

**June 2014 Baby Bar
Question 4 Contracts
Model Answer**

1. Is Wholesaler likely to prevail in its suit? Discuss.

Wholesaler v. Manufacturer

U.C.C.

The U.C.C. applies to transactions in goods.

The contract deals with the selling of 100,000 widgets, thus it is a transaction in goods.

Thus, the U.C.C. applies.

Merchant

A merchant deals in goods of a kind.

Wholesaler purchased widgets to resell, thus deals in goods of a kind. Manufacturer makes widgets, thus it deals in goods of a kind.

Thus, both Wholesaler and Manufacturer are merchants.

Offer

An offer is an outward manifestation of present contractual intent with definite and certain terms, which is communicated to the offeree.

On February 1, Wholesaler called Manufacturer and ordered 100,000 widgets. The act of calling and ordering the widgets demonstrates an outward manifestation of present contractual intent.

The order was for 100,000 widgets, quantity, and \$5.00 each was the price. Delivery was to be February 8, the time period. Wholesaler and Manufacturer were the identity of parties. Further, the contract dealt with widgets, thus subject matter was also identified. Hence the terms were stated with particularity making them definite and certain.

Wholesaler called Manufacturer to order thus communicated to the offeree.

Hence there is a valid offer.

Acceptance

An acceptance is an unequivocal assent to the terms of the offer.

When Wholesaler called and ordered 100,000 widgets, Manufacturer said, "It's a deal." Thus, Manufacturer's response was an unequivocal assent to the terms of Wholesaler's offer.

Therefore, there was an acceptance.

Consideration

Consideration is a bargained for exchange of a legal detriment.

Manufacturer agreed to deliver 100,000 widgets in exchange for Wholesaler's payment for the widgets. Wholesaler agreed to pay for the widgets in exchange for Manufacturer's delivery of the widgets. Each party has agreed to a legal detriment in exchange for the benefit each is receiving under the contract.

Thus, valid consideration does exist.

Statute of Frauds

A contract for the sale of goods over \$500.00 or more must be in writing to be enforceable.

The widgets are goods. The contract was for 100,000 widgets for \$5.00 each. Thus, the amount of the widgets costs more than \$500.00 such that the contract must be in writing.

Exception – Sufficient Memorandum

A memorandum with essential terms signed by the party to be charged will take the contract out of the purview of the statute of frauds.

After placing the order with Manufacturer, Wholesaler sent Manufacturer a signed formal memorandum confirming the agreement and setting forth all its terms. The memorandum contained the description of the goods, quantity, and price. Thus, it contained the essential terms.

However, there was a mistake in the price, as the agreed price was \$5.00 each and the memorandum mistakenly stated \$6.00.

Further, there are no facts that suggest the memorandum was signed by Manufacturer to satisfy the signing by the party to be charged.

Therefore, the sufficient memorandum is not a valid exception.

Exception- Written Confirmation

The U.C.C. provides if a merchant sends a written confirmation to another merchant, the merchant is held to have waived the Statute of Frauds as a valid defense unless he objects within ten days after receipt of the confirmation.

Wholesaler sent a memorandum confirming to Manufacturer, which had an added arbitration term.

When Manufacturer received the confirmation, he read the confirmation and did not reply to it. Thus, they waived the Statute of Frauds as a valid defense since they did not object to the confirmation within ten days following receipt.

The written confirmation will act as a valid exception to the Statute of Frauds.

Exception: Estoppel

Where a promisor represents by conduct that he will perform, in spite of the Statute of Frauds, coupled with the promisee's reliance, the Statute of Frauds will not prevent a contract otherwise falling within its purview from being enforceable.

Once Manufacturer agreed to sell the widgets to Wholesaler, Wholesaler immediately entered into contracts to resell them for \$15 apiece. Manufacturer knew Wholesaler was buying the widgets in order to resell them to retailers. Thus, Wholesaler relied on their agreement, evident by contracting to resell them to retailers immediately after they contracted with Manufacturer. Thus, Wholesaler's conduct and reliance on the agreement, takes the contract outside the purview of the Statute of Frauds.

Therefore, the Statute of Frauds is an invalid defense.

Mistake

Common Law - Modification

A modification is a change in terms of an existing contract which requires mutual assent and new consideration.

After Wholesaler called and ordered the widgets, and Manufacturer stated "It's a deal," on February 2, Wholesaler sent Manufacturer a signed formal memorandum confirming the agreements setting forth all of the terms. However, there was an added term. The added term was a binding arbitration clause. Manufacturer received the memorandum and read it, but he never responded to it, demonstrating there was no mutual assent to the change in terms.

Further, since Wholesaler added an arbitration clause that was binding, a material term was added and there was no new consideration. Wholesaler was already under a pre-existing duty to perform under the terms of the oral contract.

Thus, the modification will fail under common law.

U.C.C.

A modification is a change in terms of an existing contract between merchants, which requires mutual assent, and good faith.

As discussed supra, Wholesaler and Manufacturer never mutually assented to the added arbitration term of the contract. Further, the adding of a material term does not support that it was made in good faith.

Therefore, there is no valid modification.

Conditions

An act or event that must occur before one's duty arises.

Constructive Condition Precedent

Manufacturer must deliver the widgets before Wholesaler's duty arises to pay.

Anticipatory Repudiation

Manufacturer discovered that the price of the market price of the widgets had climbed to \$25 a piece and refused to deliver them to Wholesaler. Manufacturer is repudiating the contract.

Breach

A breach is an unjustified failure to perform, which goes to the essence of the bargain.

When Manufacturer refused to deliver the widgets to Wholesaler, it establishes an unjustified failure to perform going to the essence of the contract.

Therefore, there was a major breach by Manufacturer.

General Damages

Upon a breach by the seller the buyer has the right to cover and purchase on the market substitute goods. Cover is the difference between the contract price and the new price of the substituted goods.

Wholesaler did not have the money or credit to purchase substituted goods. Under UCC 2-712 the buyer is not required to cover, however, if buyer fails to cover, buyer cannot sue the seller for any cover price.

Since Wholesaler did not cover he has no damages. However, Wholesaler will argue that he did not have the money to pay \$25 per widget, only \$5 per widget that he contracted with Manufacturer. Hence, he should be able to receive damages.

Therefore, Wholesaler had no general damages.

Special Damages

A buyer can recover any loss resulting from the seller where the seller had reason to know and was foreseeable at the formation stage of the contract.

When Wholesaler contracted with Manufacturer, Manufacturer knew that Wholesaler was buying the widgets in order to resell them to retailers for \$15.00 a piece. Thus, Manufacturer knew, and was able to foresee if they did not perform the delivery of the widgets, that Wholesaler would lose profit.

However, generally if you do not have general damages you are not able to recover special damages. But, this rule does not apply where cover would be unreasonable.

Based on the facts Wholesaler contracted to pay \$5.00 per widget. The current price for a widget at the time of Manufacturer's breach was \$25.00 per widget. That is a \$20.00 difference for 100,000 widgets.

Therefore Wholesaler should be able to recover for his lost profit.

Reformation

Where the parties make an oral agreement which, when reduced to a writing is mistranscribed, the aggrieved party is entitled to reformation so that the writing corresponds to the oral agreement.

When Wholesaler's memorandum confirming the agreement changed the price from \$5 to \$6 per widget, there was a mistake. Although Manufacturer did read the memorandum, Wholesaler had no reason to know of the mistake.

Since Wholesaler and Manufacturer agreed to \$5 per widget, and only due to the misstated price typed in the memorandum, both parties testimony would be clear and convincing that the contract price contemplated was \$5 per widget.

The contracts will be reformed to reflect the \$5 per widget price.

Specific Performance

Specific performance is an equitable remedy at law. Specific performance is allowed only where damages cannot be measured with reasonable certainty. The court will order the Defendant, who breached the contract, to perform under the contract terms.

Wholesaler can prove an existing contract as discussed supra. In this case, although Wholesaler can buy identical widgets on the open market for \$25 a widget, they do not have the money to make the purchase for the 100,000 that they do need. Therefore, Wholesaler's damages cannot be measured with reasonable certainty.

Further, since Manufacturer sold the widgets to Wholesaler for \$5 each, then the next competitive price is \$25 each; damages will not make Wholesaler whole. Thus, damages are an inadequate legal remedy. Both parties are within the court's jurisdiction to enforce the decree. Thus, since Manufacturer failed to deliver the widgets and is in breach, the court has the ability to force Manufacturer to deliver the 100,000 widgets to Wholesaler.

Therefore, specific performance should be granted.