

Question 3

On May 1, Owner asked Builder to give her an estimate for the cost of building a wooden fence around her back yard. Builder gave Owner signed written estimates of \$4,000, consisting of \$2,500 for labor and \$1,500 for materials for a cedar fence, and of \$7,000, consisting of \$2,500 for labor and \$4,500 for materials for a redwood fence. He said, however, that he would have to verify that the redwood was available.

Owner said she liked the idea of a redwood fence but wanted to think about it before making a decision. In any case, she said she wanted the fence completed by June 1 because she was planning an important event in her back yard for a local charity. Builder said he would check with redwood suppliers and get back to her within two days.

On May 2, Builder telephoned Owner. Owner's phone was answered by her voice-message machine, which informed callers that she had been called away until about May 25 but would be checking her messages daily and would return calls as soon as she could. Builder left a message stating, "I've found the redwood, and I can build the redwood fence for \$7,000, as we agreed. Please give me a call, as I will otherwise buy the redwood, which is in short supply, and start the work within a few days." Owner heard the message, but because the charity event she had planned had been cancelled and there was no longer any urgency about getting the fence erected, she decided to wait until she returned to speak to Builder.

By May 14, Builder had still not heard from Owner. He was concerned that the supply of redwood might not hold and that if he did not start work immediately he would not be able to finish by June 1. Thus, he bought the redwood and completed construction of the fence on May 24.

When Owner returned on May 25, she saw the completed fence and sent Builder a letter stating, "You did a great job, but I never agreed to go ahead with the fence, and I certainly hadn't decided on redwood. Besides, the charity event that I had planned got cancelled. You should have waited until I got back. But, to avoid a dispute with you, I'll offer to split the difference – I'll pay you \$5,500."

Builder received the letter on May 26. He telephoned Owner and said, "When I first read your letter, I was going to get a lawyer and sue you, but I decided to let it go and I do accept your offer of \$5,500." Owner replied, "Well, you're too late. I've changed my mind. I don't think I owe you anything."

May Builder recover all or any part of \$7,000 from Owner on a contractual or other basis? Discuss.

Answer A to Question 3

Applicable Law

This contract will be governed by general common law contract principles. Contracts for the sale of goods are governed by Article 2 of the Uniform Commercial Code. All other contracts are governed by general common law contract principles. The contract at issue, assuming there is one, involves personal services: building a fence. Although Builder may also supply materials such as the wood, that does not convert it into a contract for the sale of goods because the materials are collateral to the primary purpose of the agreement, which is to provide the service of fence building.

Formation

There was no enforceable contract between the parties, because they never had a meeting of the minds. For a contract to come into formation, there must be an offer, followed by a manifestation of assent to the offer. The parties must objectively agree to a bargained-for exchange.

Offer - May 1 Estimates

Builder (B) may argue that the estimates he provided on May 1, were offers. An offer is a communication of definite terms of the agreement which creates a power of acceptance in the offeree. The estimate for the redwood fence was not an offer, however, because B did not objectively manifest an intent to be bound if Owner (O) accepted right there. B said that he would have to verify that redwood was available. This suggests that he did not intend to be bound to the terms of these estimates until he verified the supply of the redwood. The estimate for the cedar fence was not similarly conditioned, and so it may be construed as an offer. Since he withheld the power to accept with regard to the redwood fence, that estimate was a mere invitation to make an offer.

Offer – May 2 Message

The May 2 voicemail message from B does qualify as an offer for the redwood fence. In the message he referred to their earlier discussion, and said that he would be willing to build the redwood fence for \$7,000. Furthermore, he expressly granted O the power to accept by calling him back or that he would start the work in a few days if he did not hear from her. Since he created power of acceptance, this message was an offer to build the redwood fence for \$7,000.

Offers have no effect, however, unless actually communicated. B reasonably expected that his message would be heard by O since her message said that she would be checking her messages daily. Owner did in fact hear the message. Once she heard the message, the offer was effective.

Acceptance by Silence

The general rule is that the offeree must objectively manifest assent to the offer to be bound. As a corollary, silence on the part of the offeree is not generally an objective

manifestation of assent. There are exceptions to this general rule where the parties have a prior history of dealing on such a basis. There is no indication that B and O have any such history. Although B attempted to create a power of acceptance by O's silence, she will not be bound by silence unless it is objectively assent.

B would argue that under the circumstances, O's silence should be construed as assent. O had already told him that she needed the fence to be completed by June 1. She had not informed him that the charity event scheduled for June 1 had been cancelled. B was under the impression that O need[ed] the fence done on time. Furthermore, her message said that she would be checking her messages daily, but would return calls as soon as she could. Given this, B was reasonable in believing that she heard the message but was too busy to respond. Since he told her he would start in a few days unless he heard back from her, it may have been objectively reasonable to believe that her silence meant that she wanted him to start but was too busy to respond.

On the other hand, O would argue that it would be unfair to hold her to an agreement that she had not assented to. After all, at the time, there were two outstanding offers: one for the cedar fence, and another for the redwood fence. Moreover, on their last communication, O had told B that she liked the idea of a redwood fence, but wanted to think about it before making a decision. Given that she could have decided on either, it was not objectively reasonable to interpret her silence as assent to the building of the redwood fence. O has the better argument here, particularly because courts are loathe to enforce an agreement where one party has not affirmatively manifested assent. Thus, O is not bound to the contract by her silence.

Consideration

There are no issues of consideration here. For a contract to be binding, there must be a bargained-for exchange whereby each party incurs some legal detriment. In this case, B would be obligated to build a fence, and O would be obligated to pay.

Remedies

Compensatory Damages

If there is no enforceable contract then B may not recover the \$7,000 from Owner. If there is a contract, however, then B would be entitled to recover the entire \$7,000. In California, the measure of compensatory damages is the expectancy interest. In other words, the law seeks to place the parties in the monetary position they would have been in had the contract been fully performed by both parties. Here, B fully performed by obtaining the materials and building the fence. When O refused to pay, she was in breach of her obligation to pay. Had the contract been fully performed, B would have expected to be paid the contract price of \$7,000. Thus, if there is an enforceable contract, B would be entitled to \$7,000.

Quasi-Contract

If there was no enforceable contract, B may still be able to obtain some of the money under the theory of quasi-contract. A quasi-contract is an equitable doctrine used to

prevent the unjust enrichment of one party. A quasi-contract arises where one party confers a benefit upon the other with the reasonable expectation that they will receive payment for the benefit. Unlike contract damages, however, the measure of damages under quasi-contract are restitution, or the prevention of unjust enrichment. In other words, the law will require O to pay B for the reasonable value of the services to prevent her unjust enrichment.

In this case, a quasi-contract likely arose. B certainly conferred a benefit on O. She has a brand new redwood fence. The issue is whether it was reasonable for B to expect that he would be compensated for his services. As discussed above, it is a close call as to whether B was reasonable in interpreting O's silence as consent. While it was probably not sufficient to bind O to the contract terms, it may have been sufficient under the circumstances to create a reasonable expectation in B that he would be compensated for his services.

If B prevails on a quasi-contract theory, he would at a minimum be entitled to recover the value of the materials, or \$4,500. If the new fence has increased the value of O's property, he may also be entitled to recover that increased value because to allow O to benefit from the increased value to her property would also unjustly enrich her. If this measure is applied, however, it would be limited to a maximum of \$7,000 representing the effective contract price. Furthermore, O may oppose this measure of damages as being too speculative.

Accord and Satisfaction

O will be required to pay B \$5,500 on the accord and satisfaction contract. When O returned and discovered the fence, she sent B a letter. In this letter, she agreed that B did a "great job" but asserted that she had never agreed to the contract. O then offered that in order to "avoid a dispute" she would "split the difference" and pay B \$5,500. This may be interpreted as an offer of accord. The offer was effective on May 26, when B received it.

There is sufficient consideration to bind the parties to this agreement because O has agreed to pay \$5,500 in exchange for B agreeing not to waive any claim to the original contract. As discussed, although her claim that she never agreed is stronger, B still had a viable contract claim against her. B reinforced his reasonable belief that he had a non-frivolous claim when he called her and told her that his first instinct was to get a lawyer and sue her. By forgoing his right to sue her on the contract theory, B has incurred a legal detriment sufficient for consideration.

O became bound to the offer when B called her and accepted it. In general, an offer may be revoked at any time by the offeror, but a revocation is not effective until communicated. Here, B called O and immediately accepted her offer of accord. Although O may have decided to revoke the offer before B called (which she suggests by saying "You're too late. I've changed my mind"), her subjective intent does not legally revoke the offer until she communicates the revocation to B. Here, since B

accepted before she could revoke, and there is sufficient consideration, O will be bound to the accord and satisfaction contract. B may recover \$5,500 from her on that theory.

Answer B to Question 3

Builder v. Owner

Builder may wish to proceed on three theories: 1) that Owner is in breach of contract formed on May 2, and thus, he should recover the full contract price; 2) that Owner is in breach of contract formed on May 25; and 3) that Builder should be entitled to restitutionary remedies under an unjust enrichment or quasi-contract theory.

Controlling Law

The first issue is whether the agreement between Builder and Owner is controlled by the UCC or the common law of contracts. The agreement was for the construction of a fence. In general, constructions are contracts for the personal services of the builder, with the cost of materials being incidental to the contract. However, the contract also involves the sale of goods, since the fence was being built out of wood. The UCC controls contracts for the sale of goods, which are defined as movable, tangible personal property. Thus, whether the UCC or the common law controls the contract depends on which part of the contract was the most important part.

If the agreement were for a cedar fence, the labor was valued at \$2,500 and material valued at \$1,500. Thus, such a contract would be governed by the common law of contracts. If the agreement were for a redwood fence, the labor was again valued at \$2,500 but instead the materials were valued at \$4,500. This contract could be governed by the UCC, since the primary part of the contract was the sale of the redwood, with the labor constructing the fence being incidental to the sale of the expensive wood.

Here, Builder is asserting a contract for the construction of a redwood fence. This is a close issue, because while there is a disparity between the value of the labor and the goods, the entire purpose of the contract was not to buy and sell wood, but rather to construct a fence. A pile of redwood would not be of use to Owner. Rather, Owner contacted Builder for the purpose of the construction of a fence. Thus, the court could also hold that the contract should be controlled not by the UCC, but rather by the common law.

1. Contract Formation on May 2

K Formation

In order to form a valid contract, there must be 1) offer, 2) acceptance, and 3) consideration.

Offer

An offer is the manifestation of a present intent to contract, definitely communicated to the offeree, inviting acceptance. Whether a statement constitutes an offer will be judged by a reasonable person standard. If a reasonable person in the offeree's shoes would understand the commitment to be a contract, then the statement is an offer.

Builder may argue that he made an offer to build the redwood fence on May 1. However, this argument will likely fail because Builder stated on May 1 that he would have to verify that the redwood was available. Thus, Builder's equivocation regarding the availability of redwood made his statement too indefinite to be considered an offer. Builder may also argue that he made an offer to build a cedar fence, but his argument would also likely [fail] because he was simply responding to an inquiry by Owner for an estimate regarding the cost of completion.

Builder will also argue that his May 2 telephone message constituted an offer. Owner stated in her phone message that she would be checking her messages daily. His message stated a price term, was definitely communicated to Owner, and manifested a present intent to contract. Thus, Builder's May 2 message would very likely be considered an offer because, judged by a reasonable person standard, it was clear that he was inviting acceptance of his promise to build a fence for \$7,000, and it was clearly directed at her based on their prior conversation.

Acceptance

Acceptance is words or conduct manifesting an assent to the terms of the offer. At common law, acceptance had to be a "mirror image" of the offer. Any deviation from the terms of the offer constituted a rejection of the offer, and instead formed a counteroffer. Under the UCC, acceptance may be made on different terms, and whether such terms become part of the contract depends on whether the parties are merchants.

Builder may argue that Owner accepted his offer on May 1. This argument will fail because, as noted above, Builder did not make an offer on that date. Thus, there could be no acceptance. Builder's better argument is that Owner accepted his May 2 offer by her silence.

Silence ordinarily does not manifest an assent to the terms of the offer. Silence can only indicate acceptance when the circumstances would clearly indicate to the offeror that his offer had been accepted. In this case, Builder will argue that he knew Owner was checking her phone messages daily. Thus, he would understand that Owner would receive his message if not on May 2, then certainly soon thereafter.

However, this argument should also fail because Builder himself requested that Owner "give him a call" soon, since redwood was in short supply and he wanted to get to work right away. Twelve days elapsed between May 2 and May 14, when Builder – who still had not heard from Owner – commenced building the fence. Based on their past conversations, Builder was aware that Owner wanted to think about building the fence before coming to a decision. Thus, it was unreasonable for Builder to assume that Owner's silence manifested an assent to his offer.

Moreover, Builder may argue that Owner had made time of the essence of the contract, since she stated in their May 1 conversation that she wanted the fence completed by June 1 in any event. Builder was concerned on May 14 that he would not be able to complete the fence by June 1 and therefore he commenced building in order to comply

with this condition set by Owner. This argument would also likely fail, because while a time of the essence clause makes late performance a material breach of contract, no contract had yet been formed between Owner and Builder. Thus, Builder cannot state that Owner's silence was acceptance even if time was of the essence.

Consideration

Consideration is the bargained-for exchange between the parties. Consideration is present any time promises or performances are exchanged. Any legal detriment or forbearance, as well as actual benefits and performance, can constitute consideration.

If there was a valid offer and acceptance on May 2, consideration would be present because Owner would have promised to pay \$7,000 in exchange for Builder's promise to construct the fence. This would be a bargained-for exchange of promises, and thus consideration would be satisfied.

However, as noted above, Owner did not accept Builder's offer on May 2 through any action or through silence. Therefore, no valid contract could have been formed on May 2.

Unilateral v. Bilateral

A unilateral contract is one whose acceptance is expressly conditioned on performance. That is to say, the offer can only be accepted by the demanded performance. All other contracts are bilateral. Builder may attempt to argue that, on May 1, Owner made an offer to pay \$7,000 if the fence were completed by June 1, and that a unilateral contract was formed by his full performance of building the fence. However, for the same reasons noted above, Owner did not make any offer on that date, and thus a unilateral contract argument will be rejected.

Statute of Frauds

Even assuming a contract was formed between Owner and Builder, Owner may attempt to assert a statute of frauds defense if the contract is governed by the UCC. Under the UCC, contracts for the sale of goods in excess of \$500 must be in writing. If the court finds that the UCC governs this contract, it would be in violation of the Statute of Frauds because all communications made between the parties were oral. In order to satisfy the Statute of Frauds, there must be a writing evidencing the contract, signed by the party to be charged (unless the parties are merchants).

Builders may argue that the signed written estimates he sent to Owner should satisfy the statute of frauds. Under the UCC, a Merchant's Firm Offer will take a contract out of the statute of frauds, even if the party to be charged does not sign a writing evidencing the contract. The merchant's firm offer rule will apply if 1) the sender is a merchant, 2) the recipient has reason to know its contents, and 3) does not respond to the writing. Here, Builder is likely a merchant under the UCC's broad definition of a merchant, since he probably frequently deals in construction contracts. Owner received the estimates and knew their contents, since she expressed that she liked the idea of the redwood fence. However, Owner did respond to the estimate, indicating that she wanted time to

think about it. Thus, the merchant's firm offers rule here cannot apply. Any subsequent agreement must still be evidenced by a signed writing, which here is absent under these facts.

It should also be noted that if the contract is governed by the common law, there would be no Statute of Frauds issue because the contract did not fall within the types of contract normally governed by the Statute.

Frustration of Purpose

Additionally, assuming a contract was formed, Owner may attempt to assert a defense based on frustration of purpose since the whole purpose for which she wanted to build the fence – the charity event in her backyard – was cancelled. However, this argument would fail because the purpose of the contract was not to perform a charity event, but rather to build a fence, which was still possible even after the event had been cancelled.

Conclusion

Thus, on May 2, no contract was formed between Owner and Builder. As such, Owner is not in breach of contract for refusing to pay \$7,000 and Builder has no contract remedy to recover any part of that money.

2. Formation of Contract on May 25

Builder may alternatively argue that a new contract was formed on May 25, when Owner returned home. Builder will assert that Owner's letter to him was an offer to pay \$5,500 in exchange for the fence, which Builder accepted by his phone call on May 26. Again, every contract must contain both offer, acceptance, and consideration. Offer and acceptance are likely satisfied, but Owner will assert that no consideration was present.

Owner will argue that the consideration for her promise to pay \$5,500 was Builder's completion of the fence. That would be past consideration, which cannot constitute a bargained-for exchange, since there was no promise to support Builder's performance at the time he rendered it. In other words, Owner will argue that she did not bargain for the fence, and thus there was no return promise or performance in exchange for her offer to pay Builder \$5,500. Owner will very likely prevail on this point, and therefore since no consideration was present, a new contract to build the fence could not have been formed on May 25.

Good Faith Settlement of a Dispute

Alternatively, Builder may argue that Owner's promise to pay \$5,500 constituted a good faith settlement of a dispute, which Builder then accepted. Here, the exchange was not money for the construction of the fence, but rather money in exchange for Builder's release of any legal claim he might assert against Owner.

In this case, Owner stated that she never agreed to the fence, and that Builder should have waited until she returned – but that to avoid a dispute, she will offer Builder \$5,500. Builder stated that he was going to get a lawyer and sue Owner, but agreed to accept the money instead. Thus, there is a good faith dispute between these parties as

to the existence of the debt and as to the amount owed. Owner made an offer via her letter on May 25, and Builder accepted it on May 26. Consideration is present because there was a bargained-for exchange: in this case, Owner promised to pay money in exchange for Builder's legal forbearance (doing something he had a right to do, in this case, sue Owner).

Accord and Satisfaction

An accord is an agreement which rests on top of an underlying contract. An accord occurs when one party agrees to accept a different performance in lieu of the performance promised in the underlying agreement. An accord suspends performance of the underlying agreement. Satisfaction is the performance of the accord agreement. When a satisfaction occurs, the accord merges with the underlying agreement, which is extinguished.

Here, Builder will argue that the settlement of their dispute constituted an accord but not a satisfaction. As analyzed above, the good faith dispute contained an offer, acceptance and consideration. Thus, there is an overlying agreement resting on top of an underlying agreement. However, the accord was never performed. Owner did not pay the \$5,500 in lieu of her original performance. Thus, Builder could seek damages for breach of the accord agreement – but not damages for breach of the underlying contract since, as noted above, no actual contract was formed to build the fence. Builder's damages would be measured by the loss he incurred as a result of the breach of the accord agreement, which here would be \$5,500.

Revocation of Offer

Owner will argue that she revoked the offer on May 26 when she told Builder that she had changed her mind. In a bilateral contract, an offer may be revoked at any time before acceptance is made. Once acceptance is given, the contract is formed and an offer cannot be revoked. Here, Owner's argument will fail because Builder accepted the offer by calling her immediately. Thus, Owner could not revoke her offer.

Therefore, if Builder proceeds on this theory, he could likely recover the \$5,500.

3. Quasi-K Remedies

If Builder decides that he cannot succeed on a contract theory, he may proceed on a quasi-contract theory, which will avoid unjust enrichment on the part of the defendant. In this case, Owner has a new redwood fence in her backyard. Builder will argue that if she were permitted to keep it without paying any sort of damages to Builder, she would be unjustly enriched.

Builder could likely prevail on this argument. Owner would argue that she should not have to pay any amount of damages because she did not actually request that Builder construct the fence. However, Owner heard Builder's message on May 2 and decided not to reply, because the event had been cancelled. Owner knew that she would not be returning until May 25, and that she had told Builder she wanted the fence built by June 1. Additionally, Builder had asked her to call him back as soon as possible, because

the redwood was in short supply. Thus, based on Builder's message on May 2, Owner should have at least communicated to Builder that she was no longer interested in having the fence constructed.

Fairness would therefore require that Owner make restitution for the benefit conferred upon her by Builder. Builder will be able to recover the fair market value of the work he did in order to build the fence. It should be noted that restitutionary remedies can sometimes even exceed the contract price, if that is the fair market value of services rendered. Thus, Owner can recover all, part, or more of the \$7,000 depending on the fair market value of the benefit conferred upon Owner.