

## QUESTION 1

Marta operated a successful fishing shop. She needed a new bait cooler, which had to be in place by May 1 for the first day of fishing season.

On February 1, Marta entered into a valid written contract with Don to purchase a Bait Mate cooler for \$5,500 to be delivered no later than April 15.

On February 15, Don called Marta and told her that he was having trouble procuring a Bait Mate cooler. Marta reminded Don that meeting the April 15 deadline was imperative. "I'll see what's possible," Don responded in a somewhat doubtful tone. Concerned that Don might be unable to perform under the contract, Marta immediately sent him the following fax: "I am worried that you will not deliver a Bait Mate cooler by April 15. Please provide your supplier's guarantee that the unit will be available by our contract deadline. I want to have plenty of time to set it up." Believing that Marta's worries were overblown and not wanting to reveal his supplier's identity, Don did not respond to her fax.

When Don attempted to deliver a Bait Mate cooler on April 16, Marta refused delivery. Marta had purchased a Bait Mate cooler from another seller on April 14, paying \$7,500, which included a \$2,000 premium for one-day delivery by April 15.

Have Marta and/or Don breached the contract? If so, what damages might be recovered, if any, by each of them? Discuss.

# QUESTION 1: SELECTED ANSWER A

## **I. Governing Law**

The UCC governs contracts for goods. The common law governs all other contracts, including contracts for services and real estate. The UCC has additional rules that apply when both parties are merchants.

Marta and Don entered into a contract to purchase a bait cooler. Because the bait cooler is a good, the UCC rules will govern this contract. Further, Marta is the owner of a successful fishing shop, and Don sells bait coolers. They can both be considered merchants and the UCC's merchant rules should also apply.

## **II. Contract Formation**

A valid contract requires an offer, acceptance, and bargained for consideration. Under the UCC, goods that cost over \$500 require that the contract be in writing to satisfy the Statute of Frauds.

The facts state that Marta and Don entered into a "valid written contract" to purchase the Bait Mate cooler. Marta and Don mutually assented for Marta to purchase a Bait Mate cooler for \$5,500 to be delivered no later than April 15. Because the contract was for over \$500 for a purchase of a good, the contract needed to be in writing to satisfy the Statute of Frauds, which Marta and Don satisfied.

## **III. Breach of Contract**

### **A. Anticipatory Repudiation**

A person who unequivocally states that they will not perform the contract before the time performance is required will have been considered to anticipatorily repudiate the

contract. The other party who has not repudiated can treat this as a total breach and sue on the contract prior to the time of performance.

Two weeks after Marta and Don entered into their contract, Don called Marta and expressed his concerns in procuring a Bait Mate cooler. Marta told Don that meeting the April 15 deadline "was imperative" and Don merely responded that he would "see what's possible."

Marta may argue that Don anticipatorily repudiated the contract by telling Marta that he may not be able to perform on the contract before the contract was due. However, his statements were not unequivocal as to his inability to perform. Rather, Don only expressed doubt as to his ability to procure and deliver.

Because Don did not unequivocally state that he would not be able to deliver the Bait Mate cooler, he will not have been considered to have anticipatorily repudiated the contract.

## **B. Reasonable Assurances for Insecurity**

Under the UCC, a buyer who has reasonable concerns or insecurity about the seller's ability to tender a good can request assurances that the seller will tender a good. The seller must offer the assurances within a reasonable period of time (generally no more than 30 days) or else the buyer who requested the assurances can treat the lack of assurances as a contract breach. The buyer has no duty to inform the seller that she is seeking to cover through the breach.

Here, Marta had reasonable concerns that Don would not be able to tender the Bait Mate cooler. Don himself raised his concerns about his possible inability to procure and deliver the good, and when Marta reminded him that she needed the cooler by April 15, Don did not assuage her concerns by stating that he would absolutely perform. Instead,

he merely responded that he would see what was possible. Thus, Marta had reasonable concerns and was within her right to ask Don for further assurances.

Don, however, might point out that Marta demanded that he provide the supplier's guarantee that the unit would be made available by the delivery deadline. He did not want to reveal the identity of his cooler supplier and he believed that Marta's demand was unjustified. However, as discussed above, it was reasonable for Marta to have the concerns about Don's inability to deliver the contracted good. Accordingly, Don should have provided assurances and communicated his ability to tender the goods as contracted within a reasonable period of time. Don not only failed to respond to Marta in a reasonable time, he wholly failed to respond to her.

Don may counter that Marta should have informed him that she was treating his failure to respond as a breach of contract. However, Marta is not under any obligation to do so after not receiving assurances for her reasonable insecurity.

Because Marta had reasonable grounds to be insecure about Don's delivery of the bait cooler, Don should have replied to Marta within a reasonable period of time. Don failed to provide Marta any sort of assurance. Accordingly, Marta was justified in treating Don's lack of assurances as a breach.

However, if Marta did not have reasonable grounds to be insecure, and should not have treated the lack of assurances as a breach, then she can point out that Don breached the contract when he failed to deliver on April 15 (discussed below).

### **C. Failure to Tender the Good on the Contracted Date**

The UCC requires that goods be perfectly tendered. This requires that the products have no defects and that they are delivered by the date required.

Marta can argue that even if she couldn't treat Don's failure to provide assurances as a breach, that Don breached the contract because he failed to deliver the cooler on the

contracted date. Marta and Don's contract stated that Don would deliver *no later than April 15*. However, Don delivered on the 16th. By failing to tender delivery of the good by the contracted date, Marta can argue that Don breached and she isn't required to accept the good.

Don may argue that he substantially performed by delivering the day after, and in any case, the contract did not specify that time was of the essence. Further, he might argue that Marta was not harmed by the delay, because he still delivered the cooler before the first day of fishing season on May 1. However, Marta can correctly point out that those defenses such as substantial performance and delivery within a reasonable time frame after the contracted date where time is not of the essence is not applicable to UCC contracts. Perfect tender requires delivery on the contracted date. In any case, Marta may further counter that the contract was specific about the date the cooler needed to have been delivered. Additionally, she had made known through her fax communication in February that she needed the cooler on April 15 because she needed sufficient time to set up the cooler.

Because Don failed to perfectly tender the good, by not delivering the good on the contracted date, Don breached the contract.

#### **D. Purchase of the Replacement Good Prior to Date of Delivery**

Don might argue that it was Marta who breached the contract by purchasing a replacement cooler before the affected delivery date. However, as discussed above, if he failed to provide assurances for her reasonable insecurity, then Don was in breach and Marta was entitled to cover. If Don breached on April 15, Marta's cover purchase on the 14th should not be considered a breach of contract because Marta may still have been able to perform had Don delivered on April 15. However, Don did not deliver nor was Don aware of Marta's cover purchase.

## **IV. Damages for Contract Breach**

### **A. Expectation**

Where a contract has been breached, and the buyer is without the good and the seller has the good, the UCC provides that the buyer can receive expectation damages for the breach. This would place the non-breaching party in the position it would have been in had the contract been fulfilled. This can include the cost to cover and purchase the replacement good.

Here, Marta expended \$7,500 to purchase a replacement Bait Mate cooler on April 14th. This included a \$2,000 premium for the one-day delivery of the cooler by April 15. Marta paid \$5,500 for the cooler itself, which is the same price she would have paid to Don for the same cooler. Marta then paid an additional \$2,000 to have this cooler delivered within one day.

As to the cooler itself, Marta did not pay additional costs to actually cover for the replacement Bait Mate cooler. Thus, as to the cost of covering for the replacement cooler, Don would not be liable for any additional costs to cover the purchase of the replacement cooler.

Marta might argue that Don should be liable for the additional \$2,000 it cost to deliver the Bait Mate cooler because this is the additional cost it required to have the cooler delivered by April 15, and place her in the position she would have been in had Don performed on the contract. Don will counter (as discussed below) that Marta did not mitigate her damages.

### **Consequential damages**

A breaching party can also be liable for the foreseeable indirect harm that results from the breach of contract. This might include, for example, economic harm that Marta's shop faced when she didn't have the Bait Mate cooler on the date contracted.

Here, it does not appear that Marta is alleging such losses that relate to Don's breach.

### Incidental damages

A breaching party can also be liable for incidental damages, which cover the ordinary expenses the non-breaching party may have incurred in responding to the breach of contract. This includes the costs of inspection, the costs to return the non-conforming good, or the costs of negotiating with a new vendor to cover a good.

Marta does not appear to have additional incidental costs related to negotiating with the new supplier for the replacement cooler.

### **B. Duty to Mitigate Damages**

The non-breaching party still has a duty to mitigate damages and minimize the costs that the breaching party will be liable for.

Here, Don might point out that Marta breached her duty to mitigate the damages.

If Marta is correct in arguing that Don breached the contract by failing to provide assurances for her insecurity, Don will point out that the breach would have occurred when he failed to provide the assurances in a reasonable period of time. Marta demanded assurances in mid-February and Don never responded. Don will point out that if Marta is correct that he failed to provide necessary assurances, then he would have breached after that reasonable time period expired. We can assume that 30 days would be a reasonable response period. Accordingly, Don would have breached the

contract in mid-March. However, Don can point out that Marta did not seek to replace the Bait Mate cooler until April 14.

Marta may argue that she had been looking for a replacement cooler and it wasn't until April 14 that she was able to enter into the contract. However, the facts do not indicate that Marta took those steps to replace the cooler. If Marta breached her duty to mitigate because she failed to try and cover earlier, then Don has a strong argument as to why he should not be liable for the \$2000 premium Marta paid.

Further, Don might argue that if it wasn't reasonable that Marta demanded assurances, then his breach of contract did not occur until April 15, but Marta purchased the cooler on April 14. He might argue that he shouldn't be liable for Marta's premium purchase prior to the breaching date, but he could be liable had she purchased after the breach and paid a premium for the speedy delivery.

Don has a strong argument that Marta breached her duty to mitigate. Accordingly, Don may not be liable for the \$2,000 premium Marta paid on her replacement cooler.



## **QUESTION 1: SELECTED ANSWER B**

### **Governing Law**

The UCC governs contracts for the sale of goods. Goods are tangible and moveable items. The common law governs all other contracts. If the UCC governs, certain rules will apply if the parties are merchants. Merchants are those who deal in the type of goods or have specialized knowledge or skill regarding the goods. Implied in every UCC contract is a covenant of good faith and fair dealing.

Here, there is a contract for a bait cooler. A bait cooler is a tangible good, and therefore, the UCC will govern this contract. Marta owns a fishing shop, which means she has specialized knowledge and skill and deals in the type of goods here (fish and fishing supplies), so she is a merchant. It is unclear if Don is a merchant. Marta has contracted with Don to purchase a bait cooler, but nothing in the facts indicate if Don is a commercial seller of bait coolers, or anything else to indicate his status as a merchant. However, because this is a very expensive cooler (\$5,500), it is very likely that Don is a merchant seller of bait coolers. Also, because Don is procuring it for Marta, as opposed to having one personally and selling it online or by advertisement, that tends to show he is a merchant seller. Certain rules may apply relating to the parties as merchants. Also, because this is a UCC contract, there is an implied covenant of good faith and fair dealing.

### **Contract Formation**

To have a valid contract, there must be mutual assent and consideration. Mutual assent is an offer and acceptance. An offer is a manifestation to presently have the intent to contract, with the terms clearly specified, communicated to the offeree. An acceptance is a manifestation to assent to the terms of the offer. Consideration is a bargained-for exchange, consisting of a legal value to one party and a legal detriment to the other. Consideration usually comes in the form of performance, forbearance, or a promise to perform or forbear.

Here, the facts indicate that a valid written contract was formed on February 1<sup>st</sup>; therefore, it can be inferred that there was a valid offer and acceptance. The consideration for the contract was the promise by Marta to pay the \$5,500, and for Don to procure and sell to Marta a bait cooler.

### **Statute Of Frauds**

Certain contracts must be in writing to be enforceable, signed by the party against who enforcement is sought. One such type of contract is a contract for the sale of goods over \$500.

Here, the contract is for a good (cooler) for \$5,500, which is over \$500. The facts indicate that a valid written contract was entered into. Therefore, it is assumed that the statute of frauds is satisfied.

### **Anticipatory Repudiation**

When one party gives a clear and unequivocal indication that he will not perform his end of the contract, the other party can treat that as an anticipatory repudiation, which is an instant breach of the contract. When this occurs, the non-breaching party may elect to not perform and immediately sue for damages, or to wait until performance is due and then sue for damages.

Here, On Feb 15, Don called Marta and told her that he was having trouble procuring the cooler. Marta reminded Don that there was a strict deadline of April 15, and Tom told her he would "see what is possible", using a doubtful tone. Because these words are not a clear and unequivocal indication that Don would not perform, there is not an anticipatory repudiation. To have an anticipatory repudiation, Don would have had to say something more along the lines of "I will not be able to procure the cooler by April 15". Because Don's words did not amount to an anticipatory repudiation, Marta cannot treat the contract as breached as of Feb 15. However, she can demand assurances.

### **Reasonable Grounds For Insecurity and Demand for Assurances**

When a party has reason to believe the other party may not be able to perform, typically actions by the other party that fall short of an anticipatory repudiation, the party may, in writing, demand assurances of performance by the other party. If commercially reasonable, the demanding party may suspend performance. Additionally, if the party who has given reasonable grounds for insecurity does not provide assurances within 30 days, the other party may treat that as an anticipatory repudiation and immediately treat the contract as breached, even if the time for performance has not come.

Here, Don's words to Marta on the phone did not amount to an anticipatory repudiation (above), but, they certainly gave Marta reasonable grounds for insecurity. At the time the contract was formed, Marta and Don agreed that the cooler would be delivered no later than April 15. On the Feb 15 phone call, Marta again reminded Tom of the strict deadline. When Tom, using a doubtful tone, said he will see what is possible, this gave Marta reasonable grounds for insecurity. Marta was worried that he would miss the deadline and she would not have time to set the cooler up and ready for the first day of the fishing season. Marta faxed Don, which meets the writing requirement, asking him to provide assurances of performance by providing his supplier's guarantee that the unit will be available. Don believed that this was overblown and did not respond. Marta will argue that Don needed to provide assurances within 30 days. Because Don did not respond, Marta can treat the contract as repudiated as of 30 days after the fax, which would be March 15. Don did not want to give up his supplier's identity, and may argue that although Marta's grounds for insecurity are reasonable, that her demanding his suppliers guarantee was unreasonable. Don is assumingly in the business of procuring items for fishing shops, and he will argue that if he gave up his suppliers identity, Martha may go straight to the supplier in the future for her needs and circumvent Don. A court could go either way on deciding this issue. A court will surely find that Marta had reasonable grounds for insecurity, but may find that her demand for assurances (providing the supplier) was not reasonable. However, the court would likely find that Don doing nothing, and not responding at all, was also reasonable and not in good faith.

If Don did not want to give up his supplier, he still could have replied and given Marta assurance that he would perform by the deadline.

It is most likely that a court would find that Don failing to respond to Marta's insecurity within 30 days amounted to an anticipatory repudiation. In that case, Marta could treat the contract as breached immediately and find other options for her cooler, and sue Don for damages. However, even if the court finds that it did not amount to a repudiation, Don will still be in breach of the contract for delivering late.

### **UCC Perfect Tender**

In UCC contracts, there must be a perfect tender of goods; otherwise there is a breach. A perfect tender means every item is delivered as promised, and at the correct time. When there is not a perfect tender, the non-breaching party may take the non-conforming goods and sue for damages, reject some goods and keep some, or reject all the goods and sue for damages. The non-breaching party must notify the seller of the breach and if they are going to accept or reject the goods, and if they reject, must timely return the goods, arrange for the goods to be shipped back, hold the goods for pickup, or re-sell on the breaching party's account.

Here, Don attempted to deliver the cooler on April 16th, one day late of the strict deadline. Because Don did not deliver on the agreed deadline (April 15), he did not make a perfect tender. Therefore, Don has breached, and Marta is under no obligation to accept the cooler. The facts indicate that Marta promptly notified Don that she was refusing delivery, as required by the rules.

### **Damages**

#### **Marta's Damages Claims**

When a UCC contract has been breached, the non-breaching party may sue for and receive compensatory damages. The most common compensatory damages are expectation damages, incidental damages, and consequential damages.

### Expectation Damages

Expectation Damages put the non-breaching party in the position they would be had the contract not been breached. Expectation damages must be foreseeable, certain, and mitigated. When the seller has breached, the expectation damages would normally be the fair market value of the good minus the contract price, or the cost to cover minus the contract price.

Here, Don and Marta contracted for the sale of the cooler for \$5,500. Because Don did not perform by the deadline of April 15, and because he likely repudiated when he did not respond to Marta's request for assurances, Marta was entitled to either sue for the difference in the fair market value of the cooler and the contract price, or to cover and sue for the difference between the cost of cover and the contract price. Here, Marta covered and purchased a different cooler for \$7,500. Marta will argue that Don is liable to her for the difference of \$2,000. Don may argue that he should not be liable for this difference, because the fair market value (and the price it appears Marta paid) of the cooler was actually only \$5,500; the \$2000 extra was a one day rush delivery fee. Marta will argue, however, that she had no choice but to pay the \$2,000 delivery fee, since she needed it by April 15th. Don may also argue that if the court does find he repudiated as of March 15th, that Marta did not mitigate, because she could have found another cooler between March 15 and April 15th, but instead, she waited until April 14th to purchase the cooler with 1 day rush. Marta may respond that when there is a repudiation, she has the option to wait until performance is due to treat the contract as breached. However, Don will then argue that because she bought the new cooler on April 14, not April 15th, that she was not waiting for performance. Also, Don will likely successfully argue that Marta MUST have been relying on the anticipatory repudiation, and not on the perfect tender breach, since she did not wait until his performance was due on the 15th to purchase the new cooler.

A court could go either way. Don may have to pay Marta the \$2000 difference for what she paid and the contract price, but, the court also might find that Marta did not mitigate, and therefore the \$2000 rush fee was avoidable. However, if Marta did in fact look

around for coolers between March 15 and April 15 and just could not find one until April 14, then she will have met her duty to mitigate and could recover the \$2,000.

### Incidental Damages

Incidental damages are those damages that are incidental to the breach, and are always expected, such as costs to return or store the goods.

If Marta incurred any incidental costs, such as advertising that she was looking for a cooler, or long distance calls to other suppliers, etc., then she will be able to recover these costs also.

### Consequential Damages

Consequential damages are special damages that are unique to the non-breaching party, such as lost profits, and they must be foreseeable at the time of contracting to the breaching party to be recoverable.

It does not appear that Marta suffered any consequential damages as a result of the breach, but if she did, and they were foreseeable, then she could recover these too.

### Punitive Damages

Punitive damages in contract cases are not recoverable. Marta will not be able to recover any punitive damages, because they are not available in breach of contract actions.

### Don's Damages Claims - Restitution

Restitution is an equitable remedy meant to prevent unjust enrichment. Typically, this type of remedy is used when a contract is unenforceable, and one party received a benefit but did not have to pay for it. In such a circumstance, the other party can usually receive the reasonable value of their services. At common law, the breaching party could not receive restitution. But, modernly, many courts will provide reasonable value of services even to the breaching party to prevent unjust enrichment by the non-breaching party.

Here, Don may argue that he is entitled to something from Marta, since he procured the cooler, and likely had to pay for the cooler from his supplier to get it for Marta. However, Marta will successfully argue that she was not unjustly enriched in any way, because she did not get anything from Don. She did not keep the cooler. Don may then try to argue that the services he provided in spending the last few months procuring the cooler were valuable services, and that he should be compensated for the procurement services. However, a court will likely find this a very weak argument, as Don breached the contract, and Marta received absolutely no benefit from Don.