



California First-Year Law Students' Examination

**Essay Questions
and
Selected Answers**

June 2018



The State Bar of California
Committee of Bar Examiners / Office of Admissions

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ESSAY QUESTIONS AND SELECTED ANSWERS

JUNE 2018

CALIFORNIA FIRST-YEAR LAW STUDENTS' EXAMINATION

This publication contains the four essay questions from the June 2018 California First-Year Law Students' Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

<u>Question Number</u>	<u>Subject</u>
1.	Contracts
2.	Torts
3.	Contracts
4.	Criminal Law

June 2018

ESSAY QUESTIONS



California First-Year Law Students' Examination

Answer all 4 questions.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little or no credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

You should answer according to legal theories and principles of general application.

QUESTION 1

Seller sells imported food products to local food distributors like Buyer. Seller and Buyer entered into a valid written contract under which Seller promised to deliver to Buyer “on or before May 1 of this year, 2,500 pounds of Canadian wild rice, packed in 100-pound sacks, at \$6.00 per pound, total price -- \$15,000.” Buyer, a supporter of the local nonprofit Food Bank, insisted on a provision in the contract stating, “In addition to the quantity of goods to be delivered by Seller to Buyer under this contract, Seller agrees to deliver free of any charge an additional 200 pounds of the identical product to Food Bank.”

Immediately after Buyer informed Food Bank of Seller’s promise to deliver the 200 pounds of Canadian wild rice, Food Bank decided to use the rice as part of its upcoming fundraising campaign. Food Bank spent \$300 for 200 one-pound bags that were labeled “Famous Canadian Wild Rice — Thank You from The Food Bank.” It planned to send letters to 200 donors offering a bag of the Canadian rice to anyone who contributed at least \$50, believing that the campaign would raise \$10,000.

On May 1, Seller delivered 2,500 pounds of Canadian wild rice to Buyer. However, the rice was packed in 50-kilogram sacks that contained 110.2 pounds each. Seller’s agent explained to Buyer that his Canadian producer had recently switched to metric weights because it now exports much of its wild rice to Europe. Buyer refused to accept the delivery. The next day Buyer sent a fax to Seller stating, “Because you failed to satisfy your obligations under our contract, I hereby terminate our purchase agreement.” Seller believes Buyer refused to accept the delivery because Buyer had found a cheaper source of Canadian wild rice. A few days later Buyer purchased 2,500 pounds of Canadian wild rice from another supplier for \$4.00 per pound.

After Seller failed to deliver the Canadian wild rice to Food Bank following Buyer’s rejection, Food Bank was unable to find any other affordable source and had to suspend the fundraising effort.

1. Can Food Bank enforce the contract between Buyer and Seller? Discuss.
2. What, if any, defenses does Seller have? Discuss.
3. What, if any, relief can Food Bank seek? Discuss.

QUESTION 1: SELECTED ANSWER A

Food Bank's ability to enforce the valid contract between Buyer and Seller will be determined by whether there has been a breach of that contract and whether Food Bank's rights had vested.

APPLICABLE LAW

Article 2 of the UCC governs contracts for the sale of goods. Goods are all movable chattel.

Here, the contract is for the sale of pounds of rice. Pounds (or kilogram sacks) of rice are movable chattel.

Thus, the UCC applies.

Merchant

Some provisions of the UCC apply only to merchants. A merchant is one who regularly deals in goods of the kind sold in the contract.

Here, Seller is in the business of selling imported food products to local distributors. Buyer is a local food distributor. They both regularly deal in the sale of commercial foods.

Thus, both Buyer and Seller are merchants.

FORMATION

A valid contract is formed where there is mutual assent (evidenced by an offer and acceptance), consideration, and no defenses. The Statute of Frauds is a defense to formation that requires certain agreements--including those for the sale of goods valued at over \$500--be in a writing signed by the party to be bound in order to satisfy the Statute.

Here, the contract was for the sale of 2,500 pounds of rice valued at \$15,000, which is

within the Statute of Frauds. The facts tell us, however, that the contract was written and valid.

Thus, the Statute is satisfied and there is an enforceable contract between Buyer and Seller.

PERFECT TENDER RULE

Under the UCC, where a seller accepts a buyer's offer by promise to ship, the perfect tender rule applies. The seller's delivery must conform exactly to the buyer's order and the tender must be perfect. Where the seller accepts an offer by prompt shipment rather than promise to ship, the seller is entitled to ship an accommodation rather than an absolute perfect tender, so long as the seller includes a note to the buyer qualifying the shipment as such.

Here, Seller delivers to buy 2,500 pounds of Canadian wild rice packed in 50-kilogram sacks containing 110.2 pounds each rather than the contracted-for 100-pound sacks. Because the facts tell us, through Buyer's communication with Food Bank, that the seller had "promised" to ship, the Seller was bound to a perfect tender.

Thus, Seller's delivery of 50 kilogram/110 pound sacks rather than 100 pound sacks (even though it was very close to the 100-pound sacks) was an imperfect tender and a breach of its contract with Buyer.

THIRD PARTY RIGHTS

Third Party Beneficiary

A third party beneficiary (TPB) is one who is not a party in the making of the contract but who is named and is to receive a benefit conferred under that contract. A TPB must be an intentional, rather than an incidental, beneficiary in order to have rights under the contract. A donee beneficiary is one to whom the promisee (Buyer) intends to confer its benefit under the contract; a creditor beneficiary is one to whom the promisee owes a debt and intends to have its benefit conferred as a repayment of that debt.

Here, Buyer and Seller's contract names Food Bank and provides that Food Bank will receive 200 pounds of rice. This delivery of rice is complimentary and was therefore a benefit to be conferred as gift by Buyer.

Thus, Food Bank is an intended, donee beneficiary under the contract between Buyer and Seller.

Vested Rights

A TPB's rights must first have vested before the TPB has contractual rights. A TPB's rights vest when it (i) assents to the terms of the contract; (ii) brings suit; or (iii) changes position in reliance on the contract.

Here, Food Bank, after being informed by Buyer of the 200 pounds of rice, planned to use it as part of its upcoming fundraising campaign. Not only did it plan to use the rice, but it proceeded to purchase 200 one-pound bags at a cost of \$300 to package the rice into "thank you" tokens for would-be donors in this fundraising campaign. This \$300 expenditure shows that Food Bank changed position in reliance on the delivery of that 200 pounds of rice.

Thus, by changing position in reliance on delivery of the rice, Food Bank's rights as a TPB vested and it may enforce the contract between Buyer and Seller.

SELLER'S DEFENSES

Impossibility

A party's performance is excused if performance has become impossible due to an unforeseen event, the nonoccurrence of which was a basic assumption of the parties at the time of the contract. The impossibility must affect the party's ability to perform--a mere increase in cost or inconvenience would not suffice.

Here, Seller will argue that delivery of the 2,500 pounds of rice in 100-pound sacks had become impossible because its producer had switched to metric weights. If the seller could prove that due to this change, he was actually unable to otherwise package the rice into 100-pound sacks, he will be able to raise the defense of impossibility.

However, it is likely that he could have simply incurred an additional expense to have

the rice sorted and weighed in an additional step, and that it was not impossible to deliver the rice in the 100-pound sacks which he was under contractual duty to do.

Impracticability

A party's performance will be excused if it has become commercially impracticable. This means that the Seller must have encountered extreme and unreasonable difficulty or expense in performing under the contract.

Here, the Seller shipped 110-pound sacks rather than 100-pound sacks because its producer had changed its system to metric weights. It is unlikely that re-weighing or repackaging, done either by the Seller's producer or by the Seller upon receiving the 110-pound sacks would cause extreme and unreasonable difficulty or expense.

Thus, the Seller is unlikely have the defense of impracticability.

Breach

The Seller is not entitled to the defense that the Buyer breached the contract by refusing to accept delivery due wherein Seller had substantially performed because the UCC required perfect tender.

FOOD BANK'S REMEDIES

Expectation Damages

Expectation Damages exist to compensate and put the aggrieved/third party beneficiary in the position it would have been had there been no breach, and give the non-breaching party the "benefit of the bargain."

Here, Food Bank expected to receive and be able to use 200 pounds of rice as gifts to donors.

Thus, it can seek expectation damages for the value of the 200 pounds of rice.

Reliance Damages

Reliance damages exist to put the aggrieved party in the position it would have been had there been no contract and compensate for any expenses it incurred in reliance on the contract.

Here, Food Bank purchased 200 one-pound at \$300 in reliance on the delivery of the rice and in anticipation of packaging the rice as 'thank you' gifts.

Thus, it can seek reliance damages for the \$300.

Consequential Damages

Consequential damages are damages which would be special to the aggrieved party, which were foreseeable and known to the breaching party at the time of the contract.

Here, Food Bank intended to use the rice in a fundraising campaign in which it believes it would have raised \$10,000. If it can establish that but for the non-delivery of the rice, it would have raised this money and now cannot, Food Bank would be able to seek and be awarded expectation damages to compensate for the \$10,000 would have; however, there is no fact to indicate that Seller knew of this fundraiser.

Thus, it is unlikely Food Bank can seek consequential damages.

Specific Performance

Where money damages would be inadequate and the goods are unique in nature, an aggrieved party may seek specific performance to have the breaching party perform under the contract.

Here, Food Bank could be awarded compensatory damages. As a result, it would not be able to seek specific performance to have the Seller deliver the 200 pounds.

QUESTION 1: SELECTED ANSWER B

1. Can Food Bank enforce the contract between buyer and seller?

Governing Law

UCC is the governing law for contracts mainly dealing with the sale of goods, which are movable, tangible materials.

This contract is mainly dealing with the sale of the food product of wild rice. Therefore, UCC will be the governing law.

Merchants

Merchants are parties to a contract that regularly deal in the buying or selling of the type of good identified in the contract.

Seller is described as one who "sells imported food products to local food distributors like Buyer".

Buyer is described as a "local food distributor".

Therefore, both parties are regularly dealing with the sale of such food products, like wild rice, and are merchants for the purposes of this contract.

Formation

A valid contract formation requires an offer, acceptance, and consideration.

The facts state that "seller and buyer entered into a valid written contract...". Therefore,

it is likely that the contract is validly formed.

UCC requires quantity to be stated in a contract. This contract does state a quantity of "2,500 pounds of Canadian Wild Rice", and it does have the clear and definite terms that the contract needs.

3rd party beneficiary

When 2 parties make a contract to benefit a third party, the third party can enforce the contract if they have properly accepted their rights under the contract. A donee beneficiary can accept their rights by detrimental reliance that was reasonably foreseeable.

Seller and Buyer entered into a valid written contract... Buyer... insisted on a provision in the contract stating, "in addition to the quantity of goods to be delivered by Seller to buyer under this contract, Seller agrees to deliver free of any charge an additional 200 pounds of the identical product to Food Bank."

The facts state that "immediately after Buyer informed food bank of seller's promise to deliver the 200 pounds of wild rice... food bank spent \$300 for 200 one-pound bags that were labeled". Therefore they did detrimentally rely on this contract by Buyer and Seller.

Additionally, Food Bank will argue that this detrimental reliance is reasonably foreseeable, because Buyer informed them of this contract.

Seller will argue that this reliance is not reasonable because they never explicitly agreed to this provision. However, as will be discussed below, because of UCC [merchant's] additional terms, it is still likely that the provision will be part of the contract.

UCC [merchant's] additional terms

Under the UCC, an acceptance of a contract with additional terms can still be a valid acceptance. Whether or not the additional terms will be part of the contract depends on if all of the following elements are met: (1) both parties must be merchants, (2) the additional terms must not be a material change from the offer, (3) there must not have been a rejection of the additional terms from the other party within 10 days, (4) the original offer must not have excluded any other terms outside of its own

Although the provision that Buyer insisted on, for 200 additional pounds to be given for free to Food Bank, is not an insignificant amount, and there is no additional consideration for this amount, it is still likely that this amount can be considered not to be a "material change". Therefore, it is likely that this provision does meet all 4 elements: both parties are merchants (discussed above), there was no rejection by Seller, and the facts don't state of any exclusivity from the original offer. Since it is likely that this provision meets all 4 requirements, it is likely that the provision will be part of the contract.

Since the provision is likely part of the contract between Buyer and Seller, Food Bank can argue that it was not unreasonable for Food Bank to detrimentally rely on this deal for them to receive 200 pounds.

Therefore, Food Bank likely validly accepted their benefits under the legally formed Buyer-Seller contract.

Defenses to formation

Statute of Frauds

Statute of Frauds requires contracts for the sale of goods for \$500 or more to be written and signed by the parties to be charged.

This contract was for the sale of wild rice, a good, for a total price of \$15,000. Therefore, it falls under the SOF.

As discussed above, the facts state that there was "a valid written contract". Therefore, it is likely that this contract does meet the SOF requirements.

Conclusion

Since there was a validly formed contract between Buyer and Seller, and Food Bank likely validly accepted their benefits, it is likely for Food Bank to be able to enforce the contract between Buyer and Seller, for the purposes of the benefit Food Bank was to receive.

2. What defenses does Seller have?

Breach

A material breach can excuse the non-breaching party from performing their duties.

Under the "**perfect tender rule**": UCC contracts require perfect goods and perfect delivery.

The contract terms were that Seller would deliver on or before May 1 of this year, 2,500 total pounds of wild rice, packed in 100-pound sacks..."

On May 1, Seller delivered 2,500 pounds of Canadian wild rice to Buyer. However, the rice was packed in 50-kilogram sacks that contained 110.2 pounds each instead of 100-pound sacks that were promised.

Buyer will argue that this alteration was a breach, as it varies from the parties' agreement, and which does not meet the "perfect delivery" requirements as well. Buyer

will argue that because of this breach, they are excused from the agreement, and thus owe nothing to either Seller or Food Bank.

Seller will defend by arguing that their alteration from "100-pound sacks" stated in the agreement, to 110.2-pound sacks is not a material breach. They will argue that the main purpose of the agreement was the *total weight/quantity* of 2,500 pounds, which they did fulfill perfectly. Furthermore, Seller will argue that the main reason Buyer is refusing the total amount (which was correctly/perfectly 2,500 pounds) was because Buyer found a cheaper source of rice, and not because of the change of 10.2 pounds per sack. Thus, Buyer is the one in breach with their arguably-wrongful refusal to accept delivery and fax "terminating our purchase agreement".

Therefore, Seller will argue that Buyer breached, and it is buyer responsible to Food Bank (as well as to Seller).

Defenses to breach

Impossibility

When unforeseen circumstances make a contract objectively impossible to fulfill.

Seller will argue that their Canadian producer switching to metric weights was unforeseeable. However, it was not impossible for them to either change the sacks themselves into 100-pound portions, and it is also not impossible for them to give Food Bank the 200 pounds of wild rice that they were promised. Even if doing so would be very expensive, neither aspect is actually impossible to fulfill.

Impracticality

When unforeseen circumstances make a contract subjectively expensive to fulfill.

As discussed above, the switch of the amount in the sacks was possibly unforeseeable.

Seller will argue that both switching the sacks to 100 pounds, and giving Food Bank 200 pounds after Buyer reneged on the agreement are prohibitively expensive to them.

Seller will argue that they would only be financially able to give Food bank the 200 pounds if Buyer actually accepted the purchase, (which Seller is arguing they wrongfully refused to do). This argument is likely to succeed.

Frustration of purpose

When unforeseen circumstances frustrate the purpose of a contract, and the purpose was known to the parties of the contract.

As discussed above, the switch of the amount in the sacks was possibly unforeseeable.

Seller will argue that the purpose of the agreement to deliver to Food Bank 200 pounds is frustrated by the actions of Buyer, who Seller is arguing to be in wrongful breach.

3. What relief can food bank seek?

Expectation damages

Damages that place plaintiff in the financial position they would have been in had the contract been fully performed.

Food Bank will argue that they should receive the monetary value of the 200 pounds of wild rice (or the 200 pounds of rice, itself).

If Seller is found to be in breach, they will be forced to pay this amount. If Buyer is found to be in breach, they might be charged to pay this amount for the 200 pounds of

the rice Food Bank was owed.

Reliance damages

Damages that place the plaintiff in the financial position they would have been in had the contract never been made. It is usually calculated by the amount plaintiff reasonably spent in reliance of the contract being performed.

Food Bank spent \$300 for 200 one-pound bags as part of a campaign they believed would raise money. Since they were likely reasonable to detrimentally rely on the contract (as discussed above) it is possible for them to recover [from the party found to be in breach].

Consequential damages

In addition to expectation damages, a party can seek consequential damages for that was known or reasonably foreseeable to be lost as a consequence of breach of contract.

Food Bank expected their campaign with this rice to raise \$10,000, with the letters and rice bags sent to contributors. However, this amount was not foreseeable or known at the time of contract formation between Seller and Buyer. Therefore, this amount is not likely to be collected.

Mitigated damages

A party has the responsibility to do what they reasonably can to mitigate damages they suffer. The amount a party can collect depends on how much they could have reasonably mitigated.

The facts state that "food bank was unable to find any other affordable source and had

to suspend the fundraising effort". This implied they reasonably tried to mitigate damages, but were unable to do so.

Specific Performance

A party can enforce injunction on another party to perform a specific performance if: there is a valid contract, conditions are met, inadequacy of legal remedy, mutuality of remedies, and no defenses.

It is unlikely that specific performance will be given/forced because legal remedy can arguable be adequate.

QUESTION 2

In July 2015, Carole broke her neck and became disabled when she dove into a swimming pool manufactured by Swim Wonder and struck the bottom.

In September 2016, Carole hired Larry, a lawyer, to negotiate with her health insurer, which was slow in paying her medical bills. Larry suggested filing a claim against Swim Wonder for negligence in its design of the pool. Carole agreed.

In September 2017, Carole, who had heard nothing about the negligence claim, contacted Larry. Larry informed Carole that he intended to file her claim, but recently learned that her claim was barred by the two-year statute of limitations.

Carole has sued Larry for legal malpractice.

1. Is Carole likely to prevail? Discuss.
2. If Carole does prevail, how will her damages be determined? Discuss.

QUESTION 2: SELECTED ANSWER A

Carole v Larry

Statute of Limitations

The statute of limitations is in place to prevent defendants from having to defend stale claims. The idea being that it would be unfair to defendants to have to defend claims when certain discovery and witnesses may be difficult to locate which would or could possibly affect the defendant's defense negatively.

The statute of limitations states that the plaintiff in personal injury cases has a stated amount of time to timely file their claim or forever be barred from raising their claim. The amount of time varies from state to state but for discussion of this case let's assume the statute is two years for personal injury cases. The Plaintiff has two years from either the (1) the date of the injury, or (2) the date the plaintiff first discovered the injury, or (3) the date that the plaintiff should have discovered the injury whichever is later. There are certain situations that will toll (stop) the running of the statute of limitations such as incapacity, mental illness or concealment by the defendant.

Here, we are provided little facts regarding her original claim against Swim Wonder the manufacturer of the swimming pool so we are not certain if Carole would have prevailed in her claim against Swim Wonder if her attorney had filed her claim timely. This is important because in order to prevail against Larry she will not only have to prove that Larry was negligent but also that she would have prevailed in her lawsuit against Swim Wonder.

Product Liability

Manufacturers, distributors, and retailers of products which are sold and put into the stream of commerce will be held liable for harm suffered by the user of their products. There are three types of defects; Manufacturing, Design, and Failure to warn. One can file a product liability cause of action based on intentional torts, negligence, strict liability and warranties.

Here, it would appear that Carole would have a possible claim against the manufacturer, distributor or retailer depending on the facts.

Therefore, Carole would have a claim for products liability.

Negligence

Larry may be held liable to Carole for negligence if it can be determined that Larry owed a duty to Carole, Larry breached that duty, and Carole suffered damages that were actually and proximately caused by Larry's breach.

Duty

The defendant owes a general duty of care to the plaintiff not to create a risk of harm to the plaintiff. The standard of care is based on what a reasonable person is expected to react to in the same or similar circumstances.

Here, Larry owed Carole a duty of care to not cause her harm.

Special Duty

Certain relationships such as employer-employee, attorney-client establish a special duty of care.

Here, in September 2016, Carol hired Larry to represent her in negotiating with her health insurance provider and to file an action against Swim Wonder.

Therefore, Larry owed Carole a special duty based on the standard of care of a professional attorney.

Breach

If the defendant owes a duty of care to the plaintiff and his conduct falls below the standard of care then the defendant has breached that duty of care.

Here, Larry who was hired in September 2016 to file suit against Swim Wonder failed to file a lawsuit within the statute of limitations.

Therefore, Larry breached the duty of care to Carole.

Damages

In order to prevail in a negligence action the plaintiff must have suffered damages.

Here, Carole suffered damages because her claim was barred by the statute of limitations.

Therefore, Carole suffered damages due to Larry's breach.

Actual Cause

But for Larry's failure to file Carole's lawsuit timely against Swim Wonder, Carole was forever barred from filing her cause of action.

Therefore, Larry is the actual cause of Carole not being able to seek relief by filing her lawsuit.

Proximate Cause

Since Larry is an attorney it should have been foreseeable to Larry that if he did not file a lawsuit timely on Carole's behalf she would be forever barred from filing her suit.

Therefore, Larry is the proximate cause of Carole's damages.

Defenses

Contributory Negligence

If the plaintiff's conduct contributed to her injury then she is barred from recovery.

Here, the facts do not indicate that Carole contributed to her damages and thus Larry will not be able to utilize this defense.

Comparative Negligence

This is an apportionment of the liability based on the relative fault of the plaintiff and defendant.

Here, as discussed supra, there appear to be no facts to support Carol's negligent conduct.

Therefore, this defense will not be available to Larry.

Assumption of Risk

When the plaintiff has knowledge, comprehension and appreciation of the risk and

chooses to ignore or proceed then she has assumed the risk.

Here, there are no indication that Carole assumed any risk by hiring Larry.

Conclusion

As discussed supra, Larry was negligent in filing Carole's lawsuit against Swim Wonder but the court will have to determine if Carole's original claim against Swim Wonder would have been successful for her to recover.

2. If Carole does prevail, how will her damages be determined? Discuss

If Carole can prove to the court that but for Larry's negligent act of not filing her lawsuit timely she would have definitely prevailed against Swim Wonder then she will be able to recover from Larry the damages she would have recovered from Swim Wonder.

She would be able to recover general damages and special damages which would include pain and suffering, medical bills both current and future, out of pocket medical expenses, loss of earnings etc.

QUESTION 2: SELECTED ANSWER B

1. Carole v. Larry

For Carole to prevail against Larry, she will have to demonstrate that her lawsuit against Swim Wonder would have been successful and that all avenues are addressed that a practicing attorney would have addressed including Larry's contention of negligence.

Products Liability

Manufacturing defect

A product is defective if there is a defect in manufacturing making the product dangerous to the ordinary consumer.

Although Swim Wonder manufactured a swimming pool, there are no facts to indicate a manufacturing defect.

Therefore, there is no manufacturing defect.

Design defect

A product is defective in design if it is manufactured as intended, but due to inherent flaws the product is dangerous to the ordinary consumer.

Although there are no facts to indicate Swim Wonder's pool had an inherent flaw, under the merits of Lawyer's suggestion that Swim Wonder is negligent in its design of the pool, it will be assumed that there is a possible design defect.

Therefore, there may be a design defect.

Warning defect

A product is defective in warning if absent a warning an ordinary consumer would not realize the dangers of the product.

There are no facts to indicate a warning defect that would have prevented Carole from sustaining injuries.

Therefore, there is no warning defect.

Negligence

Negligence will be found if one owes a duty, the duty was breached, and the breach was both the actual and proximate cause of the plaintiff's injuries.

Duty

A manufacturer has a duty to ensure that products released into the stream of commerce are safe for an ordinary consumer's use.

Swim Wonder has a duty to Carole, a user of their swimming pool, to ensure it is safe for her use.

Therefore, Swim Wonder has a duty.

Breach

A breach is a failure to conform to one's duty.

There are no facts to indicate that Swim Wonder breached its duty in the manufacture of its swimming pool. Assuming Larry is correct and there is a design defect, then if the design was a direct result of Carole's injuries, then they would be considered to have breached.

Res Ipsa Loquitur

Res ipsa loquitur can prove breach if

- 1) the defendant was in a better position to explain the breach
- 2) the defendant was in complete control of the product
- 3) the plaintiff was not contributorily negligent

If there is a design defect, then Swim Wonder would be in a better position to

demonstrate the cause of the breach as they were in complete control. Further facts need to be elicited on Carole's dive into the swimming pool to evaluate if she was also negligent.

Therefore, there may be a breach if Larry is correct.

Actual Cause

Actual cause is the but for or direct cause of the plaintiff's injuries.

But for Carole diving into a swimming pool manufactured by Swim Wonder, she would not have been injured.

Therefore, Swim Wonder is the actual cause.

Proximate Cause

Proximate cause is found when the injury is caused by a direct and foreseeable consequence of the defendant's actions with no intervening acts breaking the chain of causation.

There are no facts to indicate that any defect in Swim Wonder's swimming pool caused Carole's injuries. But if the design defect made it foreseeable that Carole would be injured, they may be the proximate cause.

Foreseeability (Wagon Mound) jurisdictions

In these jurisdictions, if it is found Carole's injuries were foreseeable, then Swim Wonder may be liable.

Direct (Polemis) jurisdictions

In these jurisdictions, if it is found Carole's injuries were a direct result of Swim Wonder's design defect, they will be liable.

Therefore, Swim Wonder may be the proximate cause of Carole's injuries.

Damages

Damages are both special, which are pecuniary in nature, and general, which are non-pecuniary in nature.

Carole has special damages due to her medical bills.

Carole has general damages due to her pain and suffering from a broken neck.

Therefore, Carole has damages.

Strict Liability in Tort

Under Products Liability, strict liability in tort will be found if a manufacturer or seller releases an unreasonably dangerous product into the stream of commerce and the product is defective in manufacturing, design, or warning, and the defect is the cause of the plaintiff's injuries when used in a foreseeable or anticipated manner.

To prevail in strict liability in tort,

- 1) the product must have been manufactured by the defendant (Proper Defendant)
- 2) the product must be defective
- 3) the product must be the actual and proximate cause of the plaintiff's injuries
(Proper Plaintiff)
- 4) the product was defective when it left the manufacturer's hands

The facts stipulate that the product was manufactured by Swim Wonder, the proper defendant.

Per Larry, a lawyer, the product was defective in design.

Actual Cause: Defined and discussed supra.

Proximate Cause: Defined and discussed supra.

The product, if defective in design, was likely defective when it left Swim Wonder's hands.

Nevertheless, because Swim Wonder's swimming pool was not the proximate cause of Carole's injuries, they will not be liable for strict liability in tort.

Negligence of Larry

Defined supra.

Duty

Standard of Care

An attorney owes a duty to his or her clients as customary in the profession.

Because Carole hired Larry, a lawyer, Larry has a duty to perform as other attorneys in his profession.

Therefore, Larry owes Carole a duty under the standard of care.

Breach

Defined supra.

When Larry informed Carole that he intended to file her claim, but as of September 2017 did not, he failed to conform to his duty owed. Because two years passed, he did not fulfill his obligations to Carole, since now due to the two-year statute of limitations, he is unable to proceed with his case. A reasonable attorney after being hired believing there to be a claim would file such a claim on their client's behalf.

Actual Cause

Defined supra.

But for Larry not filing Carole's claim, no lawsuit was filed.

Therefore, Larry is the cause of Carole's damages.

Proximate Cause

Defined supra

By not filing a claim within a reasonable time, it is a direct and natural consequence that the claim may be barred by the statute of limitations. Larry may argue that Carole not seeking his assistance until over one year after the accident and not inquiring further in a timely manner were intervening events breaking the chain of causation. However, because it is foreseeable that a client would defer to her attorney's judgments, it is not an intervening event.

Therefore, Larry is the proximate cause of Carole's damages.

Damages

Defined and discussed supra.

Defenses

Assumption of Risk

Assumption of risk is found when one knows of the dangers yet voluntarily chooses to encounter it.

Larry will argue that when Carole came to his office in September 2016, it was 14 months after the initial accident which she knew. Consequently, Larry would argue that she voluntarily assumed the risk that the statute of limitations would take effect.

However, there is no indication that Carole was aware of the statute of limitations, and, hence she did not knowingly and voluntarily choose to take on such a risk.

Therefore, Carole did not assume the risk.

Contributory Negligence

In contributory negligence jurisdictions, the minority, one who is contributorily negligent will be barred from any recovery.

Carole may be found to have been negligent in not seeking a lawyer until over a year

later. However, Carole will argue that her delay was only due to her seeking reimbursement due to her health insurer being slow in paying her medical bills. Lawyer could also contend that Carole had the last clear chance of contacting him rather than waiting another year. But she would likely have assumed that Larry, who she hired, was doing the appropriate work.

Therefore, there is no contributory negligence.

Comparative Negligence

In comparative negligence jurisdictions, the majority, the plaintiff will have their damages apportioned accordingly to their relative level of negligence. In partial comparative negligence jurisdictions, the plaintiff can still collect damages according to their relative level of fault. In pure comparative negligence jurisdictions, if the plaintiff's liability exceeds the defendant's (>50%), then she will be barred from recovery.

Carole may be found to have been negligent in not contacting Larry immediately after the accident and again by not contacting him before another year had passed. She may be found to have some relative degree of fault, but even in that case her damages would be apportioned accordingly.

1. Is Carole likely to prevail?

Carole is only likely to prevail if she can demonstrate that another attorney would be successful in the claim.

2. If Carole does prevail, how will her damages be determined?

She will be due all damages she could have collected from Swim Wonder.

QUESTION 3

For some time, Alex has owned an old, wooden cottage that needs repainting about every 5 years. Brad paints houses for a living and had seen Alex's cottage, although he had never painted it. Alex called Brad and offered to pay Brad \$10,000 to paint Alex's cottage, provided that he could do so within the next 30 days. Alex told Brad that "the reason that I always get my cottage painted every 5 years is that it has always only needed one coat of paint." Brad then agreed orally to paint Alex's cottage within the next 30 days for \$10,000. The next day Brad signed a written contract and left it with Alex. The contract did not specify how many coats of paint would be needed, only that Brad would paint Alex's cottage within the next 30 days for \$10,000.

Alex never signed the contract, but watched later that week as Brad began painting the cottage. Brad painted the cottage in one week, but by that time the wood had soaked up the first coat of paint, so the cottage looked unpainted and terrible. The cottage would have looked fine with one more coat of paint, but Brad demanded \$10,000 for his work and refused to add another coat of paint unless Alex paid another \$10,000. Alex is unhappy and refuses to pay Brad anything. Alex then hires Charles who puts the second coat of paint on the cottage for \$7,500.

Brad sues Alex for \$10,000 and Alex files a counterclaim for \$7,500.

1. What arguments can Brad reasonably make in support of his lawsuit and against Alex's counterclaim? Discuss.
2. What arguments can Alex reasonably make in support of his counterclaim and in response to Brad's lawsuit? Discuss.
3. What will be the likely outcome of Brad's lawsuit and of Alex's counterclaim? Discuss.

QUESTION 3: SELECTED ANSWER A

Applicable Law

Transactions for the sale of goods are governed by the Uniform Commercial Code (UCC). All other transactions are governed by the common law.

Here the transaction in question is for services painting a house.

Therefore it will be governed by the common law.

Formation

Formation is an offer, acceptance, and consideration.

Offer

An offer is a manifestation of present contractual intent communicated to the offeree with sufficient clear and definite terms that a reasonable objective person would assume assent would form a bargain.

Here Alex called Brad and offered to pay Brad \$10,000 to paint Alex's cottage, provided he could do it within the next 30 days. Alex is the offeror and Brad is the offeree. The fact that Alex called Brad satisfies the communication aspect of the offer. Additionally, the clear and definite terms necessary are present. Brad is to paint one house (quantity and subject matter), within 30 days (time of performance), for Alex (identity of parties), for \$10,000 (price). The present contractual intent was manifested.

Therefore, there was an offer.

Acceptance

Acceptance is unequivocal assent to the terms of the offer.

Here the facts state that Brad agreed orally to paint Alex's cottage within the next 30 days for \$10,000 and the next day signed a written contract.

Therefore there is an acceptance.

Consideration

Consideration is a bargained for exchange of legal detriments.

Here Alex is giving up \$10,000 to which he had a legal right and Brad is giving up his time to paint the cottage to which he additionally had a legal right.

Therefore there is consideration.

1. What arguments can Brad reasonably make in support of his lawsuit and against Alex's counterclaim

Defenses to formation

Statute of Frauds

The statute of frauds is the requirement that certain contracts be in writing. These are contracts for the sale of goods over \$500, consideration of marriage, that take over one year to perform, to provide surety on debt, or as the executor of an estate.

Here the contract is for none of these things and Brad signed a written contract.

Therefore the statute of frauds is no defense.

Parol Evidence Rule

The Parol Evidence Rule is that oral evidence will not be admitted to contradict or add to a contract that is intended as an integration (a full representation of the intention of the parties).

Here, Alex said to Brad that "the reason that I always get my cottage painted every 5 years is that it has always only needed one coat of paint." Brad may have taken this statement as representing his promise to Alex to be to put one coat of paint on the house and would want to submit evidence that this conversation happened. However, if the contract was an integration this evidence may be barred. However, no merger clause is included in the facts. Additionally, because of the vague language of the contract and Alex's failure to sign it is unlikely that language this formal would be included. A trier of fact will have to determine if this conversation indicated that Brad's performance was complete upon the application of a single coat of paint.

Therefore, the parol evidence rule is unlikely to bar the admission of oral evidence regarding the conversation between Alex and Brad.

Misrepresentation

Misrepresentation is a false representation of a material fact made with scienter on which the plaintiff relied.

Here, Brad will claim that Alex's statement that "the reason that I always get my cottage painted every 5 years is that it has always only needed one coat of paint" was such a statement. Because after Brad painted the cottage the wood had soaked up the first coat of paint. This shows that Alex made a false representation. The facts do not state whether Alex was aware that his statement was false, however if it was, this will show scienter and be a material misrepresentation. If Alex can show that he would not have agreed to paint the cottage for the price of \$10,000 had he known he would have to apply multiple coats then he will be able to show reliance on the misrepresentation.

Therefore, Brad can reasonably argue the defense of misrepresentation.

Mutual Mistake

Mutual mistake occurs when both parties are mistaken as to a material aspect of the contract.

Here it is possible that both Alex and Brad were mistaken as to the nature of the house. Brad was definitely mistaken in that he believed the house would require only one coat of paint. If in the past the house had only needed one coat as Alex claimed, but something changed as the house aged that was unknown to Alex at the time, then Alex was also mistaken. When both parties are mistaken the contract is voidable.

Therefore Brad can reasonably argue the defense of mutual mistake.

Unilateral Mistake

Unilateral Mistake occurs when only one party is mistaken. It is usually not grounds to make a contract voidable. However, if one party knew of the other's mistake and took advantage of it then the mistaken party will be able to void.

Here, if Alex was aware that the house would require more than one coat, then Brad will be the only one mistaken. Additionally, by making the statement he made to Brad, Alex would be inducing Brad to make the mistake he made. So, Alex would be taking advantage of Brad.

Therefore Brad can reasonably argue the defense of unilateral mistake.

2. What arguments can Alex reasonably make in support of his counterclaim and in response to Brad's lawsuit?

Performance/Conditions

A condition is an event that if it occurs it triggers an absolute duty to perform. This type of condition is a condition precedent.

Here the contract did specify how many coats of paint would be needed, only that Brad would paint Alex's cottage within the next 30 days for \$10,000. Brad painted the cottage in one week but by that time the wood had soaked up the first coat of paint.

Alex will claim it is a condition precedent to his duty to pay that Brad paint the house in a reasonably satisfactory manner, because if he did not Alex will reasonably claim that he is under no duty to pay him the \$10,000.

Breach - Material/Minor

A breach is a failure to perform one's duties under the contract.

Because the house is not painted in a satisfactory manner Alex will claim that Brad is in breach. Because this was the whole purpose of the contract it will be a material breach rather than a minor breach.

Therefore Alex will reasonably argue that Brad is breach.

3. What will be the likely outcome of Brad's lawsuit and of Alex's counterclaim?

Brad will likely be able to void the contract between him and Alex due to one of the defenses discussed supra. Since the contract will be voided, Alex will be unable to pursue his theory that the contract was breached.

Quasi Contract

A party will be able to recover in quasi contract if no contract was formed, but they detrimentally relied on the promise or where one party would be unjustly enriched.

Here because Brad is arguing that no contract was formed, but he partially performed he will be seeking recovery in quasi contract, because Alex would be unjustly enriched if he received the value of Alex's performance for free.

Therefore, Brad will recover in quasi contract.

Reliance Damages

Reliance Damages attempt to put the party in the position they would have been in had the contract not been formed.

Here if reliance damages are recovered Brad will be able to receive the price that he paid for the necessary paint.

Restitution Damages

Restitution Damages compensate for the reasonable value of the work that they have done.

Here if restitution damages are recovered Brad will be able to receive the difference between the value of the cottage prior to the paint job and the value after the first coat of paint was applied.

Expectation Damages

Expectation Damages attempt to put the parties in the position they would have been in had the parties performed the contract.

Expectation Damages are generally not allowable in quasi contract

Therefore Brad will not receive expectation damages.

Alex's claim for \$7,500

It's worth noting that while Alex will be unlikely to succeed in his theories of breach as Brad will be able to void the contract that in the unlikely event he is able to succeed he would still not receive \$7,500 because, as he has not paid Brad the \$10,000 on the contract, he will not be able to recover and in fact experienced no damages as he got

the whole job done for less than he originally contracted with Brad.

Therefore, Alex will not receive any damages even in the case that he prevails.

QUESTION 3: SELECTED ANSWER B

1. What arguments can Brad reasonably make in support of his lawsuit and against Alex's counterclaim?

Brad v Alex

Applicable Law

The Uniform Commercial Code (UCC) governs contracts for the sale of goods. The common law governs contracts for services and land.

Here the contract is for "cottage painting", a service.

Therefore, the common law controls.

Merchants

If parties are merchants a higher duty is owed for good faith and fair dealings, as well as special rules governing contract formation and performance.

Here Brad is someone who "paints houses for a living", therefore he will be construed as a merchant.

Alex is just an owner of an "old wooden cottage". Nothing in the facts indicates there is a business involved, therefore he will likely not be a merchant.

Formation

Under contract theory, for a valid formation of a contract to exist, you must have offer, acceptance, consideration, proper identification of 3rd parties, legal capacity and no defenses.

Offer

A valid offer exists when you have an outward manifestation of present contractual intent with definite and certain terms - that a reasonable objective observer would believe assent to form a bargain.

Here "Alex called Brad and offered to pay Brad \$10,000 to paint Alex's cottage, within the next 30 days".

Quantity: 1 cottage

Time: Within 30 days

Identity of Parties: Alex and Brad

Price: \$10,000

Subject Matter: Painting of cottage

As the terms are definite and certain, all parties and quantities are named, the court will find a valid offer exists, barring any defenses.

Acceptance

Acceptance is the unequivocal outward manifestation of assent to the offer. Under common law the mirror image rule applies and the acceptance must match the offer terms or it's a rejection and counteroffer.

Here the facts state Brad "orally agreed" to the terms as stated, and the next day "signed a written contract and left it with Brad".

As Alex has unequivocally assented, and in fact signed and put it into writing, he has expressed his unequivocal assent to be bound to the contract.

Therefore, valid acceptance.

Consideration

Consideration is a bargained for exchange, act or omission to act. The legal detriment must induce the promise and the promise must induce the detriment.

Here we have Brad promising to paint the house, an act he is not legally required to do, in exchange for Alex's promise to pay \$10,000, conditional upon its completion within 30 days. The payment induces the painting and the painting induces the payment.

Therefore, valid consideration.

Defense to formation - Statute of Frauds

The Statute of Frauds stipulates that in order for a contract to be valid, certain types of agreements must be in a writing signed by the party to be charged. These include contracts for marriage, year or more (for completion), land sales, executor agreements, guarantor agreements and sale of goods \$500 or more.

Here the facts indicate that the original agreement was oral and therefore would be barred by the Statute of Frauds, as it is for services of \$10,000, greatly exceeding the \$500 rule.

However Brad will argue that when he "signed a written contract" and "left it with Alex", it took the contract out of the Statute and into validity.

Alex will counter that "he never signed the contract" and therefore it is unenforceable against him because he is the party to be charged.

However an exception to Statute of Frauds states that if substantial performance begins, then the contract is valid. As Brad "painted the cottage within one week" and Alex was aware of the performance and benefitted from the performance, he will be unable to raise the Statute of Frauds as a defense.

Therefore, the Statute of Frauds will not apply against Brad.

Parol Evidence Rule

Under the Parol Evidence Rule, oral communications which took place prior to contract formation will be barred as evidence, absent a valid exception. Exceptions may include clarification of an ambiguity, if the writing was not fully integrated or to introduce evidence of duress, coercion, or mistake.

Here Brad will argue that a valid exception to the Parol Evidence Rule exists, regarding the number of coats of paint which should be used on the cottage. He will make this argument in order to introduce the oral conversation where Alex stated "the reason I always get my cottage painted every 5 years is that it has always only needed one coat of paint". This evidence will validate Brad's claim that he has performed under the contract and is entitled to damages resulting from Alex's breach.

Alex will counter that this was merely an offhand comment and should not be included

as evidence because it was not a direct order for Brad to only use one coat of paint. Rather that he expected Alex, a merchant, to operate under a standard of good faith and fair dealing and to adequately paint the house to a conforming standard and appropriate regarding the price of \$10,000.

It is likely the court will allow the admission of Parol Evidence to clarify this ambiguity.

Performance - Covenants / Conditions - 30 days

Under contract theory a covenant is a promise to act, the failure of which is construed as a minor breach. A condition is a requirement of a contract, the failure to satisfy may excuse the other party from performance.

Here an express condition states "the cottage must be painted within 30 days". Brad in fact painted the cottage "later that week".

Therefore the condition has been satisfied.

Covenants / Conditions - 1 coat of paint

Under contract theory a covenant is a promise to act, the failure of which is construed as a minor breach. A condition is a requirement of a contract, the failure to satisfy may excuse the other party from performance.

Here Brad will argue that the use of 1 coat of paint was a covenant under the contract, which he fulfilled.

Alex will counter that this was not a valid covenant, and rather that he should use a reasonable merchant standard to ensure the quality of his work.

This will depend on whether or not the court bars this evidence under the Statute of Frauds or Parol Evidence Rule.

Performance

When a party has substantially or fully performed under their contractual obligations, they will not be found to be in breach, or if only substantial performance, than a minor breach at most.

Here Brad will argue that he has fully performed under the contract, because he painted the cottage within the 30 day requirement.

Alex will counter that "the cottage looked unpainted and terrible" and therefore Brad has not substantially performed under the contract.

It is likely that while the courts may find Brad technically performed, he may only have satisfied substantial performance rather than full performance, depending on the evidence allowed, discussed above.

Good Faith / Laches

Under merchant theory the parties must act in good faith and fair dealings.

Here as Brad is a merchant (as defined above), he will hold out that he has acted in good faith by providing one coat of paint as discussed in the initial talk.

Alex will counter that Brad has not acted in good faith because as a professional he didn't satisfy and "the cottage looked unpainted and terrible".

Therefore, while Brad technically performed under the contract, he may be found to have acted in bad faith by not performing to a professional, reasonable standard as compared to other painters in his field and location.

Breach

A major breach occurs when one party fails to substantially perform their contractual duties. A minor breach occurs when one party has substantially, but not fully, performed.

Here Brad will argue that Alex is in major breach because he has not performed the payment of \$10,000.

Alex will counter that he is not in breach because Brad has not fully satisfied performance.

If the courts allow evidence to determine that only 1 coat of paint was needed, then Alex will be in major breach for refusing to tender payment for services received.

Unjust Enrichment

Unjust enrichment occurs when one party has conferred a benefit to another, and it would be unjust to prohibit the laboring party from receiving compensation.

Here Alex will fall back on a theory of unjust enrichment because he conferred a benefit

(the painting of the cottage), unto Alex (who wanted his cottage painted).

Therefore a valid claim of unjust enrichment can be made.

Damages - Expectation - No Breach

Expectation damages are monetary amounts that would be awarded to the plaintiff to put them into the position they would have been in if the contract had been fully performed.

Here Brad will be entitled to damages in the amount of \$10,000 - the contract price, if he is found to have fully performed.

Damages - Expectation - Breach

Expectation damages are monetary amounts that would be awarded to the plaintiff to put them into the position they would have been in if the contract had been fully performed. If a party is found to have committed a minor breach, then they may only be entitled to recover a portion of the original contract price.

If Brad is found to have only partially and not fully performed under the contract, he may only be eligible to receive a reduced damage award, that is equal to the amount of work he put in. For example, if the court finds he only performed 50% of his duties, then his damage award will be proportionately to only \$5,000. Additionally this award may be reduced further, if Alex had to pay out of pocket to another contractor, such as Charles, and Brad must reimburse those costs.

Damages - Incidental

Incidental damages are for small fees incurred during the process of the claim such as postage.

Here Brad will be entitled to any nominal damages he incurred as a result of Alex's breach.

Damages - Restitution

Restitution damages may be awarded when one party has been unjustly enriched by the other.

Here Alex benefitted from a single coat of paint being applied to his cottage, by Brad,

the painter.

Therefore Brad could prevail on damages for restitution.

2. What arguments can Alex reasonably make in support of his counterclaim and in response to Brad's lawsuit

Parole Evidence Rule

Defined above

Here Alex will seek to bar the inclusion of oral evidence pertaining to the statement "has always only needed one coat of paint", because it would show Brad fully performed under the contract.

As discussed above, it is likely this evidence will be introduced, but if not its exclusion would go a long way to support Brad's lawsuit.

Statute of Frauds

Defined above.

Here Alex will argue that because he never signed the writing, it cannot be held against him.

However as discussed above, Alex "watched" Brad's performance begin, therefore a valid exception takes place and the contract will likely be construed as valid.

Frustration of Purpose

When the purpose of a contract has been frustrated by an unforeseeable, intervening act, known by both parties at the time of formation, it may be found that the purpose of the contract has been frustrated.

Here Alex may claim that because the barn "looked terrible and unpainted" after Brad had painted it, that the purpose of the contract (a nice looking, painted barn), has been frustrated.

However as this would potentially be due to Brad's breach (if found to be liable), then

this theory likely wouldn't sway the court.

Covenant / Condition

Defined above.

Here Alex may argue that there was an implied material condition that the cottage be painted to the same standards as it had been in the past, and to the standard of a good faith merchant whom regularly paints houses and dwellings - which Brad is.

In this case because even after Brad painted the cottage, it looked "unpainted and terrible", he may be found to be in breach of a condition of the contract.

Anticipatory Repudiation

Anticipatory repudiation occurs when one party makes an unequivocal claim not to perform. This is a major breach and will put the un-breaching party into an immediate position to seek legal remedies.

Here Alex will argue that when Brad "demanded \$10,000 and refused to add another coat of paint unless Alex paid him another \$10,000" that this was an unequivocal claim not to perform.

Therefore if the courts find Brad was still under a duty to complete performance, this will be construed as a valid anticipatory repudiation.

Pre-existing Duty Rule

The pre-existing duty rule states that one cannot demand additional compensation to perform a duty they are already under obligation to perform.

Here the facts state that when Alex asked Brad to conform the cottage to a professional looking standard, Brad rebutted by demanding an additional payment of \$10,000.

If the court finds that in fact Brad's duty had not been extinguished, then this demand for additional payment would violate the pre-existing duty rule.

Breach

Defined above.

Here Alex will argue that Brad is liable for a major breach, for failing to substantially perform the painting of the cottage to a reasonable standard as expected by a merchant

in his field.

If found liable, this would be a major breach.

Brad will counter that at most he is liable for a minor breach, because he did substantially perform the contract by applying the paint of coat, within the 30 days, as specified.

Therefore it is likely the courts will construe this as a minor breach, as public policy favors avoiding complete frustration of a contract.

Damages

Damages may be calculated by the additional cost incurred to fully perform the services which the breaching party failed, including reasonable incidentals.

If Alex prevails in his lawsuit against Brad, he will be entitled to recover the \$7,500 he paid to Charles, the amount it cost to see the performance through to a satisfactory state. Furthermore, he may only be liable to pay Brad a reduced amount, equal to the cost of his efforts, but not the full \$10,000 originally contracted for.

3. What will be the likely outcome of Brad's lawsuit and of Alex's counterclaim?

Verdict - Brad's lawsuit

For all of the reasons discussed above, it is most likely that the courts will determine Brad has substantially or fully performed, particularly if they allow in the evidence of the phone call, prior to the writing which didn't specify the number of coats of paint. As the oral conversation stated that historically a single coat of paint was adequate, Brad relied on that information when painting the cottage and agreeing to the contract. Failure to recognize this could determine a lack of mutual assent, which would be a complete frustration of the contract. As specified, public policy dictates that courts prefer to avoid a major breach and frustrating the entire contract, when one can construe a minor breach instead.

Therefore, it is likely Brad will win his lawsuit and be entitled to expectation damages in

the amount of \$10,000 since he performed the contract as specified.

Verdict - Alex's lawsuit / counterclaim

For all of the reasons discussed above, it is likely that Alex will not prevail in his lawsuit, as Brad has fully or at least substantially performed. If found to have substantially but not fully performed, Brad may be liable for damages Alex incurred to cure Brad's non-performance.

QUESTION 4

Al, Bob, and Carl are members of a group opposed to nuclear power. They decide to break into the Gigantic Power Company (GPC) headquarters at night, remove a model of a proposed nuclear plant, and hang it in effigy in a conspicuous location. Unknown to Al and Carl, Bob intends to plant a bomb in the headquarters at the same time.

Two hours before they are to leave for GPC's headquarters, Al tells Bob and Carl that he will not participate in the break-in. Bob and Carl respond that they will go ahead without him.

Bob and Carl break into GPC's headquarters and remove the model. Bob, unseen by Carl, plants a small bomb, which is set to explode at 4:00 a.m., when Bob believes the building will be unoccupied.

As Bob and Carl are driving away, they are spotted by GPC's security personnel, who drive after them. After a short pursuit, Bob and Carl jump from their car and run toward an apartment building. Bob pulls out two guns (which Carl did not know Bob had) and tosses one to Carl. Bob then grabs apartment tenant Hostage, who is walking to his car, and forces him back toward the building. Carl pleads with Bob to let Hostage go, but Bob says, "Get in here or I'll shoot you." Bob turns his back and takes Hostage into the building and Carl follows.

The police arrive, and Bob shoots at them; Carl does not. Carl finally convinces Bob to let Hostage go.

As Hostage is running from the building, he is shot and killed by the police who mistake him for a suspect.

At GPC headquarters, the bomb fails to explode and is safely disarmed by the bomb squad.

1. With what crimes, if any, can Al be reasonably charged, and what defenses, if any, can he reasonably raise? Discuss.
2. With what crimes, if any, can Bob be reasonably charged, and what defenses, if any, can he reasonably raise? Discuss.
3. With what crimes, if any, can Carl be reasonably charged, and what defenses, if any, can he reasonably raise? Discuss.

QUESTION 4: SELECTED ANSWER A

Question 4: Criminal

1. Al's Crimes

Conspiracy

Conspiracy is the agreement between two or more people to commit a crime, with intent that the crime be committed. Modernly, an overt act in furtherance of the conspiracy is required.

Al, Bob, and Carl planned to break into GPC headquarters and remove a model of a proposed nuclear plant. As discussed below, these acts likely rise to burglary and larceny.

Al can reasonably be charged with conspiracy to commit burglary and larceny. If he is found guilty of the conspiracy, he can also be found guilty as a co-conspirator for any reasonably foreseeable crimes committed by his co-conspirators in furtherance of the conspiracy. These crimes are discussed more below.

Defenses

No overt act

In a jurisdiction that requires an overt act in furtherance of the conspiracy, Al can assert that the prosecution has failed to prove this element of the crime. We are told that Al, Bob, and Carl decided to break into GPC headquarters. Two hours before they are to leave, Al changes his mind, tells Bob and Carl, and leaves. We are not told of any overt acts committed by any of the conspirators during that time. If this is the case, then Al can argue he is not guilty of conspiracy. However, if some act did occur, then Al will be guilty of conspiracy.

Withdrawal from conspiracy

Withdrawal from a conspiracy requires that the co-conspirator communicate their withdrawal to their co-conspirators, and remove themselves from the conspiracy.

Al, two hours before they are to leave for GPC headquarters, tells Bob and Carl that he will not participate, and they go on without him.

Accordingly, Al has withdrawn from the conspiracy. Withdrawal from a conspiracy is not a defense to the charge of conspiracy, but it will prevent co-conspirator liability for future crimes committed in furtherance of the conspiracy.

Accordingly, Al will likely be found guilty of conspiracy to commit burglary and larceny. His withdrawal will mean he will likely be found not guilty of the subsequent crimes committed by Bob and Carl.

2. Bob's Crimes

Conspiracy

Defined above.

As discussed above, Al, Bob, and Carl decided together to commit burglary and larceny. Furthermore, Bob and Carl do indeed commit an overt act in furtherance of the conspiracy, traveling to GPC's headquarters and proceeding to break in.

Accordingly, Bob can be reasonably charged with conspiracy to commit burglary and larceny.

Defenses

Bob does not have any reasonable defenses to the charge of conspiracy.

Burglary

Burglary is the breaking and entering of a dwelling house of another at night with intent to commit a felony therein. Modernly, the structure can be any building and the burglary need not happen at night.

Bob and Carl break into GPC's headquarters. GPC's headquarters is a structure of another. We are told this occurs at night. Bob intends to plant a bomb in the headquarters, which could rise to arson (or attempted arson if he is unsuccessful), a felony. Bob and Carl also intend to steal the nuclear plant model, which would be larceny, though depending on the jurisdiction and the value of the model this larceny may not rise to a felony. Bob also brings guns, though it is not stated what he intends to use them for.

Bob can reasonably be charged with burglary of GPC headquarters.

Defenses

Lack of intent to commit felony

We are not told what Bob intends to blow up with the bomb. If he intended to blow up some equipment or other contents only, and not to char the structure, he can argue that he did not intend to commit arson but rather destruction of property that may not rise to a felony. Likewise, he can argue that the intended larceny of the model would not rise to a felony.

However, setting off a bomb in a structure at the very least demonstrates reckless disregard of the possibility of burning the structure, and Bob will likely be found to have had intent to commit a felony within the structure.

Attempted Arson

Arson is the malicious burning of a dwelling house of another. Modernly, the structure can be any building. Malice can be shown through intent or recklessness. Attempt is taking a substantial step toward a crime with intent to commit the crime.

Bob plants a small bomb within GPC headquarters, a structure of another. Setting off a bomb in a structure at the very least demonstrates reckless disregard of the possibility of burning the structure, if not intent to burn the structure. Bob sets a bomb to explode at 4:00 am. Setting the bomb is a substantial step toward arson. The only reason Bob does not succeed is that the bomb fails and the bomb squad disarms the bomb. He took a substantial step and went past the point of probable desistance.

Bob can reasonably be charged with attempted arson of GPC headquarters.

Defenses

Bob does not have any reasonable defenses to the charge of attempted arson.

Larceny

Larceny is the trespassory taking away of the property of another with intent to permanently deprive the owner of possession.

Bob and Carl take the model from the headquarters. The model is the property of another, and Bob and Carl do not have permission. They do seem to intend to permanently deprive the owner of the property.

Bob can reasonably be charged with larceny of the model.

Defenses

Lack of intent to permanently deprive

Bob and Carl plan to "hang [the model] in effigy in a conspicuous location." They can argue that this shows that they did not have intent to permanently deprive GPC of the model. The model would be noticed from its conspicuous location, and presumably then be recovered by GPC.

Depending on where they intended to hang the model, Bob and Carl may be able to reasonably raise this defense.

Assault with a Deadly Weapon

Hostage

Assault is (i) an act that intentionally places another in reasonable apprehension of an imminent harmful or offense contact, or (ii) attempted battery.

Bob takes Hostage at gunpoint. Pointing a gun at a person would reasonably place them in apprehension of an imminent harmful contact, i.e. being shot. A gun is a deadly weapon.

Bob can reasonably be charged with assault with a deadly weapon of Hostage.

Carl

Furthermore, Bob tells Carl "Get in here or I'll shoot you" while holding a gun. This

reasonably places Carl in apprehension of an imminent harmful contact, i.e. being shot. A gun is a deadly weapon.

Bob can reasonably be charged with assault with a deadly weapon of Carl.

Police

Furthermore, Bob shoots at the police. This is attempted battery with a deadly weapon (if not also attempted murder, discussed below).

Bob can reasonably be charged with assault with a deadly weapon of the police.

Defenses

Bob does not have any reasonable defenses to the charge of assault with a deadly weapon, of Hostage, of Carl, or of the police.

Kidnapping

Kidnapping is the unlawful confinement by force or threat of force of another to a bounded area, with movement or concealment of the victim.

Bob grabs Hostage while holding a gun, and forces him back toward the building. The grabbing constitutes force, and the open brandishing of the gun constitutes threat of force. Hostage has no reasonable means to leave the bounded area, and Bob moves him back toward the building.

Bob can reasonably be charged with kidnapping.

Defenses

Bob does not have any reasonable defenses to the charge of kidnapping.

Attempted Murder

Homicide is the unlawful killing of a human being by another. Murder is homicide committed with malice aforethought. Attempt is taking a substantial step toward a crime with intent to commit the crime. Malice can be shown in four ways: (i) intent to kill, (ii) intent to commit serious bodily harm, (iii) reckless indifference to human life ("depraved heart"), or (iv) felony murder. First-degree murder is a murder committed with deliberate premeditation, or committed in the commission of a dangerous felony. Second-degree murder encompasses all other murders.

Bob shoots at the police. Intent to kill can be presumed from use of a deadly weapon. If intent to kill cannot be proved, certainly intent to commit serious bodily harm can be shown from Bob's act of shooting at the police. Furthermore, discharging a gun in the direction of other people can be said to demonstrate reckless indifference to human life.

Bob can reasonably be charged with attempted murder of the police. Bob may be charged with attempted first-degree murder or attempted second-degree murder.

Defenses

Bob does not have any reasonable defenses to attempted murder. He may argue that he did not have time in the heat of the moment to premeditate, and so should be charged with attempted second-degree murder. However, he was still in the commission of a dangerous felony, arson, as he had not yet reached a place of temporary safety.

Felony Murder

Felony murder is a reasonably foreseeable death that occurs during the commission of a violent felony (burglary, rape, robbery, arson, kidnapping). The commission of a crime begins when attempted and ends when the perpetrator reaches a place of temporary safety. First-degree murder is a murder committed with deliberate premeditation, or committed in the commission of a dangerous felony. Second-degree murder encompasses all other murders.

Bob had not yet reached a place of temporary safety from his commission of multiple violent felonies (burglary, arson, kidnapping). Police shot and killed hostage, mistaking him for a suspect. Even though the police, not Bob, killed Hostage, Hostage's death was a reasonably foreseeable result. Liability for felony murder extends to accidental death of innocent victims by police.

Bob can reasonably be charged with felony murder of Hostage. It will likely be first-degree murder.

Defenses

Bob does not have any reasonable defenses to the charge of felony murder. He was in the course of committing multiple violent felonies.

3. Carl's Crimes

Conspiracy

Defined above.

As discussed above, Al, Bob, and Carl decided together to commit burglary and larceny. Furthermore, Bob and Carl do indeed commit an overt act in furtherance of the conspiracy, traveling to GPC's headquarters and proceeding to break in.

Accordingly, Carl can be reasonably charged with conspiracy to commit burglary and larceny.

Defenses

Bob does not have any reasonable defenses to the charge of conspiracy.

Burglary

Burglary is the breaking and entering of a dwelling house of another at night with intent to commit a felony therein. Modernly, the structure can be any building and the burglary need not happen at night.

Bob and Carl break into GPC's headquarters. GPC's headquarters is a structure of another. We are told this occurs at night. Bob and Carl intend to steal the nuclear plant model, which would be larceny, though depending on the jurisdiction and the value of the model this larceny may not rise to a felony.

Carl can reasonably be charged with burglary of GPC headquarters.

Defenses

Lack of intent to commit felony

Carl can argue that the intended larceny of the model would not rise to a felony. Bob intended to set a bomb, and brought guns, but Carl did not know either of these facts.

If Carl can successfully argue that the intended larceny was not a felony but only a misdemeanor, or that he is innocent of larceny (see below), he can argue that he did not have the requisite intent to be guilty of burglary.

Larceny

Larceny is the trespassory taking away of the property of another with intent to permanently deprive the owner of possession.

Bob and Carl take the model from the headquarters. The model is the property of another, and Bob and Carl do not have permission. They do seem to intend to permanently deprive the owner of the property.

Carl can reasonably be charged with larceny of the model.

Defenses

Lack of intent to permanently deprive

Bob and Carl plan to "hang [the model] in effigy in a conspicuous location." They can argue that this shows that they did not have intent to permanently deprive GPC of the model. The model would be noticed from its conspicuous location, and presumably then be recovered by GPC.

Depending on where they intended to hang the model, Carl may be able to reasonably raise this defense.

Co-Conspirator Liability for Bob's Additional Crimes (Attempted Arson, Assault with a Deadly Weapon, Attempted Murder, Kidnapping)

Co-conspirators are liable for each other's reasonably foreseeable crimes committed in furtherance of the conspiracy.

As discussed above, Bob and Carl conspired to commit the theft of the model. Bob's other crimes, discussed above, were committed during the course of the conspiracy.

Carl can reasonably be charged as a co-conspirator to Bob's crimes.

Defenses

Crimes not reasonably foreseeable

Crimes must be reasonably foreseeable crimes committed in furtherance of the conspiracy in order to result in co-conspirator liability.

Carl can argue that the conspiracy was merely to commit the theft of a model, which is arguably a misdemeanor, not to blow up the building or commit any of his other crimes.

He can argue that the intended crimes were minor and non-violent.

Carl can reasonably argue that Bob's crimes were not a reasonably foreseeable part of furthering the conspiracy.

Duress

Crimes committed under threat of death or serious harm can be defended on the grounds of duress.

Once things go sideways, Carl tries to leave and to get Bob to release the hostage. Bob, holding a gun, tells Carl to "get in here or I'll shoot you."

Carl can reasonably raise the defense of duress.

Felony Murder

Felony murder is a reasonably foreseeable death that occurs during the commission of a violent felony (burglary, rape, robbery, arson, kidnapping). The commission of a crime begins when attempted and ends when the perpetrator reaches a place of temporary safety. First-degree murder is a murder committed with deliberate premeditation, or committed in the commission of a dangerous felony. Second-degree murder encompasses all other murders.

Carl had not yet reached a place of temporary safety from his commission of burglary. Police shot and killed hostage, mistaking him for a suspect. Even though the police, not Carl, killed Hostage, Hostage's death was a reasonably foreseeable result. Liability for felony murder extends to accidental death of innocent victims by police.

Carl can reasonably be charged with felony murder of Hostage. It will likely be first-degree murder.

Defenses

Carl can argue he was not committing a violent felony, if as discussed above the larceny did not rise to the level of a felony and therefore does not support a charge of burglary. He can also argue that any other violent felonies committed were committed under duress, as discussed above. If he is successful in these defenses, then he can reasonably claim he was not committing a felony when the death of Hostage occurred,

and so would not be guilty of felony murder.

Involuntary Manslaughter

Involuntary manslaughter is the death of another caused during the commission of a misdemeanor (misdemeanor manslaughter), or through criminal negligence.

Carl was at the very least committing a misdemeanor in stealing the model. Police shot and killed hostage, mistaking him for a suspect. It is foreseeable that police would respond even to a misdemeanor larceny.

Carl can reasonably be charged with involuntary manslaughter.

Defenses

Carl does not have any reasonable defenses to the charge of involuntary manslaughter.

QUESTION 4: SELECTED ANSWER B

STATE v AL

CONSPIRACY

Conspiracy is an agreement between two or more people to work towards an unlawful act. Modernly an overt act is required.

Here, there was an agreement between two or more people because A, B and C as members of a group opposed to nuclear power, decided they would break into the GPC. Their agreement was to work towards the unlawful act of removing a model of a proposed nuclear plant to hang it in effigy.

There was an overt act because they met two hours before they were leaving for the GPC headquarters. A will argue this was not an overt act because he did not go to the headquarters. However, the State will argue because he was in the planning process that satisfied an overt act.

Therefore, A can be charged with conspiracy.

PINKERTON'S RULE

Under Pinkerton's Rule members of a conspiracy can be charged with crimes of co-conspirators that are foreseeable and within the scope of the conspiracy.

Here, A was a member of a conspiracy with B and C, and as such will be liable for crimes committed by them that are foreseeable and within the scope of the conspiracy. (infra).

WITHDRAWAL

Withdrawal is no defense to conspiracy under common law but maybe under the MPC if it was timely and effectively communicated to co-conspirators, and they notified law enforcement.

Here, A told B and C two hours before they left for GPC he would not participate in the break in. B and C responded they would go without him. A made no effort to stop the criminal pursuit, and did not notify law enforcement. Further, two hours before leaving would not constitute timely notice.

Therefore, A's defense of withdrawal will fail.

STATE v. BOB

CONSPIRACY

Defined supra.

Here, there was an agreement between two or more people because A, B and C as members of a group opposed to nuclear power, decided they would break into the GPC. Their agreement was to work towards the unlawful act of removing a model of a proposed nuclear plant to hang it in effigy.

There was an overt act because B did get to GPC headquarters with C.

Therefore, B will be charged with conspiracy.

PINKERTON'S RULE

Defined supra.

Here, B will be liable for all crimes committed by co-conspirators A and C that are in furtherance and within the scope of the conspiracy.

LARCENY

Larceny is the trespassory taking and carrying away of the personal property of another with intent to permanently deprive.

Here, there was a trespassory taking because B and C removed the model without the consent of the GPC company. They carried it away when they removed it from the headquarters. The model was the property of GPC. B and C had intent to permanently deprive when they planned to hang it in effigy in a conspicuous location.

Therefore, B can be charged with larceny.

BURGLARY COMMON LAW

Under common law burglary is the breaking and entering into the dwelling house of another in the night with intent to commit a felony.

Here, there was a breaking because the facts state B and C broke into GPC headquarters. B entered because the facts imply they were inside when they removed the model. This entry was at night.

The structure was not a dwelling house because it was a nuclear power company business.

B and C had intent to commit a felony because they planned to remove a model of a proposed nuclear plant, the larceny discussed supra.

Therefore, B will not be charged with burglary at common law.

BURGLARY MODERN LAW

Modernly, burglary is any trespassory entry into any structure at any time of day with intent to commit a crime.

Here, all elements are satisfied (infra), and the nuclear headquarters will satisfy the element of any structure.

Therefore, B can be charged with burglary under modern law.

ASSAULT

Assault under common law was an attempted battery, and modernly is threatening conduct with intent to injure or frighten.

Here, when B had a gun when he approached the hostage as he walked to his car. This would be threatening conduct and the hostage was likely frightened as they approached.

Therefore, B will be charged with assault which will merge with the larger crime of battery.

BATTERY

Battery is the unlawful application of force to another without consent or privilege.

Here, B grabbed the apartment tenant and took him hostage. This grabbing and forcing him towards the building was an unlawful application of force. The hostage did not consent and B was not privileged.

Therefore, B will be charged with battery.

FALSE IMPRISONMENT

False imprisonment is the unlawful confinement of another without consent or privilege.

Here, B grabbed the hostage and had a gun. The facts state B took the hostage into the building. This would satisfy the element of an unlawful confinement.

Therefore, B will be charged with false imprisonment.

KIDNAPPING

Kidnapping is an unlawful transportation of another against their will.

Here, the hostage was heading to their car when B approached and forced him back towards the building. The movement of the hostage from the parking lot to the building was unlawful and without consent or privilege.

Therefore, B will be charged with kidnapping.

HOMICIDE

A homicide is an unlawful killing of a human being by another human being.

Here, the hostage a human being was killed by acts set in motion by another human being B, and shot by the police, a human being.

ACTUAL CAUSE

But for B holding the hostage in the building and later telling him to run free, he would not have been mistaken for a suspect and killed.

Therefore, B is the actual cause of death of H.

PROXIMATE CAUSE

It was foreseeable that if H would run from the building where police arrived to catch criminals in pursuit they could be mistaken for a suspect.

Therefore, B is the proximate cause of death of H.

The hostage's death is a homicide.

MURDER

Murder is an unlawful homicide with malice aforethought. Malice can be found if there is an 1) intent to kill, 2) intent to cause serious bodily harm, 3) felony murder, or 4) wanton reckless conduct.

Here, B does not have an intent to kill or cause serious bodily harm because he had a gun but only threatened the hostage and eventually let him go.

B was in the commission of an inherently dangerous felony of burglary under modern law. He was still in the res gestae because they were in pursuit by the security and

police but had not reached a place of safety.

B did do wanton reckless conduct because by taking a hostage and the use of a gun, he was consciously aware and disregarded the risks to human life when he let a hostage go from a building surrounded with police.

Therefore, malice can be found based on felony murder or wanton reckless conduct.

FIRST DEGREE MURDER

First degree murder is if there is felony murder, bomb, poison, torture, or an intent to kill.

Here, Bob had a bomb and planted it in the headquarters, but this was not related to the death of the victim.

Bob was in the commission of an inherently dangerous felony and the felony murder rule may apply if modern law burglary suffices.

SPECIAL FELONY MURDER RULE

Under the special felony murder rule, if an innocent victim does the killing of another innocent victim there is a rule split. Under common law co-felons are liable. Modernly, a co felon is not liable because an innocent person did the killing.

Here, the police shot and killed H when he ran from the building and not B or C.

Therefore, modernly B will be charged with first degree murder under the special felony murder rule.

SECOND DEGREE MURDER

All murder that is not first degree is second degree.

If burglary does not satisfy the felony murder rule based on common law, then B will be charged with second degree murder.

INVOLUNTARY MANSLAUGHTER

Involuntary manslaughter is an unintentional homicide done with criminal negligence or during a malum in se crime.

Here, B did not intend to kill H. B may argue his theft of the model was done as a member of a political group and the model had low value and would only be petty larceny. Further he may argue his acts of letting the hostage go only posed an unreasonable risk of harm to H.

B may be able to mitigate his murder charge to involuntary manslaughter.

STATE v. CARL

CONSPIRACY

Defined and discussed supra.

PINKERTON'S RULE

Defined and discussed supra.

Therefore, C will be charged with all the crimes of B discussed supra.

ACCOMPLICE

A principal in the second degree is a person who is present at the crime. Modernly this is classified as an accomplice. An accomplice is one who aids the principal with knowledge, intent and active assistance.

Here, C had knowledge of B's crimes because they discussed plans to break into GPC. C had intent to assist B because he also took the gun when B tossed it to him in their attempt to flee and get a hostage. C had active assistance because he went to GPC and removed the model with B.

Therefore, C is an accomplice.

ACCOMPLICE LIABILITY

An accomplice is liable for crimes committed by co-felons. Under common law liability was to the extent of foreseeable crimes. Under the MPC liability extends to those crimes that were intended by the principal.

It was foreseeable B would commit larceny and burglary. C will argue that B did not intend to commit assault, battery, false imprisonment, kidnapping and murder.

Therefore, C may be charged with the crimes of B (supra).

WITHDRAWAL

Withdrawal may be a defense to accomplice liability under the MPC if there was timely notice and law enforcement was notified.

Here, C will argue he did not know B had a bomb or guns. Further he will argue he

convinced B to let the hostage go.

However, the state will argue this was not timely because the hostage was already taken in, and C never attempted to notify law enforcement but in fact fled in a pursuit.

Therefore, this defense for C will fail.

DURESS

Duress is a defense if there is an imminent threat of harm.

When B took in the hostage he stated to C "get in here or I'll shoot you." This may be a defense to the kidnapping and false imprisonment of the hostage because C was threatened with a gun.

It will not be a defense to the homicide of H because duress does not allow one person to be killed when another was threatened.