

## QUESTION 2

Buyer opened a new automobile service station earlier this year. Buyer wanted to buy a television set for the station so her customers could watch television while she worked on their cars.

Buyer found the television set she wanted at Seller Sets, Inc. ("Seller"), a television set retailer. A Seller salesperson told Buyer she could purchase the set for \$300. Buyer replied that she would like to "shop around". The salesperson then wrote "Seller Sets, Inc.- \$300" on a sales brochure describing the set and gave the brochure to Buyer. The printed phrase "Available for a Limited Time Only" appeared at the top of the brochure. As the salesperson handed Buyer the brochure he said, "I think you'll find no one will beat our price."

Not finding a better price, Buyer returned to Seller's one week later to buy the television set. However, the salesperson told her that the set was out of stock and that Seller could not sell her another at the \$300 price. Two months later, Buyer purchased the same model set from another dealer for \$450.

Buyer wishes to sue Seller, seeking damages for lost profits. Buyer intends to allege that she lost customers because she has not had television in the station for the past two months.

What theory or theories for recovery of damages will Buyer assert in her complaint and what is her likelihood of success on each theory? Discuss.

## ANSWER A TO QUESTION 2

- I. What law applies: Uniform Commercial Code (UCC) or common law?

The UCC is the governing law for the sale of goods. Goods are movable items and do not include services, real estate, or intangibles.

Here, the governing law is the UCC.

2. Is Seller a merchant as defined by the UCC?

The UCC defines merchant as someone who trades the types of goods in question or holds themselves out to be knowledgeable regarding the goods.

Here, Seller is a television set retailer and is clearly a merchant.

Note: Seller's salesperson, since acting within the scope of her/his employment, binds Seller Sets, Inc. to any contracts/offers, etc., that she makes (respondeat superior).

3. Did Buyer and Seller have a contract for the sale of a TV set for \$300?

A contract consists of an offer, an acceptance, and consideration. An offer is a manifestation to be presently found or committed, communicated to specific offerees, with definite subject matter and material terms. Under the UCC, quantity and subject matter are generally the only two terms required.

### Offer

Here, the salesperson clearly offers Buyer the television set for \$300.

## Acceptance

Acceptance is the manifest willingness to be presently bound to a valid offer. It can be express or implied. Under the UCC acceptance can occur by a means stipulated by the offer, or if no such means is provided, in any reasonable manner.

\*Here, Buyer clearly does not accept Seller's offer because Buyer states that she would like to "shop around."

Therefore, as of the time of the Buyer's first visit to Seller Sets, there is no contract between Seller and Buyer.

#### 4. Did Seller make a Merchant Firm Offer to Buyer?

Under the UCC, an offer can remain open if supported by consideration (an options contract) or if a merchant firm offer is made. A merchant firm offer occurs when a merchant makes a signed writing to keep an offer open. The offer remains open for the stated period of time not to exceed three months or for a reasonable period of time if no time is stated, again not to exceed three months.

Here, Seller is a merchant as discussed above. Seller wrote on the T.V. sales brochure that described the set "Seller Sets, Inc. \$300." Buyer will argue that this is a signed writing because of Seller's handwritten note. Seller, on the other hand, will argue that Seller's writing is not a signature. In general, the UCC favors contracts and a trier of fact may determine that Seller's handwritten notes with the words "Seller Sets" constitutes a signing:

Here, no specific time is given for the length of the firm offer. Seller will argue that the printed phrase "Available for a limited time only" suggests only for a period of time in which Seller has inventory. Also, this phrase suggests a short period of time. Buyer, on the other hand, would argue that one week, the time in which the Buyer returned, is within a "limited time" and furthermore one week is within a reasonable time as contemplated by the UCC, which cuts off firm offers without consideration at three months. Because one week is a reasonable time for holding open an offer to sell a TV, Seller must keep its offer open for one week.

Therefore, Seller gave Buyer a merchant firm offer that was open for at least one week.

### Detrimental Reliance

In the event that Seller was not found to have made a merchant firm offer, Buyer may argue that she detrimentally, reasonably, and foreseeably relied upon Seller's statement that T.V.'s at \$300 would be available.' If so, this detrimental reliance in effect provides the consideration to keep Seller's offer open.

\*Here, in addition to the facts pertaining to the merchant firm offer, Seller says Buyer will not find anyone that can beat Seller's price.

5. What damages can Buyer recover if Seller violated its merchant firm offer?

Assuming a merchant firm offer was made by Seller that stayed open for a week, Seller broke that offer when Buyer returned a week later to purchase the TV (Salesperson tells Buyer TV out of stock and could not sell Buyer one at \$300.)

### Expectation Damages

Parties to a contract are awarded expectation damages-damages to make them whole so that they receive the benefit of their bargain. Under the UCC, when a seller breaches, by not providing the goods to buyer, buyer can cover, that is purchase an identical or equivalent good and the seller owes the buyer expectation damages equal to the difference in prices.

Here, Buyer covers her purchase by buying an identical TV two months later at a \$150 increase in price (\$450 - \$150). Seller may argue that Buyer waited too long to cover herself and, if TV prices increased during this time, Seller should not have to pay for such increases. Here, there are no facts to support this and therefore Seller owes Buyer \$150 in expectation damages.

## Consequential Damages

Consequential Damages may be awarded to the non-breaching party *if* at the time of contract formation (in this case the merchant firm offer) the non-breaching party makes clear to the breaching party that there are special circumstances that would not be obvious that would cause harm if the contract were breached.

Here, Buyer does not tell Seller that the TV is necessary to retaining customers at Buyer's service station, and Seller would have no reason to know this. Furthermore, Buyer could have covered much sooner than two months in order to mitigate damages (that is, loss *of* customers to the service station). In addition, Seller would argue that Buyer's consequential damages are too speculative, too remote, and cannot be reasonably determined by a court because it would be hard to determine whether the lack *of* a TV resulted in a specific number of customers not using Buyer's service station.

Therefore, Buyer will not recover consequential damages.

## ANSWER B TO QUESTION 2

### I. Governing Law-UCC or Common Law?

If Buyer can establish that a contract exists, it will be governed by the UCC because this is a contract for the sale of goods, a TV (a movable object).

### II. Do the parties have a contract?

#### A. Has there been an offer?

Seller is a party that deal in "goods of the kind," and as such is defined within the UCC as a merchant. Specifically, Seller is a TV set retailer, as stated in the fact pattern. Therefore, the special rules for merchants' offers will apply. The salesperson for Seller, as an agent of Seller, has provided Buyer with a brochure describing the set, and salesperson wrote "Seller Sets, Inc.-\$300" on the brochure. Thus, the elements of a Merchant's Firm Offer are established: 1) price, 2) quantity (implied to be one), 3) description of the product stated with specificity, and 4) signed by the merchant. The courts have held that a written or printed business name on the estimate or brochure may be held to construe a signed offer. Further, under the objective theory of contracts, the brochure and statements made by salesperson would induce a reasonable person to believe that had the power to presently accept Seller's offer to sell one TV for \$300. Under the Merchant's Firm Offer rule, the merchant must hold the offer open to the offeree for a "reasonable time," not to exceed 3 months. Therefore, it would appear that there has been an offer.

#### B. Is the offer still open?

As stated supra, under the Merchant's Firm offer rule, the merchant is required to hold an offer open for a reasonable amount of time. Under these facts, Seller had reason to know that Buyer intended to "shop around" a bit, and this is the reason Seller's salesperson provided the brochure. The words, "Available for a Limited Time Only" appeared on the brochure. Thus, when Buyer returned to purchase the

set he may have believed that this was within the "Limited Time." Since this is an ambiguous statement as to how long the offer will remain open, it will be up to the court to determine if Buyer acted reasonably. Ordinarily, a merchant's firm offer must be held open for a period not to exceed 3 months unless unambiguously stated in the offer. Seller's offer is ambiguous on its face, and this will be an issue for the court

C. If the offer is still open-

If the court rules that one week was a reasonable time in which Buyer could return and expect to be able to accept Seller's offer, then her act of returning to the store prepared to make a perfect tender to purchase the set would have been an acceptance on Buyer's part. Thus, a contract would have been formed.

D. If the offer was no longer open

If the court rules that it would be unreasonable for Buyer to expect to be able to purchase the set one week later, in light of the fact that the brochure clearly indicated the special price was available for a limited time only, Buyer's actions would be construed as an ineffective attempt to accept the offer. Under these facts, no contract would have been formed.

III. If Buyer was reasonable in returning to the store one week later to purchase the set, offered perfect tender, and expected to make a contract with Seller for one TV, she has accepted the contract. When she was informed by Seller that there were no more in stock, this was, in effect, a breach on the part of Seller. Since it went directly to the essence of the contract (the TV), it is a material breach on the part of Seller. Thus, Buyer could reasonably sue for damages.

Under the Merchants' Firm Offer rule, which appears to be in effect here, it is likely that the court will rule in favor for Buyer as to whether the Seller should have expected his brochure to induce reliance on the part of Buyer. A reasonable person in Buyer's position would expect that he would be able to accept the offer and form a contract with Seller. Thus, Buyer will be owed some damages based on his reliance on Seller's statements.

### A. Reliance-Compensatory Damages

Buyer will first state that based on her reliance on Seller's offer, she expected to be able to purchase this model of TV for \$300. Ultimately, she had to pay \$450 for the same model. Thus, she should be compensated for the difference in what she actually paid and what she would have paid had the contract with Seller not been breached. This amount, \$150, is her compensatory damages. Buyer would be under an obligation to mitigate her damages, and there are no facts presented to indicate either that she did or did not. The fact that she waited two months to make the purchase of a TV set, that it was the same model and that it was 50% more expensive would all be factors for the court to consider in determining if Buyer was reasonable in her attempt to mitigate her damages. She seems to have a strong case, given her reliance on a merchant's firm offer.

### B. Lost profits

Damages for lost profits must be established with reasonable certainty, and are designed to place the plaintiff in the position they would have been in had the contract been adequately performed. Here, that would mean, if Buyer had been able to purchase the TV set from Seller as originally desired, how would that have affected her business profits? Typically, lost profit damages are very difficult to establish absent significant historical data to indicate some trend or pattern. Since this was a new business, for Buyer, it will be especially difficult for her to establish with the requisite specificity exactly how her business was harmed by the lack of a TV in the waiting area of the station. Therefore, it is unlikely that she will recover damages for lost profits.

### IV. Seller's Defenses to whether there is a contract-

Buyer will be owed nothing if Seller can prove that there was no contract. This might be achieved in either of two ways: 1) That Buyer's reliance was unreasonable, and 2) claiming the statute of frauds as a defense to formation.



A. Buyer's unreasonable expectation to contract

As discussed supra, whether Buyer's expectation that she could presently accept Seller's offer via the brochure is a matter for the court. Seller will argue that the printed "Limited Time Only" should not have induced any reliance on Buyer's part that she could expect to return one week later and purchase the TV set.

B. Statute of Frauds

Seller may raise an issue with the statute of frauds, but this would be ineffective, since the Statute of Frauds provision applying to goods is applicable only to goods of \$500 or more. The TV was offered for \$300, and therefore, is outside the Statute of Frauds.