October 2005 Baby Bar
Question 4 – Contracts

1. Is GravelCo obligated to sell 5000 tons of gravel to Builder at $8 per ton? Discuss.

Builder v GravelCo

U.C.C.

A contract involving a transaction in goods is governed by the U.C.C.

Since the transaction involved the sale of gravel, the transaction would qualify as a transaction of goods. Therefore, the transaction would be governed by the U.C.C.

Merchants

A merchant is a person who deals in the kind of goods involved in the transaction or otherwise holds himself out as having knowledge and skill peculiar to the practices or goods involved in the transaction.

GravelCo is a distributor of high quality gravel. Thus, it deals in the kind of goods involved in the transaction.

Builder builds with the gravel. Thus, Builder holds himself out as having knowledge and skill peculiar to the goods involved.

Thus, both parties are merchants under the U.C.C.

Offer

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

On August 15, GravelCo's sales director sent a fax to Builder stating because of an oversupply we are offering to sell 5000 tons of high quality of gravel at $8 per ton. GravelCo's conduct of faxing over to Builder on its letterhead offering to sell and the use of the language "offering to sell" demonstrated an outward manifestation of present contractual intent to be bound by contractual agreement.

The terms were described as: 5000 tons, quantity; delivery not stated, but the court would look to a reasonable period of time for the time period; GravelCo and Builder are the parties; $8 per ton is the price; and high quality gravel is the subject matter. Since the terms are stated with sufficient particularity, the terms are definite and certain.

GravelCo faxed the offer to Builder evidencing a communication to the offeree.

Therefore, there was a valid offer.

Option

An option is an offeror's promise to keep an offer open. An option requires consideration to be enforceable.

GravelCo represented that it would keep the offer open for thirty days. However, there was no valid consideration to support the option agreement.

Thus, there is no valid option and the offer is revocable at anytime prior to timely acceptance.

Firm Offer

However, a firm offer is an offer between merchants in a signed writing that is irrevocable for a reasonable period of time not to exceed ninety days.

As discussed, GravelCo and Builder are merchants. GravelCo sent a fax on the company stationary with its logo at the top of the paper. Since this was within their exclusive control this will work as the writing. The fax stated that the offer would remain open for thirty days.

Thus, a firm offer was formed.

Rejection of Firm Offer?

A rejection by an offeree is an indication that it does not want to accept the offer.

Builder faxed back a response to GravelCo stating, "We do not wish to order at $8 per ton, but would consider a purchase at $7 per ton." Builder will likely argue that Builder's statement must be taken in context with its inquiry that it would consider purchasing gravel at a $7 per ton rate.

However, GravelCo will probably prevail on this issue in that, even though Builder used the term "wish", such language was sufficient to indicate that Builder did not intend to be bound by the terms of GravelCo's offer at $8 per ton.

Thus, Builder's language is a rejection of GravelCo's offer to sell the high quality gravel at $8 per ton.

In the event that Builder's letter was not a legal rejection of GravelCo's offer, analysis of additional issues is necessary, as follows.

Acceptance

An acceptance is an unequivocal assent to the terms of the offer. Generally, the "mirror image" rule applies such that acceptance must be in regard to the indentical terms of the offer.

On September 7, GravelCo received an overnight letter from Builder stating, "We accept your offer for 5000 tons of gravel at $8 per ton." Such language shows an unequivocal assent to the terms of the original offer. However, Builder's communication added that payment would be made within 90 days after delivery of the purchased product. Thus, this was not a mirror image to GravelCo's offer.

Therefore, no acceptance occurred unless there is an exception.

Battle of the Forms -- U.C.C. 2-207

Pursuant to U.C.C. 2-207, additional terms between merchants become part of the contract unless the term materially alters the contract.

Both GravelCo and Builder are merchants. GravelCo's offer stated full payment due on delivery. Since GravelCo's offer had a stated payment term and Builder returned an acceptance with a different payment term, i.e., that payment would be made within 90 days after delivery of the

purchased product, Builder has added a term to the contract. However, between merchants a payment term is not construed as a material alteration of the contract terms. Thus, since there is no material alteration there is an acceptance between the parties.

Consideration

Consideration is that which is bargained for and given in exchange for a return promise, requiring a benefit and a legal detriment to all parties.

GravelCo bargained to supply 5000 tons of gravel at $8 per ton in exchange for Builder's return promise to pay GravelCo. Builder bargained to pay $8 per ton for 5000 tons of gravel from GravelCo in exchange for GravelCo.'s return promise to deliver 5000 tons of high quality gravel.

Thus, GravelCo obligated itself to deliver 5000 tons of high quality gravel to Builder in which it was not previously obligated to do. GravelCo incurred a legal detriment to deliver the 5000 tons of Gravel in exchange for a legal benefit of receiving payment from Builder. Conversely, Builder incurred a legal detriment of making payment to GravelCo in exchange for the receipt of the 5000 tons of gravel.

Therefore, there is valid consideration.

Statute of Frauds – Contact for the Sale of Goods for $500 or More

Pursuant to the Statute of Frauds, a contract for the sale of goods for $500 or more is unenforceable unless in writing.

The contract involved the sale of 5000 high quality gravel at $5000. Since the agreement was made with partial writings, i.e., made on GravelCo's stationery with Builder's letter of acceptance, and deals with the sale of goods for over $500, the contract is unenforceable under the Statute of Frauds.

Exception – Sufficient Memorandum

Under the UCC, a writing that does not contain all of the essential terms will satisfy the Statute of Frauds if there is some writing sufficient to indicate a contract of sale has been made, the quantity term is supplied, and the memorandum is signed by the party to be charged.

Builder will argue that GravelCo's letter contained the definite and certain terms of the offer and is a sufficient memorandum to satisfy the Statute of Frauds to make the contract enforceable. However, the letter is merely an offer and in no way evidences that seller and buyer had an actual agreement for the purchase of the gravel by Builder. Even though GravelCo's fax did not contain an actual signature, the fact that the offer was on GravelCo's company stationery with GravelCo's logo at the top is sufficient to meet the requirement of a signature.

Thus, when Builder sent its letter of acceptance with its purchasing agent's signature, and specifying a 5000 ton quantity, this combination of documents satisfied the Statute of Frauds.

Implied-In-Law – Constructive Condition Precedent

A condition is a fact or event in which the happening or non-happening of either creates or extinguishes an absolute duty to perform.

GravelCo must deliver the gravel, an event which must occur, before Builder's duty to pay GravelCo arises. GravelCo.'s act of providing the gravel to Builder creates an absolute duty for Builder to pay GravelCo.

Therefore, a constructive condition precedent exists.

Defense – Impossibility of Performance

Impossibility of performance excuses performance under a contract where it becomes objectively impossible for the party to perform a condition.

GravelCo will argue that a railroad strike caused a shortage on gravel and on September 5, it entered into several contracts with major contractors to sell large quantities of the gravel. GravelCo may argue since it entered into these contracts, and there is a supply shortage, its performance to Builder became objectively impossible, thereby excusing their performance.

However, Builder will argue that the mere fact that there is a shortage of gravel it does not make their performance objectively impossible to perform, but merely more expensive and non profitable.

Thus, GravelCo will not be excused from supplying the 5000 tons of gravel.

Commercial Impracticability

The defense of commercial impracticability is where a contract is entered into between the parties and an event renders performance commercially impossible, the event was a basic assumption on which the contract was made and the adversely affected party did not assume the risk of that event occurring.

GravelCo will argue that the railroad strike caused a shortage of gravel. The shortage resulted into an increase in market price of the gravel making their performance commercially impossible due to the high demand on the gravel. However, that there would not be an increase in market price of gravel, i.e., that it would be more costly for GravelCo to purchase gravel for resale, was not a basic assumption on which the contract was made.

Thus, commercial impracticability does not excuse GravelCo's performance.

Frustration of Purpose

The defense of frustration of purpose requires that due to an unforeseeable event, the value of the contract, as contemplated by both parties, is totally destroyed.

GravleCo will argue that since there was a strike in the railroad and this resulted in a shortage of gravel and thereby resulting in GravelCo sustaining a loss if it is required to perform the Builder-GravelCo contract. However, the action of a railroad strike causing a shortage which resulted in increase in price does not totally destroy the purpose of the contract between Builder and GravelCo. Moreover, GravelCo can still perform the contract, but must do so at a financial loss.

Thus, frustration of purpose is not a valid excuse.

Breach

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

If GravelCo. Refuses to deliver the 5000 tons of gravel goes to the essence of the bargain.

Therefore, GravelCo will be in breach of contract.

Remedies

A buyer of goods may bring an action for the contract based on cover, plus any incidental damages.

Builder can sue for the difference between the contract price and the fair market value of the gravel.

2. If GravelCo is bound to sell the gravel to Builder, can Builder be required to make full payment upon delivery? Discuss.

Battle of the Forms -- U.C.C. 2-207

Pursuant to U.C.C. 2-207, additional terms between merchants become part of the contract unless the term materially alters the contract.

Both GravelCo and Builder are merchants. GravelCo's offer stated full payment due on delivery. Since GravelCo offer had a stated payment term and Builder returned an acceptance with the statement that payment would be made within 90 days after delivery of the purchased product, he has added a term to the contract. A payment term would not be construed as a material alteration of the terms of the contract. Thus, since there is no material alteration there is an acceptance between the parties.

Thus, an acceptance will be found with the terms on Builder's acceptance letter. Therefore, Builder will not have to pay until 90 days after the delivery of the gravel.