which condo was being discussed, and clearly John was not contracting to benefit Martha as he was planning to sell the condo when she graduated, which was only in a few months. Thus, he will say the benefit to her was incidental and she should be an incidental beneficiary.

However, Martha had suggested painting it and would at least benefit for a few months so the court may find an intent to benefit.

Classification

Here, Martha was not a creditor of either party. A non-creditor beneficiary is a donee beneficiary. Martha is a donee beneficiary if she is not an incidental beneficiary as discussed above.

Vesting

Vesting occurs when a third-party beneficiary assents to the contract or changes position in reliance on it.

The parties are able to remove the third party benefit any time before vesting.

Here the parties did remove the benefit and Karl will argue this was before vesting.

However, the facts say Martha was "disappointed to hear" John was not going to have the condo repainted, so it appears she was aware and assented to the John/Karl contract. Thus, her rights likely vested.

Thus, there is likely a third-party beneficiary contract.

Defenses

Karl can assert any defenses he had against John. This would include mistake as discussed below. Also, his excuses to performance as discussed below.

III. Performance

Breach: Anticipatory Repudiation

When one party repudiates the contract before the time of performance, the other party has the option to treat it as a present breach and immediately suspend performance and sue for damages.

Here, the facts say that Karl's truck was in an accident two weeks after contracting, leaving a week before performance was due.

It appears that Karl told John he could not perform at that time. Although he offered to possibly perform if extra money would be given for travel and lodging, this still qualifies as a repudiation.

This was before performance was due. Thus, Karl anticipatorily repudiated the contract.

IV. Damages

Expectation Damages

Martha will claim expectation damages. Here, she paid \$3000 to get a condo painted, when she expected to get it for free. However, Karl will claim that who paid the painter is a matter between Martha and John. Karl will claim there are no expectation damages because the painter charged the same amount as he would have.

Incidental Damages

Martha can claim any expenses in finding another painter.

Consequential Damages

The painter's additional work was not foreseeable at the time of contracting and does not fall under consequential damages.

KARL'S DEFENSES?

Defenses to Formation

Mistake

In certain circumstances, a mistake may be grounds for voiding or reforming a contract.

Here, Karl thought that the subject of the contract was a condo in the same town. In fact, it was 250 miles away. Thus, he was mistaken as to a fact about the subject of the contract.

In general, **unilateral mistake** which is not a clerical error, is no defense to the formation of a contract. Poor judgment or not adequately informing one's self about a contract does not fall within a valid defense in usual circumstances.

There is an exception where the other party has reason to know of the mistaken party's mistake and takes advantage of it. There are no facts to show this here.

Karl did not make a basic inquiry about the location of the condo. Unless he can show that John knew or had reason to know about the mistake, he cannot get out of the contract based on his own failure to check into it.

Thus, Karl likely is unable to claim mistake.

Discharges of Duty

Impossibility

A party may be excused if their performance is objectively impossible. Here, despite the truck wreck, it is unlikely to be completely impossible. Karl could buy another truck and drive 250 miles. This defense will fail.

Impracticability

When performance becomes so difficult as to become extremely impracticable, through no fault of the defendant, the court may excuse the party's performance.

Here, because Karl's truck and all his equipment was destroyed through no fault of his own, likely he can claim impracticability.

Waiver

Here, Karl can claim that John waived his duty by saying "let's forget about the whole thing." Thus, he will claim he has no duty.

Rescission

Karl will claim that when John said "let's forget..." there was a rescission of the contract.

WHAT CLAIM OR CLAIMS CAN MARTHA BRING AGAINST JOHN IF ANY MARTHA V. JOHN

Here, there is no clear offer and acceptance (definitions supra). Merely a "promise" by John that he would give Martha the condo when she graduates. Generally, such promises are not enforceable.

However, Martha will claim there is a valid unilateral contract, in which John has offered to give her the condo if she graduates from college. Her graduating from

college would be her acceptance and also function as consideration (defined supra).

There may be a unilateral contract

Promissory Estoppel

If a promisor makes a promise which they can reasonably foresee will induce reliance on the part of the offeree, the promise may be enforceable to the extent necessary to prevent injustice.

Here, John has promised the condo.

He could reasonably foresee that she would rely on the promise.

In this case a court may grant Martha reliance damages (SEE BELOW).

Damages

Specific Performance

Under a unilateral contract theory, Martha will be seeking a conveyance of the property. Generally, courts do not grant specific performance but because land is unique, they may.

Reliance Damages

Under promissory estoppel, she may receive reliance damages for \$15,000 for painting and improvements. This may include her improvements to the property. John will argue they are not foreseeable. However, likely improving a property you believe you will own is foreseeable.

JOHN'S DEFENSES?

Impracticability

John will claim specific performance is impracticable because he can longer afford it.

Statute of Frauds

Supra.

There appears to be no writing between the parties, so generally a contract for an interest in land is not foreseeable. However, there is an exception where one has moved onto the land and made improvements such as to constitute part performance. She has spent a lot of money improving the property Thus the court may find this has been taken out of the statute and is enforceable.

November 2020

ESSAY QUESTION 3 OF 4

Answer All 4 Questions



California First-Year Law Students' Examination

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

You should answer according to legal theories and principles of general application.

QUESTION 3

Manufacturer produces and sells fully-assembled bicycles (“bikes”) directly to consumers. Alice purchased one of Manufacturer’s commuter bikes, the frame of which was composed of aluminum tubes welded together. Shortly after receiving her bike, Alice was riding it to work when, without warning, the frame collapsed, causing her to crash and suffer serious injuries.

Alice took the broken frame to a bike mechanic, who told her that several of the tubes had not been properly welded together. The mechanic told Alice that, “In my many years of repairing bikes, I have never seen such sloppy welds on this or any other brand of aluminum bikes.”

Bill purchased one of Manufacturer’s road racing bikes, the frame of which was composed of a carbon fiber making it much lighter than if it were made of aluminum. Many of Manufacturer’s competitors also produce racing bikes with carbon frames. In order to make its racing bikes lighter than any other similar bike on the market, Manufacturer reduced the thickness of the carbon tubing by one millimeter in comparison to its competitors. Several reviews of Manufacturer’s bike in bike racing magazines suggested that, although the bike was lighter, using less fiber carbon material made the bike less stable, slowing the bike down. According to these reviewers, using less fiber carbon material also made the frame considerably weaker and subject to breakage.

Six months later during a race, the frame on Bill’s bike collapsed, causing him to suffer serious injuries. An investigation of the crash revealed that one of the carbon fiber tubes on Bill’s bike had cracked and broken in half.

1. On what theory or theories of liability could Alice reasonably sue Manufacturer? Discuss.
2. On what theory or theories of liability could Bill reasonably sue Manufacturer? Discuss.

QUESTION 3: SELECTED ANSWER A

1. *Alice v. Manufacturer*

Strict Products Liability

In strict products liability, Manufacturer has an absolute duty as a commercial supplier not to put a defective product into the stream of commerce. In the case at hand, Manufacturer produces and sells fully assembled bikes, which makes him the commercial supplier who is the proper person to sue.

Liability

Is this a defective product? To see if this a defective product courts use the consumer expectation test - Did the product perform as safely as a reasonable consumer would have expected? Here, the frame of the bike collapsed without warning resulting in her crashing and seriously injuring herself. A reasonable consumer would not expect a bike they just bought to collapse while they were riding it, and the bike clearly did not perform safely as Alice's resulting injury shows. Some states, such as California also require that the existence of a defect be present at the time it left the manufacturer's hands and that it be the proximate cause of the plaintiff's injury. As Manufacturer makes the bikes and ships them directly to customers themselves, and that the bike mechanic said that the bike collapsed as a result of poor welding, it can be assumed that the existence of a defect was present when it left manufacturer's possession. Proximate cause will be discussed later.

What sort of defect is this? A manufacturing defect is where one product is different from the others. Here, Alice's bike mechanic said that "in all his years, he had never seen such sloppy welding on this or any other brand of aluminum bikes." This

statement shows that not only is the mechanic familiar with aluminum bikes, but that he is also familiar with Manufacturer's bikes. If he is saying that this is the sloppiest welding that he has ever seen, it is most likely that this is a manufacturing defect.

Causation

Actual Cause can be established using the but for test: But for Manufacturer's poor welding, would Alice have crashed and injured herself while riding her new bike?

Essentially, was Manufacturer's sloppy welding the sole, exclusive, and direct cause of Alice's injury. The facts do not show that Alice or anything else for that matter was involved in causing her injury, Alice was using her bike in the manner in which it was intended and without warning the bike collapsed. From the facts provided, the defect appears to be the actual cause of Alice's injury.

Proximate cause is a way of assessing liability based on the examination of intervening forces and the foreseeability of the plaintiff's injury which may limit the defendant's liability. Simply, are there any outside forces that may break the chain of causation and cut off the defendant's liability. Here, the facts do not show any outside intervening or superseding forces that would limit Manufacturer's liability, and the injury Alice suffered from falling off her bike is easily foreseeable. It appears that the defect is the proximate cause of Alice's injury.

Injury

Alice's injury is established in the facts when she fell from the bike collapsing and seriously injuring herself.

Manufacturer's Defenses

In strict products liability, the only defense available is assumption of the risk. Did Alice

know of the risk the defect created and did she voluntarily assume it? Here, the facts give no evidence that there were any risks or defects known about the bike, Manufacturer may argue that the risk of falling off a bike is inherent in the product, but it will not likely stand as Alice fell from her bike as a result of the defect.

Conclusion

Alice will likely prevail in a strict products liability suit against Manufacturer.

Negligent Products Liability

Duty

What is the applicable standard of care? Here, Manufacturer as a commercial supplier had a duty as a reasonable commercial supplier not to put a defective product into the stream of commerce. To whom is a duty owed? A duty is owed to any foreseeable plaintiff who could have reasonably foreseen the risk and harm under the circumstances. Here, as a supplier of bikes, Manufacturer has a duty to take due precautions to prevent defective products from injuring their customers such as in the case at hand with Alice.

Breach

In manufacturing defects, the plaintiff may use *res ipsa loquitur* to establish a breach. *Res Ipsa Loquitur* "The thing speaks for itself" requires that the plaintiff prove that the thing that caused their injury was in the exclusive control of the defendant, that the only possibility of it happening came from the defendant, that it would not have happened unless someone was negligent, and that the plaintiff was not negligent either. Here, there is no evidence of Alice acting negligently, so the burden of proof falls on Manufacturer to prove that they did not breach their duty. From the facts gathered, and

from the bike mechanic's observations, Manufacturer does not have any defenses to disprove *res ipsa loquitur*.

Please incorporate the previous strict products liability analysis of: the existence of a defect, the type of defect, Causation, Injury, And defenses as they are all the same, except for defenses:

Defenses

In negligence, Comparative negligence and Contributory negligence are also available along with assumption of the risk (*supra*). In contributory negligence if a plaintiff is found to also have been negligent in causing their own injury, then they are completely barred from recovery. Comparative negligence weighs the plaintiff's negligence against the Defendant's negligence and awards damages based on how much the other side is at fault. As there is no evidence of Alice being negligent at all, comparative and contributory negligence are not a defense for Manufacturer.

Warranties

Implied Warranty of Merchantability (IWM)

IWM states that when a seller of a certain kind of goods makes an implied warranty the goods are generally acceptable by those who deal in goods of the kind, and that they are fit for ordinary use. Here, the Bike did not perform as expected when the bike's frame broke without any damage coming from anywhere else.

2. Bill v. Manufacturer

Strict Products Liability

Supra.

Liability

Supra. - consumer expectation test. What type of defect is this? Design defects are when an entire line of products is defective. In design defects, courts generally use the feasible alternative test - Was there a reasonably less dangerous and economically feasible modification or alternative available? Here, because Manufacturer was trying to gain a competitive edge over their competition, they made the carbon fibers of the bike thinner than other bikes built for a similar purpose. Because of this and all of the negative magazine reviews, it is reasonable to foresee that there was a feasible alternative available that Manufacturer did not use. Warning Defects are when warnings on a product are not clear and complete. Here, Manufacturer could have put a warning on the bike that it is made with a thinner frame that may cause instability or breakage, as evidenced by the magazine reviews.

Actual Cause

Supra Definition. Again, the bike came directly from the manufacturer. There may however have been damage to Bill's bike over the 6 months of use that may have been a contributing factor, but it is not established in the facts. Manufacturer is most likely the actual cause.

Proximate Cause

Supra Definition. There appears to be no intervening cause and Bill's injury was foreseeable.

Injury

Established by the facts.

Damages

Supra.

Negligence Products Liability

Duty

Supra.

Breach

Supra - Except in Design defects, plaintiff must prove that the designers of the defective product either knew or should have known of the defect. Here, because of all the bad publicity in the racing bike's reviews in bike magazines, Manufacturer knew or should have known about the risk of the bike breaking.

Causation

Supra.

Injury

Supra.

Defenses

Supra.

Warranties

Implied Warranty of Merchantability (IWM)

IWM states that when a seller of a certain kind of goods makes an implied warranty the goods are generally acceptable by those who deal in goods of the kind, and that they are fit for ordinary use. Here, the Bike did not perform as expected when the bike's

frame broke without any damage coming from anywhere else.

Implied warranty of fitness for a particular purpose (IWF)

IWF states that there is an implied warranty when the seller knows or has reason to know that the goods required are for a particular purpose, and that the buyer is relying on the seller's knowledge or skill to furnish or select suitable goods. Here, Bill races bikes, and Manufacturer sold Bill their bike as a bike built for the specific purpose of racing. Because of this Manufacturer appears to have breached their IMF.

QUESTION 3: SELECTED ANSWER B

Alice vs Manufacturer

A manufacturer, distributor, or seller that places a defective product into the stream of commerce can be liable under different theories including strict liability, negligence, warranty, and even intentional tort as describe infra.

Strict Liability

Identification of parties - Manufacturer is one that devotes to the sale and fully assembles bikes - Alice is a customer that purchased a bike from Manufacturer.

In order to assert a claim under strict liability, we need to determine if the product was defective. This could include manufacturing defect, design defect or lack of warning.

A manufacturer defect is when the product does not comply to the company's own standard of the product. Here the facts indicate that when Alice took the bike to the mechanic, she was told that the tubes had not been properly welded together. This means that there was a defect as the tubes were not welded as intending and causing the bike to have a defect.

Actual Cause - of cause in fact. This can be determined utilizing BUT FOR TEST. Here, but for M's failure to inspect the Bike and make it safe, Alice would not have suffered the serious injuries. The fact that the frame collapsed was attributed to M's failure to properly weld the tubes.

Thus, M is the proximate cause of the injures of Alice.

Proximate Cause - When there are no intervening causes that breach the chain of causation, D is liable. Here it was foreseeable that if the tubes were not well welded the

frame could collapse.

Thus, M is liable for the injuries to Alice.

If Alice can prove based on this evidence, M will be liable under strict liability to compensate Alice for the serious injuries that Alice suffered as a result of a defective product that manufacturer placed in the stream of commerce.

Defenses - Contributory negligence - When a P is responsible for his contributory negligence to his own injuries as he does not take the proper care. Under strict liability - this is never a valid defense. The product was defective and under no circumstance Alice contributed to her injury.

Comparative negligence - This DOES NOT apply as explained before, the product was defective and under strict liability this defense will not apply.

Assumption of the risk - A person can be barred from recovery when the P knew the risk of the activity and knowing the risk undertook the activity. Here there is no indication that Alice took the risk, as she was not aware that the bike was defective.

Damages - Alice suffered serious injuries. She would be compensated for general and special damages including pain and suffering, medical bills, and loss of work.

Negligence

Negligence - In order for Alice to prove a prima facie case of negligence, Alice needs to prove that manufacturer owed Alice a duty, that the duty was breached, and that Alice's injuries were the result of the actual and proximate cause of the breach.

General duty - This can be measured under the reasonable person test. A manufacturer owed a duty to Alice to act as a reasonable manufacturer under the circumstances. He needed to comply and ensured that his bikes were safe to prevent any injury to

purchasers. Thus, Manufacturer owed duty to Alice.

Breach of duty - Here M breached his duty, as M placed a defective product into the stream of commerce. M had a duty to inspect and ensure that the bike complied with the requirements and that all tubes were properly welded together. As explained supra, the bike was a manufacturing defect and this is enough to show that M breached its duty. M was supposed to inspect and to ensure M bikes were as intended.

Thus, M breached its duty.

Actual Cause - of cause in fact. This can be determined utilizing BUT FOR TEST. Here, but for M's failure to inspect the Bike and make it safe, Alice would not have suffered the serious injuries. The fact that the frame collapsed was attributed to M's failure to properly weld the tubes.

Thus, M is the proximate cause of the injuries of Alice.

Proximate Cause - When there are no intervening causes that breach the chain of causation, D is liable. Here it was foreseeable that if the tubes were not well welded the frame could collapse.

Defenses - Contributory negligence - When a P is responsible for his contributory negligence to his own injuries as he does not take the proper care. The product was defective and under no circumstance Alice contributed to her injury.

Comparative negligence - This does NOT apply as explained before, the product was defective and Alice did not contribute to her injury. She did not alter or do anything to modify the bike. Thus, there was no fault of her own.

Assumption of the risk - A person can be barred from recovery when the P knows the risk of the activity and knowing the risk undertakes the activity. Here there is no

indication that Alice took the risk, as she was not aware that the bike was defective.

Damages - Alice suffered serious injuries. She would be compensated for general and special damages including pain and suffering, medical bills, and loss of work.

Intentional Tort - Battery

Alice will not be able to bring a suit under intentional tort as there is no indication that M knew that the bike was defective and still sold the bike.

Warranty

Under the theory of warranty - Alice can also bring a suit. M is expected to produce a product that complies with the intended use and that works properly. Here by M placing a defective product M was breaching the warranty of the product.

M has a duty to produce a product intended for the use of riding in a safe manner and by breaching the duty and providing a defective product that did not comply with the basics for the implied warranty of the product, M will be liable as explained supra.

Actual Cause - of cause in fact. This can be determined utilizing BUT FOR TEST. Here but for M's failure to inspect the Bike and make it safe, Alice would not have suffered the serious injuries. The fact that the frame collapsed was attributed to M's failure to properly weld the tubes.

Thus, M is the proximate cause of the injuries of Alice.

Proximate Cause – When there are no intervening causes that breach the chain of causation, D is liable. Here it was foreseeable that if the tubes were not well welded the frame could collapse.

Defenses - Contributory negligence - When a P is responsible for his contributory

negligence for his own injures as he does not take the proper care. The product was defective and under no circumstance Alice contributed to her injury.

Comparative negligence - This does NOT apply as explained before, the product was defective and Alice did not contribute to her injury. She did not alter or do anything to modify the bike. Thus, there was no fault of her own.

Assumption of the risk - A person can be barred from recovery when the P knows the risk of the activity and knowing the risk undertakes the activity. Here there is no indication that Alice took the risk, as she was not aware that the bike was defective.

M will be liable and has to compensate Alice for pain and suffering as well medical bills for the injuries.

Bill vs Manufacturer

A manufacturer, distributor, or seller that places a defective product into the stream of commerce can be liable under different theories including strict liability, negligence, warranty, and even intentional tort as described infra.

Strict Liability

Identification of parties - Manufacturer is one that devotes to the sale and fully assembles bikes. Bill is a customer that purchased a bike from Manufacturer. Manufacturer produces racing bikes with carbon frames. Bill intended to use the bike for competition.

In order to assert a claim under strict liability, we need to determine if the product was defective. This could include manufacturing defect, design defect, or lack of warning.

A DESIGN DEFECT is when the product is not safe due to the design and when there are other designs that make safe the product. Here the facts indicate that M devotes to

also producing bikes for racing with carbon frames. He uses the carbon frames to make the bikes lighter than other similar bikes on the market. However, if B can prove that the design was defective as the utility of using the carbon frames affects the safety of the bike, then the court will determine that there is an alternative design. The facts indicate that there are magazines that state that although the using the carbon frames makes the bikes lighter, the bikes are less stable.

Thus, there is a defect on the design.

Actual Cause - of cause in fact. This can be determined utilizing BUT FOR TEST. Here, but for M using the carbon tubes, the bike was not safe and B would not have suffered the serious injuries. The fact that the frame collapsed was attributed to M failure to properly weld the tubes.

Thus, M is the proximate cause of the injuries to Bill.

Proximate Cause - When there are no intervening causes that breach the chain of causation, D is liable. Here it was foreseeable that by making the tubes 1 mi lighter the bike will fail.

Thus, M is liable for the injuries to B.

If B can prove based on this evidence, M will be liable under strict liability to compensate B for the serious injuries suffered as a result of a defective product that design placed in the stream of commerce.

Defenses - Contributory negligence - When a P is responsible for his contributory negligence for his own injures as he does not take the proper care. Under strict liability - this is never a valid defense. The product was defective and under no circumstance B contributed to her injury.

Comparative negligence - This DOES NOT apply as explained before, the product was defective and under strict liability this defense will not apply.

Assumption of the risk - A person can be barred from recovery when the P knows the risk of the activity and knowing the risk undertakes the activity. Here, there is no indication that B took the risk, as she was not aware that the bike was defective.

Damages - B suffered serious injuries. B would be compensated for general and special damages including pain and suffering, medical bills and loss of work.

Negligence

Defined supra.

Breached duty as the design

No valid defenses

Defective product

Warranty

Product was defective, as it did not comply with intended use.

Liable for design defect - M will pay for suffering and medical bills.

November 2020

ESSAY QUESTION 4 OF 4

Answer All 4 Questions



California First-Year Law Students' Examination

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

You should answer according to legal theories and principles of general application.

QUESTION 4

Seller is in the business of building and selling musical instruments. Buyer is a recording artist who tours giving concerts for a living. Ten years ago, Seller sold Buyer a banjo for \$10,000 pursuant to a written contract. Although that contract did not mention a touring banjo case, Seller gave one to Buyer along with the banjo at no additional cost.

Six months ago, Seller and Buyer agreed that for \$15,000 Seller would specially manufacture a custom banjo for Buyer with Buyer's name engraved on the neck of the banjo. Halfway into the project, Seller and Buyer agreed to increase the price of the banjo to \$20,000 due to an increase in the cost of materials. When Seller delivered the banjo, Buyer refused to accept it because Seller had not included a touring banjo case.

Because Buyer's name was engraved on the neck of the banjo, Seller could only sell it for \$5,000. In addition, Seller had to pay a \$1,000 commission to a musical instrument dealer who found the new purchaser.

Seller has now sued Buyer for breach of contract.

1. Buyer claims that the agreement to buy the custom banjo is invalid because it was not in writing. Will Buyer prevail on this claim? Discuss.
2. Buyer claims that the agreement to increase the price from \$15,000 to \$20,000 was invalid due to a lack of consideration. Will Buyer prevail on this claim? Discuss.
3. Buyer claims that Seller breached the contract because no touring banjo case was delivered as had been done before. Will Buyer prevail on this claim? Discuss.
4. If Seller prevails, what damages, if any, should he be awarded? Discuss.

QUESTION 4: SELECTED ANSWER A

Buyer vs Seller

Applicable Governing Law

Contracts for the sale of tangible movable goods are governed by Article 2 of the Uniform Commercial Code or UCC.

Here, the item in question is a custom banjo which is a tangible and movable good.

Therefore, Article 2 of the UCC governs this transaction.

Merchants

Merchants are those that regularly deal with a particular good or have specialized knowledge or use of the good.

Here, Seller is in the business of building and selling musical instruments. Buyer is a recording artist who tours and gives concerts for a living. It is clear that seller is definitely a merchant, but could be argued whether or not buyer is a merchant as it pertains specifically to the purchase of the banjo versus musical instruments in general. It is more likely than not since buyer is an artist and has done previous deals with the seller, buyer will be considered a merchant as well. Both parties as merchants then must follow a higher standard of care when dealing with each other as compared to non-merchant buyers and sellers.

1.) Whether buyer's claim to buy custom banjo is invalid because it was not in writing?

Contract formation

In order for an agreement to become a legally enforceable one or contract, there must

be mutual assent which is an offer and acceptance, consideration and no defenses to formation. An offer consists of a communicated commitment of certain terms by the offeror to be bound to its terms if accepted by the offeree. Consideration is what makes the agreement legally binding and is the bargained for exchange between the two parties. In other words, what is each person willing to give up in order to receive something from the other party to the agreement. Lastly there can be no defenses to formation such as unconscionability, duress, fraud, or misrepresentation.

Here, the dispute arises when buyer refused to accept a custom-made banjo from seller because seller did not include a touring banjo case along with it. Six months ago, buyer and seller agreed that in exchange for \$15,000 from Buyer that seller would build a custom banjo with the buyer's name engraved on the neck of the instrument. Thus, a legally enforceable agreement has been satisfied, pending Statute of Frauds.

Statute of Frauds

The Statute of Frauds doctrine states that in order for certain types of agreements to be legally enforceable they must be in writing and signed by the party it is being charged against. One specific type agreement is for the sale of goods with a value over \$500.

Here, the agreement for the purchase of the banjo was originally for \$15,000, well above the \$500 limit. When buyer refused to accept the banjo, he was sued by the seller for breach of contract. Although buyer is right in that the contract must be in writing to be enforceable since the value of the goods is over \$500, there are certain exceptions to the Statute of Frauds requirement. In the current case, seller was not selling just any old plain banjo, but a custom manufactured one specifically for the buyer. Furthermore, buyer knew seller had already begun performance of his end of the contract or had begun to create the custom banjo as evidenced by a subsequent

agreement. The fact that the goods were custom excuses the Statute of Frauds requirement and thus the contract does not need to be in writing for it to be valid.

Therefore, buyer will **not** prevail on this claim.

2.) Whether buyer's claim that the agreement to increase price from \$15,000 to \$20,000 is invalid due to a lack of consideration.

Here, we have already established that this contract is governed by Article 2 of the UCC and not common law. Under common law, which governs contracts for everything else such as services and real estate sales, changes to the contract cannot be made without additional consideration given. However, UCC applies here and under that contracts can be modified without new consideration so long as they were done in good faith.

Halfway through the project Buyer and Seller agreed to increase the price from \$15,000 to \$20,000 due to an increase in the cost of materials. Presumably six months ago when the agreement was initially entered, the costs of materials was cheaper and buyer felt that \$15,000 was a fair price, given ten years he had purchased a non-custom banjo from the same seller for \$10,000. Both buyer and seller being merchants were probably aware of the increase in materials cost and therefore the modification to the agreement was made in good faith by both parties and thus the increase in price as agreed upon would be enforceable.

Therefore, buyer will **not** prevail on this claim.

3.) Whether buyer's claim that seller breached the contract because no touring case was delivered as had been done before.

Parol Evidence

This doctrine states that no prior written or contemporaneous oral statements may be

used to contradict a fully integrated agreement between the two parties. Full integration signifies that the contract is the intention of both parties to be the final and complete bargained for exchange between the parties. However, if the contract is partially integrated, parol evidence can be used to supplement but not contradict the terms.

Contract Interpretation

Oftentimes during contract disputes courts will look elsewhere to determine what it is each party thought they were bargaining for. In order of importance from greatest strength to lowest strength in resolving disputes, courts will look at "course of performance," then "course of dealing," and finally, "custom or trade usage."

Course of performance is usually applied to installment contracts and courts will look at how the parties are currently engaging with each other during an ongoing contract. Buyer has stated the claim that based on a previous contract, Seller has breached his end of the contract by not providing the banjo case. The courts here will then look at "course of dealing." Ten years ago, buyer and seller did in fact enter into a written contract for the sale of a banjo for \$10,000. This written contract had no mention of the touring case, but seller provided one to buyer at no additional cost. If 10 years ago, buyer was expecting the case to come along with the banjo, the parol evidence rule would bar him from entering into the court any oral conversation he may have had with the seller regarding the case being included with the \$10,000 purchase for the banjo. It can be inferred that the seller provided the case as a gesture to the buyer with the chance that buyer will take kindly to the seller in hopes for repeat business down the line. The courts in looking at the prior course of dealing would then most likely determine that since the inclusion of the case was not part of the 10 year old written contract it would be barred in the present contract by the parol evidence doctrine.

Therefore, buyer will **not** prevail on this claim.

4.) If Seller prevails, whether or not Seller should be awarded any damages.

Expectation Damages

Expectation damages are the typical awards court prefer to award. Contract damages are not designed to be punitive in nature and this type of damage is designed to award the "benefit of the bargain." In other words, this type of damage is designed to put the parties in the position they would have been had the contract been fully performed.

Here, since we established that although the contract was not in writing and even though there was no consideration given for the contract modification that due to the custom nature of the banjo and applicable governing laws under the UCC that there was a valid contract. Seller then would seek expectation damages to bring him to a gain of \$20,000 or the amount from the contract.

However, there is a duty by the seller to mitigate the damages. Seller was able to sell the banjo to another buyer for \$5,000 and thus would only be allowed to seek damages here for \$15,000.

Consequential Damages

This type of damage was reasonably foreseeable at the time of contract formation and results from changes in circumstances related to each party's performance.

Here, it is foreseeable that a manufacturer of instruments would then next try and sell his products to other interested parties. In order to sell the banjo, the seller had to employ a musical instrument dealer who found the new purchaser at a cost of \$1,000 in commission.

Therefore, seller would also seek \$1,000 in consequential damages. This way seller's

true damages would equal the \$20,000 because if only awarded \$15,000 in the form of expectation damages, seller would actually retain \$19,000 because of the commission cost.

Reliance Damages

This type of damage is to recoup any costs expended while trying to see the contract to full performance.

There is no mention of any additional cost by either party before buyer's breach, therefore no reliance damages would be awarded.

Restitution Damages

This type of damage is to prevent any unjust enrichment and is given to cover any previous benefits conferred by either party such as a down payment.

Again, there is no mention of any payments being made in accordance with the contract and neither buyer or seller had unfairly gained anything.

Therefore, no restitution damages.

QUESTION 4: SELECTED ANSWER B

Buyer claims that the agreement to buy the custom banjo is invalid because it is now in writing. Will Buyer prevail?

Applicable governing law

The UCC governs contracts for the sale of goods while the common law governs contracts for providing services.

Here, this contract was a hybrid between both the sale of a good, a banjo and the manufacture of a banjo. When a contract had differing components, either the Gravamen test which uses components of both the UCC or the predominant purpose test which determines which of the two should be applied is used.

Because the cost of the good, a custom-made banjo, is significant, namely \$15,000 compared to the work required to produce the good, it is more reasonable to apply the UCC to this contract.

Thus, the UCC will govern this contract.

Status of Parties

In a UCC contract, if the parties are merchants, special rules may apply. A merchant is one who deals in goods of the kind or holds himself out to be an expert in such goods.

Here, Seller is in the business of building and selling musical instruments and Buyer is a recording artist who gives concerts for a living.

Thus, both parties are merchants.

Valid contract: 10 years ago

10 years ago, Seller sold Buyer a banjo for \$10,000 pursuant to a written contract. At

the time, the contract did not mention a touring banjo case, but Seller gave one to Buyer at no additional cost.

In a UCC contract between merchants, if there is repeated dealing on a reasonably frequent basis, a course of performance can be created which demonstrates the intent of the parties in dealing with each other.

Here, while Seller did give Buyer a touring case for free with the banjo, it was done one time only. Because this was not done repeatedly with any frequency, it does not suffice to make this a course of dealing or performance and will be viewed independent of the more recent contract.

Current contract formation

A contract requires offer, acceptance, consideration and no defenses to formation.

An offer requires certain terms, clear communication between the parties with language that demonstrates an intent to be bound by the terms.

Here, Seller offered to specially manufacture a custom banjo for Buyer with his name engraved on the neck for \$15,000. This demonstrates specificity as to quantity and subject matter, 1 specially made banjo, parties, Buyer and Seller and price, \$15,000. As time was not specified, a reasonable time of delivery will be applied.

Thus, this was a valid offer.

Acceptance requires assent to the terms as specified with intent to assent.

Here, Buyer "agreed" which demonstrates intent to be bound by the terms.

Thus, Buyer and Seller have mutual assent.

Consideration

Consideration requires the bargained for exchange of something of legal value.

Here, Buyer agreed to pay \$15,000 for the banjo and Seller agreed to tender the banjo to him.

Thus, the contract was supported by consideration on both sides.

Defenses to formation

Statute of Frauds

The Statute of Frauds requires any contract for a sale of goods for more than \$500.00 to be in writing and signed by the party against whom the contract is to be enforced in the case of a dispute unless there are exceptions to the rule.

Here, the contract for the banjo is for \$15,000, more than \$500. However, one of the exceptions to the statute is that if the good is specially manufactured as this banjo is, any contract related to it does not have to be in writing because it is clear that any specially made good would always be created out of a contract either verbal or written.

Thus, even though this contract was not in writing, it is a valid contract because of this exception.

Therefore, buyer will not prevail on this claim.

Buyer claims that the agreement to increase the price from \$15,000 to \$20,000 was invalid due to lack of consideration? Will he prevail?

In a UCC contract, in contrast to a common law contract, a contract can be modified if it is made in good faith between the parties without consideration which promotes commerce.

Here, Seller, in good faith, notified Buyer that the cost of materials had increased and requested that the price be increased to \$20,000 to which Buyer agreed. While normally such a modification would fall under the statute of frauds because it is an increase in price over \$500, as noted above, this contract does not fall under the statute because it is a specially made good.

Thus, for this reason, this was a valid modification of a UCC contract made between 2 merchants and Buyer will not prevail on this claim.

Buyer claims that Seller breached the contract because no touring banjo case was delivered as previously done. Will Buyer prevail?

As noted above, a course of dealing or course of performance in a UCC contract can only be established by a series of performances or dealing. Because only one other dealing had occurred between the parties, this did not suffice to create any pattern of behavior between the parties and cannot be used to claim that a touring case should be included this time. The time lapse between the two events, even if they may have possibly created some expectations in Buyer, would not be reasonable given the duration. Had he wanted a case, he could have made this a term of the contract. Seller's obligation under the Perfect Tender Rule is to provide the banjo only.

Thus, Seller did not breach the contract as this will be viewed as a separate contract not related to the one performed 10 years previously.

It is possible that there may have been prior negotiations orally about this issue which might raise a parol evidence rule consideration. However, this only applies to written contracts and here, the contract was oral, so any prior negotiations are not relevant as the contract only contemplated the banjo.

If Seller prevails, what damages should he be awarded?

Expectation damages require the aggrieved party to receive the benefit of the bargain of the contract which is to recover what they expected to receive had the contract been performed as promised.

Here, the modified contract was for the banjo to be completed for \$20,000. Seller would expect to recover his lost profit although it is not clear what his expenses, including any incidental damages might be.

When a Buyer breaches and does not keep the good, the Seller is entitled to recover the difference in the contract price and the market price which will presumably be less. Given that this is a special good, it likely has no market price that can be determined. Therefore, he can recover the difference in the contract price and the resale price but must make best efforts to resell at the highest price possible.

Here, because Buyer's name was etched on the banjo, he could only sell it for \$5000.00 which is very likely a reasonable price since most consumers do not want someone else's specially made item. Thus, Seller did his best to mitigate the damage in this regard.

Thus, Seller should receive \$15,000 which is the difference between the modified contract price and the resale price plus any incidental damages.

Should Seller receive damages for the \$1000.00 commission to a musical instrument dealer?

Because it would be difficult to sell the banjo, Seller will argue that it was reasonable to hire someone to sell the guitar and that these are "incidental" damages he incurred in selling the banjo. However, \$1000.00 in this case seems to be high as it represents

20% of the final sale price and the original value was \$20,000. Thus, Buyer will argue that this commission price is exorbitant and demonstrates a failure to mitigate appropriately as he should have been able to find a buyer without having to pay a \$1000 sales commission. This is a debatable point and it is possible that Seller will not receive full damages for paying the \$1000.

Could Seller recover under a restitution theory?

While this is a UCC contract related to sale of a good, if the contract were viewed as a common law service contract, Seller could attempt to recover under a restitution theory of quantum meruit, the value of the services he provided in making the banjo, along with quantum meruit the value of the monetary investment made in performing the contract. However as noted above, this is more appropriate to be governed by the UCC so that this theory would not be applicable.