

### Question 3

On Monday, Resi-Clean (RC) advertised its house cleaning services by hanging paper handbills on doorknobs in residential areas. The handbills listed the services available, gave RC's address and phone number, and contained a coupon that stated, "This coupon is worth \$20 off the price if you call within 24 hours and order a top-to-bottom house-cleaning for \$500."

Maria, a homeowner, responding to the handbill, phoned RC on the same day, spoke to a manager, and said she wanted a top-to-bottom house cleaning as described in the handbill. Maria said, "I assume that means \$480 because of your \$20-off coupon, right?" The RC manager said, "That's right. We can be at your house on Friday." Maria said, "Great! Just give me a call before your crew comes so I can be sure to have someone let you in."

Within minutes after the phone conversation ended, the RC manager deposited in the mail a "Confirmation of Order" form to Maria. The form stated, "We hereby confirm your top-to-bottom house cleaning for \$500. Our crew will arrive at your house before noon on Friday. You agree to give at least 48 hours advance notice of any cancellation. If you fail to give 48 hours notice, you agree to pay the full contract price of \$500."

About an hour later, Maria sent RC an e-mail, which RC received, stating, "I just want to explain that it's important that your cleaning crew do a good job because my house is up for sale and I want it to look exceptionally good."

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On Thursday evening before RC's cleaning crew was to show up, Maria accepted an offer for the sale of her house. The next morning, Friday, at 10:00 a.m., Maria sent RC another e-mail stating, "No need to send your crew. I sold my house last night, and I no longer need your services." By that time, however, RC's crew was en route to Maria's house.

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At 10:30 a.m. on Friday, Maria received RC's Confirmation of Order form in the mail. At 11:00 a.m., RC's crew arrived, prepared to clean Maria's house. Maria explained that she no longer needed to have the house cleaned and sent the crew away.

RC's loss of profit was \$100, but RC billed Maria for \$500.

Maria refused to pay.

Has Maria breached a contract with RC, and, if so, how much, if anything, does Maria owe RC? Discuss.

### Answer A to Question 3

3)

#### Applicable Law

The common law applies to all sales of service contracts and the UCC applies to sale of goods. Here, the contract is for cleaning services (a service) so that it clearly falls within the ambit of the common law. As such, none of the rules under the UCC will be applicable.

#### Valid Contract Formed

Before addressing whether Maria breached her contract with Resi-Clean ("RC"), it must first be determined whether she had a valid contract to begin with. A valid contract requires: (1) an offer; (2) an acceptance of the aforementioned offer; (3) consideration from each party; and (4) no defenses to formation. Each will be discussed below.

#### Offer

For an offer to be valid there must be an intent to be bound, communicated to the offeree, with sufficient and definite material terms. Here, there are several points at which the parties may argue an offer was made. Whether or not a valid offer is made (i.e. whether above factors are met) is determined by looking at whether a reasonable person receiving the communication would feel that their acceptance of the offer would create a binding obligation.

First, it may be argued that the handbills placed on the doorknobs of the houses created an offer from RC to all of the houses. However, this argument is likely to fail. An advertisement that merely states the cost of services, a phone number, and possible coupons would not be construed by a reasonable person to evidence the intent of advertising to be bound to a contract upon acceptance.

Thus, this would not likely be construed as a valid offer. However, a court may accept an argument by Maria that the coupon attached that specified that the party would get \$20 off if they called within 24 hours and ordered a top-to-bottom cleaning was a valid offer because it was specific with the terms of how it could be accepted, when it had to be accepted by, and a reasonable person would feel that the party giving the coupon would be bound by the offer. The effect of the binding effect of the coupon will be discussed further with respect to the damages that Maria receives below.

A second possibility for the offer could be the phone call that Maria made to RC to order to the top-to-bottom cleaning service. She requested that they come and clean her house, as described on the handbill, and specified the \$480 price (\$500 less the \$20 coupon). This would be construed by a reasonable person in RC's shoes to be [an] offer than [sic]

they could accept to form a binding contract so that it likely would be deemed to be an offer. Moreover, even if this offer was deemed rejected by RC's manager indicating that "they would be there Friday" because this was an additional term, that statement would be an [sic] counteroffer to Maria on the same terms but including the Friday cleaning provision.

If, for some reason, the court determines that the above was not an offer, then the confirmation order may also be deemed to be an offer to Maria. Thus, Maria would be free to accept that order at any point after receiving it. This is very unlikely to be the case, however, as Maria's phone call would almost certainly be construed to be the offer in this case.

### Acceptance

A valid acceptance requires that a party who is able to accept the contract unequivocally accepts the offer and communicates that acceptance to the offeror. Of course, if and when a valid acceptance occurred would depend on when the offer occurred. Because the advertisement described above was not an offer (except to the extent of the coupon which was incorporated into Maria's offer) it will not be discussed here with respect to acceptance.

Assuming that Maria's phone call is deemed to be the offer then RC likely accepted the offer when its manager stated "[t]hat's right. We can be at your house on Friday." While Maria may argue that the statement "we can be at your house on Friday" was an additional term that did not create a valid contract but, rather, was a rejection and counteroffer, this argument would have little effect given that Maria promptly said "Great[,] " thereby accepting the counteroffer with the additional Friday term. Maria may also argue that by telling them to call her before they come [sic] so that someone is there to let them in she did not unequivocally accept their offer. However, this statement was not intended to modify the terms of the contract but, rather, just told [sic] them that they should call in advance to ensure someone would be home. Whether or not this amounted to a condition precedent will be discussed below. Thus, Maria's offer was accepted by RC (or Maria accepted RC's counteroffer on the same terms with the Friday provision) upon their phone call and a binding contract was completed at the time.

If the phone call was not deemed to be a valid offer so that the offer was the confirmatory memo, then Maria did not accept it and there would be no valid contract. Maria only received the memo on Friday morning and from that point on tried to send RC away. Thus, there would be no acceptance. However, this argument would be unlikely given that they almost certainly formed a valid contract during the phone call as described above.

### Consideration

Here, Maria agreed to pay RC \$480 and they agreed to clean her house from top-to-

bottom. This exchange of promises provides the required bargained[-]for exchange and legal detriment to each party for there to be valid consideration.

Thus, this element is met.

## Defenses

### Statute of Frauds

The Statute of Frauds does not apply to services contracts that will be completed in less than one year. Here, the contract was to be completed in its entirety by Friday so that the statute of frauds was inapplicable.

As no other defenses are applicable, a valid contract was likely formed at the time of the phone conversation between Maria and the manager of RC.

### Terms of the Contract Formed

Once it is determined that a valid contract was formed between the parties, the next step is determin[ing] the terms of that contract. In this case, Maria called RC and stated that she wanted a “top-to-bottom” house cleaning “as described in the handbill.” Moreover, she indicated (and the manager of RC agreed) that the price would be \$480 once the coupon from the handbill was taken into consideration. The contract likely also contains the provision that RC will complete the work on Friday as that was agreed upon by the parties during the course of the phone conversation. Thus, the contract will certainly be for a top-to-bottom house cleaning at Maria’s house on Friday for \$480.

A question exists as to whether Maria’s statement that they had to call her before their crew comes in order to be sure that someone was there to let them in. It is unlikely that this would become part of the contract given that the parties had already agreed on the contract before Maria made that statement. Moreover, the statement does not affect the performance of the obligation but was merely intended to ensure that the contract would move forward with no hassles. Thus, this is not likely to be considered part of the contract.

The provision in the “Confirmation of Order” memo sent by RC also does not likely become part of the contract. The contract was completed over the telephone and RC may not unilaterally make modifications to that contract (i.e. the 48 hour notice provision) without additional consideration provided by the other party. Here, RC gave no additional consideration to Maria for requiring the 48 hour notice provision). This does not mean, however, that Maria was free to cancel the contract at will[;] because the contract became enforceable over the phone, she is bound by the contract unless she has some excuse or defense to its enforcement or unless she is for some reason relieved of her duties under the contract.

Finally, for the same reasons as the 48-hour provision above, Maria's subsequent e-mail regarding the "exceptionally good job" would not become part of the contract. There was no additional consideration for the this [sic] provision and to require RC to do an "exceptionally good job" would deprive them of the benefit of the bargain their [sic] received when they negotiated for the \$480 price. Thus, this would not become part of the bargain and RC would be required to do a reasonable job in good faith.

Thus, the contract was for a full house cleaning on Friday for \$480 and it did not include the 48-hour notification provision or the "exception[al] job" provision.

### Did Maria Breach or Does She Have Any Excuses/Defenses For Her Breach?

Because a valid and enforceable contract existed, Maria is liable to RC if she breached the contracted [sic] as [she] is not excused from performance.

### Maria's Breach

Under the terms of the contract, Maria was required to pay RC \$480 and allow them into her house in order to complete the cleaning to which she agreed. Here, rather than allowing RC to come and clean her house, she sent them an e-mail at 10 a.m. on the morning of performance indicating that she was repudiating the contract and, when they showed up to perform, she turned their workers away. Thus, Maria anticipatorily repudiated the contract which would allow RC to: (1) treat it as an offer to rescind the contract and rescind; (2) treat the contract as materially breached and sue for damages immediately; (3) suspend their performance and sue once the contract becomes due; or (4) do nothing and encourage performance.

Here, Maria breached the contract the morning of performance so that suspending their performance or encouraging Maria's performance would be infeasible. Moreover, RC would not want to rescind the contract because that is exactly what Maria wanted to do and it would cost them \$100 in lost profits. Thus, RC would treat the contract as materially breached and Maria would be liable for damages unless she had a valid excuse for her breach.

### Possible Defense/Excuses of Performance

#### Condition Precedent Not Met

Maria may argue that she had a valid excuse for not performing because in the course of their telephone call she indicated that the crew should call her before they come so that someone may be there. However, this argument would fail for a few reasons. First, as I indicated above, the provision that they call on Friday before they come was not likely part of the contract because they had already agreed on the terms of the agreement at that point and Maria's statement was only intended to make sure she could make arrangement

to let them into her house. Second, the purpose of the covenant was not breached because they showed up to clean her house when she was there (because she turned them away). Third, she repudiated the contract before they could make the phone call by sending them her repudiating e-mail that morning so that they could treat the contract as breached immediately without adhering to the condition precedent. Thus, this argument would fail to excuse Maria's material breach.

House sold (Impossibility, Impracticability, Frustration of Purpose)

Maria may also argue that the fact that she no longer owned the house at the time the contract came due excused her performance by way of: (1) impossibility; (2) impracticability; or (3) frustration of purpose. As will be shown below, all of these arguments would fail.

Impossibility - For performance to be excused by way of impossibility an unforeseeable and supervening event must render performance impossible for any person to perform. Here, Maria's sale of her house was not unforeseeable because she knew that [she] was trying to sell her house and it was not a supervening outside factor because it was entirely within Maria's control. Moreover, it was still possible for RC to complete performance – it just would not be as valuable to Maria now that she no longer owned the home that she contracted with them to clean. Thus, this argument would fail.

Impracticability - For performance to be excused by way of impracticability an unforeseeable and supervening event must render performance by one party inordinately difficult so as to create an injustice if the contract was enforced. Here, as noted immediately above, Maria controlled the event and it was foreseeable so this did not excuse her performance. Moreover, paying \$480 to have a house that you have just sold cleaned does not seem unduly difficult on Maria. Thus, this defense would fail as well.

Frustration of Purpose - For performance to be excused by way of frustration of purpose an unforeseeable and supervening event must intervene to render the entire purpose of the contract – known by both parties to the contract at the time the contract was formed – a nullity. Like the two arguments above, this would fail because the supervening event was in Maria's control and was entirely foreseeable so that Maria assumed the risk that her house would be sold by Friday. Moreover, at the time the contract was formed RC had no idea that she was selling her house so that the purpose was to fix the house up for its sale. Thus, the fact that this purpose was frustrated would not excuse Maria's performance because RC had no idea of that purpose at the time the [sic] contract was formed.

Potential Damages that Maria Owes RC For Her Breach

In a contracts case where one party materially breaches the other party is entitled to damages to compensate them for their expectancy under the contract. They may also receive consequential and incidental damages as appropriate. However punitive damages

are typically unavailable in contract actions.

### Expectancy Damages

For expectancy damages to be provided to a party they must be causal, foreseeable, certain, and unavoidable. In this case, providing RC with the full \$500 for Maria's breach as is claimed in their bill to Maria would unjustly enrich them given that they only lost \$100 in profit as a result of her breach. Their expectancy under the contract was to make \$100 in profit so they should be entitled to the \$100 from Maria. Note, however, that the "loss of profit" provided in the facts does not indicate whether this includes the \$20 coupon or not[;] it it[sic] does not then [sic] they should only get \$80 because their expectancy was only \$80 profit but if it does then they should get the full \$100. This \$100 is causal because they lost the money as a result of her breach, certain because they clean places like this all the time and can likely show what they typically make, and foreseeable because Maria knew that by breaching they would not be able to find another customer right away. So long as RC made reasonable efforts to find another house to clean to make up for the lost profits so as to mitigate their damages the damages would also be unavoidable. Thus, RC would be able to recover their \$100 (or \$80) of expectancy damages.

### Consequential Damages

Consequential damages are those damages that are causal, foreseeable, certain, and unavoidable but that do not stem directly from the breach. There is no evidence of such damages in this question.

### Incidental Damages

In the course of finding a new customer to mitigate their damages if RC was forced to expend resources, they would be entitled to those reasonable costs as incidental damages. There is no evidence of such damages here.

### Specific Performance

Here, because the \$100 (or \$80) lost profit damages are adequate to compensate RC for its losses, specific performance (i.e. by forcing Maria to allow them to complete the contract) would be unavailable.

Thus, RC would be entitled to \$100 (or \$80 if the \$100 lost profit does not take the coupon into account because the coupon was enforceable as described above) for their lost profits as a result of the contract so long as they took adequate reasonable steps to mitigate their

losses.



## Answer B to Question 3

Maria v. Resi Clean

1. Applicable Law: The transaction between Maria and RC involved the purchase and sale of services. Accordingly, even though RC may have used tangible items (detergent, etc.) while performing services, the predominant aspect of the transaction involved services. Thus the common law (not the U.C.C.) controls.

2. The handbill constitutes an Offer: Many advertisements are merely invitations to negotiate. Here, under the objective theory of contract formation, the handbill would induce a reasonable person to conclude that RC had manifested an intention to perform the services at the stated price if Maria called “within 24 hours.” By giving Maria the power to accept the offer with[in] 24 hours by calling, the handbill was not merely an invitation to negotiate – at least not with respect to a “top-to-bottom housecleaning.” If someone had called with respect to some other service or bundle of services, the handbill might not be deemed an offer. Here, RC gave Maria the power of acceptance.

3. Maria’s acceptance was a mirror image of the offer. First, Maria noted that she wanted a top-to-bottom cleaning as offered in the coupon. Accordingly, the subject matter of the offer and the acceptance was the same. Second, Maria did not attempt to negotiate or make a counterproposal that would have served as a rejection. Her request for clarification did not reject the offer. Having received clarification, her utterance “Great!” was an objective manifestation of her willingness to be bound to the terms of the offer, including the time for performance.

4. The Offer and Acceptance Created a Contract:

4.A. Consideration

Upon Maria’s acceptance, both Maria and RC suffered a legal detriment. Both had exchanged promises to do something they were not otherwise legally obligated to do.

4.B. Essential Terms

Maria and RC agreed to all essential terms. RC agreed to perform a top-to-bottom cleaning consistent with the standards in its handbill. Maria agreed to pay \$480 upon completion of the service. Although performance of the services within a reasonable time would have been a concurrent condition, RC agreed to perform the services on Friday and Maria agreed. RC’s obligation to perform the services prior to payment would be a concurrent condition, filling in any gap concerning order of performance. All essential terms were established even though the term “top-to-bottom housecleaning” was not defined with specificity.

4.C. No writing required: A contract to perform \$480 of services on Friday is not covered by any aspect of the statute of frauds. The oral agreement is enforceable without a writing.

5. There were no valid modifications to the Contract[.]

5.A. RC's confirmatory memorandum stated one inconsistent term and one additional term. Neither would be incorporated into the contract; both would be a unilateral attempt to modify the contract. Maria did not agree to the higher price, and she did not agree to the cancellation terms. Because the UCC does not apply, the consistent additional term between a merchant and consumer does not become part of the contract. Likewise, the inconsistent term regarding price is merely an offer for a modification that Maria did not accept. Maria had no duty to make a reasonable objection to the letter. She may have, but was not required to, request assurances of performances.

5.B. Maria's e[-]mail did not modify the contract. Maria's statement of the importance to her of RC's crew doing a good job does not alter, or purport to alter, RC's obligation to perform or her obligation to pay. Had RC performed, Maria would not have been justified in refusing to pay unless she was satisfied that RC did an exceptionally good job. Nor did it create an agreement about a basic assumption of the K.

6. Maria's cancellation was not excused: Maria will argue that the sale of her house on Thursday gave rise to a frustration of purpose. That "purpose", however, was not known to RC when the contract was formed. (Nor was it expressed as a condition: "I will pay you to clean my house if services are rendered before I sell it".) Maria's undisclosed purpose was not a basic assumption of the contract known to both parties. Further, a clean house between sale and closing is still valuable. Although under the UETA, Maria's e[-]mail is a proper mode of communication, it occurred after formation and does not relate back to formation.

7. Maria cancelled the contract after RC commenced performance. Although, as stated above, Maria did not accept RC's cancellation clause, Maria would still have the power, although not the right, to cancel before RC tendered performance. By dispatching the crew in accordance with the contract (i.e., before noon), RC commenced performance. [That would be a form of acceptance, were that needed.] Accordingly, Maria sent the crew away after RC partially performed.

8. Maria's cancellation excused RC's performance. Maria cannot defend her refusal to pay on the grounds that RC never performed. RC's performance was discharged by her breach.

9. Maria is liable to RC for damages caused by her breach: Given the late cancellation RC had no opportunity to mitigate and thus sustained \$100 in lost profits due to the breach.

RC would not be able to recover \$480, the contract price[,], because it did not perform (although excused). It could only recover \$100 plus incidental damages (cost of fuel, wages paid to the crew, supplies, etc.).

RC could not recover \$500 because (a) Maria never agreed to the cancellation clause and

(b) \$500 would be either an improper penalty or unjustified liquidated damages (in that the damages for lost profit would not be difficult to determine and \$500 is not a reasonable amount).

Maria owes \$100 plus incidental damages[.]