

Question 2

Andrea recently started making Rosso, a new red wine, at her winery. Rosso received very high ratings at preview tastings. Bob, who owns a wine shop, telephoned Andrea on May 15 and asked about price and delivery date for 20 cases of Rosso. Andrea told Bob that she expected to have Rosso available for sale by June 28 and would deliver 20 cases to Bob on that date for \$250 per case. Bob replied that he had to think about it because the price was high. Andrea said: "Fine. You can have until June 15 to decide."

One June 11, Bob agreed orally to sell 5 cases of Rosso to Paul, an accountant, for \$400 per case, delivery promised on July 1. Paul paid Bob in full and made plans to serve the Rosso at a Fourth of July party he was giving for existing and prospective clients. Invitations to the party, which announced that Rosso would be served, were highly prized and many guests planned to attend in order to have a chance to try Rosso.

On June 12, Andrea sent Bob a fax stating: "The market is so hot for Rosso that the price is now \$330 per case. Let me know by June 15 if you are still interested." On the same day, Bob replied by fax stating: "I accept your May 15 offer to sell me 20 cases of Rosso for \$250 per case, delivery on June 28." Andrea immediately telephoned Bob and said she would not sell for \$250. Bob would have to pay \$330. Bob replied: "No way. We have a deal at \$250." Andrea then said, "forget it," and hung up. Bob attempted to get Rosso elsewhere for Paul, but none was available.

Because no Rosso was available, Paul purchased 5 cases of Canti, a premium red wine, at \$500 per case. The total cost of his Fourth of July party was \$75,000. The party was a disaster because Rosso was not served. Few guests drank Canti. Many left early. Paul gained no new clients.

1. What rights, if any, does Paul have against Bob? Discuss.
2. What rights, if any, does Bob have against Andrea? Discuss.

Answer A to Question 2.

PAUL v. BOB

OFFER/ACCEPTANCE/AGREEMENT:

On June 11, Bob offered to sell 5 cases of wine and Paul promised to pay \$400, with delivery on July 1 St. There appears to have been offer and acceptance by the parties. The terms of the agreement are unambiguous.

Bob may claim that since the place for delivery was not stated, that the contract should fail for lack of a material term. However, for the sale of goods, unless otherwise specified, delivery is assumed to be the seller's place of business. Since Bob was a wine merchant, it's reasonable to preclude that the parties intended that Paul pick up the wine at the shop.

CONSIDERATION:

Bob promised to supply the wine; Paul promised to pay for it. This agreement constitutes bargained for exchange and is adequate consideration.

STATUTE OF FRAUDS:

Bob will contend that the agreement is unenforceable in that it violates the Statute of Frauds, which require contracts for the sale of goods over \$500.00 to be in writing.

Paul will contend that their agreement comes within the exception to the S of F in that since he has already fully performed, by paying, and Bob has accepted that performance, Bob is estopped from this claim. Since Bob's action in accepting payment would indicate the existence of the contract, his defense of Statute of Frauds should fail.

IMPRACTICABILITY/BREACH BY THIRD-PARTY/CONDITION PRECEDENT:

Bob may claim that Andrea's refusal to sell the wine for less than \$330 per case made his contract with Paul impracticable. He may also claim that, since Andrea hung up the phone on him and he was unable to locate the wine elsewhere, his performance should be excused.

Paul will state that Bob could have paid the \$330.00, and still made money in selling to Paul, and

that when a party to a contract is relying upon a third-party to supply some necessary element of the contract, the party to the contract has assumed the risk of default by the third-party. When Bob agreed to sell the wine to Paul, he took the chance that Andrea might not deliver the wine to him in time. Since there are not facts to indicate that the receipt of wine from Andrea was a condition precedent to Bob's obligation to Paul, Bob will not prevail on this claim.

MATERIAL BREACH/DAMAGES:

Since the parties had a valid and enforceable contract and Bob failed to perform, his failure constitutes a material breach of the agreement and Paul is entitled to his damages. Under the UCC, when a seller fails to deliver goods, the buyer may "cover" and claim as damages the difference between the contract price and market price, plus incidental and consequential damages.

Paul was unable to locate Rosso and thus had to purchase the more expensive Canti wine. Bob may claim that Paul was obligated to cover with Rossi, but the buyer needs only to make reasonable efforts in obtaining substitute goods at a fair price; they need not obtain the "best price". Therefore, Bob is liable for the additional \$100 per case, for a total of \$500.00.

In addition, Paul will be entitled to recover his incidental damages; any additional shipping costs, etc. in obtaining the replacement wine.

Paul may claim that he is entitled to consequential damages as well; compensation for the disastrous party. Bob will assert that he is only liable for those damages reasonably foreseeable by the parties at the time they entered into the contract. Since it is unlikely that Bob and Paul intended to insure that Paul's party be a success, Bob should prevail on this point, and Paul's damages should be limited to the \$500.00, plus his incidental damages.

BOB v. ANDREA

OFFER/ACCEPTANCE/IRREVOCABLE OFFER/PROMISSORY ESTOPPEL:

Andrea offered to Bob during their May 15th telephone call 20 cases of Rosso for \$250, with delivery not later than June 28th. She manifested an intent to be bound by the terms of her offer, which were reasonably clear as to the quantity, price and time for performance.

However, Bob did not accept Andrea's offer; he asked for more time. Therefore, at the end of the conversation, the offer was still open.

Bob will claim that Andrea created an irrevocable option to keep the offer open until June 15th. However, since Bob did not provide any consideration, an offer may be revoked at any time.

Bob will claim that, as a merchant, Andrea created a "Merchant's Firm Offer". However, under

the UCC, and offer from a merchant to keep an offer open for a specified time (not to exceed 90 days) is enforceable, if it is in writing.

Bob will then claim that the offer should be irrevocable based upon a theory of promissory estoppel; Andrea knew that Bob was a wine merchant, and it was foreseeable that he would rely upon her offer in promising to sell the wine to his customers. Since the wine was highly regarded and much anticipated, it is foreseeable that there may have been advance demand for it. Although Bob made no indication during the telephone conversation that he might detrimentally rely upon Andrea's promise to keep the offer open, he may prevail on this theory, although Andrea will claim that the offer would have been held open for a reasonable time, that Bob's delay in accepting until after he had an order from Paul was unreasonable.

REVOCAION/ACCEPTANCE:

Andrea will claim that the fax of June 12' operated as a revocation of the prior offer and a new offer to sell the wine for \$330 per case. Bob will claim that since the prior offer was irrevocable under a theory of promissory estoppel, he accepted that offer on June 12'. Revocation is effective upon receipt; acceptance is effective upon dispatch. Andrea revoked before Bob accepted.

STATUTE OF FRAUDS:

Even if Bob is able to claim that the contract was formed upon his acceptance on June 22th because Andrea was estopped from revoking it for a reasonable period of time, Andrea will claim that the contract is unenforceable because, since it is for the sale of goods over \$500.00, it is within the Statute of Frauds. Since this agreement does not seem to fall into any of the exceptions of the S of F, Andrea should prevail on this theory.

ANTICIPATORY BREACH/DAMAGES:

A party to a contract, who, prior to the time of performance, unequivocally repudiates the agreement and expresses a firm indication that they will not perform, is in material breach of the agreement. An anticipatory breach allows the other party to forgo their performance and immediately sue upon the breach. Although Andrea refused to deliver the wine to Bob, there was no contractual obligation to do so; since it does not appear that there was offer and acceptance; or alternatively, that the contract would be unenforceable under the Statute of Frauds, Andrea's refusal to deliver the wine would not constitute an anticipatory breach and therefore she would not be liable for Bob's damages.

Answer B to Question 2

Paul v. Bob

UCC

The Uniform Commercial Code (UCC) governs all contracts involving the sale of goods, such as wine, which are moveable and identified at the time of contracting.

MERCHANTS

A person who holds himself out as having knowledge or skill, or by his occupation holds himself out as having such, peculiar to the services or goods involved in the transaction.

Since Bob owns a wine shop, in the business of buying and selling wine, Bob will be a merchant and therefore held to a higher standard of honesty and good faith in his dealings.

Because Paul is an accountant, he is not in the business of buying and selling wine and as such is not a merchant.

OFFER

An outward manifestation of a present contractual intent with definite and certain terms, quantity, time of performance, identity of parties, price, and subject matter as communicated to the offeree. UCC only requires quantity.

When Bob and Paul orally agreed on June 11 for Bob to sell Paul five cases of Rosso, it can be inferred there was an offer by Paul since the facts state Bob orally agreed.

Paul's oral offer was his outward manifestation showing his present contractual intent to buy five cases of wine (quantity) by July 1 (time of performance between Bob and Paul (identity of parties) for \$400,per case (price) for Rosso Wine (subject matter).

These definite and certain terms were communicated to Bob on June 11.

There was a valid offer under Common Law and UCC.

ACCEPTANCE

An unequivocal assent acceptance of the terms of the offer. At common law the terms must be a mirror image of the offer. Not so at UCC.

Because the facts state Bob accepted, it can be inferred there was an unequivocal assent to Paul's offer.

Therefore, there was a valid acceptance.

CONSIDERATION

That which is bargained for and given in exchange for a return promise requiring legal benefit and detriment.

When Bob bargained to sell five cases of wine in exchange for Paul's promise to pay \$400 per case, there was a bargained for exchange.

Bob's benefit is \$20,000 but his detriment is 5 cases less to sell.

Paul's benefit is good wine to serve his guest but at a detriment of \$20,000.

Therefore there was valid consideration and a valid contract.

DEFENSES TO FORMATION

STATUTE OF FRAUDS

Contracts for the sale of goods over \$500 must be in writing in order to be enforceable.

Bob will argue his contract with Paul was unenforceable since it was oral and wine cost over \$500.

However, Paul will show he paid in full for the wine on June 11 and Bob's receipt of payment will be evidence of a contract and remove it from Statute of Frauds.

Therefore there was a valid enforceable contract.

CONDITION - EXPRESS

An event or happening the occurrence or now - occurrence of which creates or extinguishes an absolute duty to perform.

When Bob and Paul orally agreed that the wine would be delivered by July 1, Paul will say this was an absolute duty which must be performed.

Further, since Paul already paid, the condition has been satisfied on behalf of Paul.

DISCHARGE - IMPOSSIBILITY

A change in the circumstances causing one party not to be able to perform due to unforeseen difficulties.

Bob will argue when Andrea, the supplier refused to supply Bob with Rosso due to their breached contract that this was an unforeseen event causing it to be impossible, for Bob to perform.

Paul will argue the wine was available but at a higher price therefore it was not impossible.

COMMERCIAL IMPRACTICABILITY

Where the cost of contracting far exceeds (1 Ox's cost) the expectations of parties.

Bob will argue the cost of wine had increased from \$250 per case to \$330 per case and the cost was in excess of what had been anticipated.

Paul will argue the cost did not exceed what would or could have been expected and were not 1 Ox's the cost of what originally contracted for.

Therefore, Bob's argument will fail.

BREACH

An unjustified failure to perform which goes to the essence of the contract.

When Bob did not supply Paul with the wine he had already purchased, Bob unjustifiably failed to perform that which was the very essence of the contract.

Therefore Bob is in major breach.

DAMAGES

General - Expectancy damages which the non-breaching party is entitled.

Since Paul already paid for the wine, Paul will be able to recover the amount paid \$20,000 and any expenses related thereto.

SPECIAL - CONSEQUENTIAL

Per Hadley & Baxendale, since it was foreseeable and known at time of contracting Paul

needed wine to wine and dine and impress his business guest, Paul will be able to recover his loss of any benefit of bargain due to loss contracts or any future prospective advantages and recover cost of party.

However, Paul would have to show these were not too speculative and cost of party may not work.

COVER - AVOIDABLE CONSEQUENCES

Since Paul covered and mitigated his damages, Paul bought a replacement wine for \$500 a case, Paul will also recover the difference in the wines or \$5,000. .

Paul will also have a Tort action as discussed.

Bob v. Andrea

UCC - defined and discussed supra. Wine is the good involved.

MERCHANTS

Defined supra.

Both Bob and Andrea are merchants. Bob as discussed supra and Andrea due to she is a producer and seller of wine.

Both are held to higher standard of honesty and good faith in dealing.

INQUIRY

Conduct or language inviting one to deal.

When Bob called Andrea on May 15 and asked about her prices for Rosso wine, Bob was using language inviting Andrea to deal.

Therefore, there was an inquiry or preliminary offer.

Andrea will argue this was an offer since Bob stated exactly what he wanted but since Bob was merely "asking" and therefore not making an offer.

OFFER

Defined supra

When Andrea told Bob over the telephone she would deliver 20 cases of Rosso wine, Andrea was making an outward manifestation of her present contractual intent to sell Bob the wine at \$250 per case.

Since the only term necessary under UCC is quantity, 20 cases, there was a valid offer.

Under common law, you also have the price at \$250 a case, Rosso Wine, subject matter, for delivery June 28, time of performance and between Bob and Andrea, identity of parties.

Therefore, under the common law and UCC there was a valid offer by Andrea.

REJECTION

A rejection of the terms of the offer and a new offer requiring acceptance.

When Bob told Andrea on May 15 he had to think about it, this was a rejection of Andrea's offer. The fact that the price was too high would not be a counter offer since no alternative price given.

Defined supra.

When Andrea faxed Bob on June 12 with the price of \$330 per case, she will say this was a new offer since Bob rejected the May 15 offer.

Bob will argue Andrea offered to hold the offer open until June 15.

However, since there was no written agreement under FIRM OFFER, in order to hold an offer open without consideration there must be a writing.

OPTION CONTRACT

An offer will be irrevocable for the time stated with consideration given.

Bob will argue Andrea as merchant in good faith agreed to hold open however since not in writing would need consideration.

Under UCC, because they look for contracts under good faith, because Andrea reaffirmed the offer to remain open until June 15, her original offer might remain in effect without consideration.

ACCEPTANCE

Defined supra.

Bob will argue the original offer valid and his acceptance was valid.

Andrea will argue she made a new offer which was not accepted, by Bob and which she revoked on June 12.

REVOCAION

The termination of offer is power of acceptance.

Andrea will argue she revoked her June 12 offer with her call to Bob however, since she refers to price of \$250, and because the court could find the original offer to hold open done in good faith, her original May 15 offer was valid and Bob's acceptance valid.

CONSIDERATION

Defined supra

Andrea bargained for sell of wine and Bob promised to pay \$250.

STATUTE OF FRAUDS

Goods over \$500 requiring writing.

Bob will agree no writing therefore unenforceable contract.

Andrea will again argue when he faxed Andrea on June 12 accepting the May 15 order his writing would be sufficient as a writing to remove from Statute of Frauds.

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Bob will argue the fax of June 12 did not change any terms which materially altered since original price was \$250 and Andrea's refusal was not in good faith.

If court determines Andrea in Breach, Bob's damages would be the cost paid by him to Paul. Except no special since not known at time of contracting about need for Paul's guest.

Paul's Tort Action against Bob

Interference with Contract/Future Projective Advantages

The intentional interference with a future prospective economic advantage. Since Paul won't prove the acts of Bob intentionally probably won't recover. If so, recover by proof of clients, benefitting bargain.

