



**California  
First-Year  
Law Students'  
Examination**

**Essay Questions  
and  
Selected Answers**

**October 2006**

**ESSAY QUESTIONS AND SELECTED ANSWERS**

**OCTOBER 2006 FIRST-YEAR LAW STUDENTS' EXAMINATION**

This publication contains the essay questions from the October 2006 California First Year Law Students' Examination and two selected answers for each question.

The answers received good grades and were written by applicants who passed the examination. The answers were typed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

Applicants were given four hours to answer four essay questions. Instructions for the essay examination appear on page ii.

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## **ESSAY EXAMINATION INSTRUCTIONS**

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 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 which are not pertinent to the solution of the problem.

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

## Question 1

Computer, Inc. ("CI") is a well-known manufacturer of computer equipment. On January 3 CI received an order by fax for a CI computer with advanced internet capabilities from a newly formed company, Startup, Inc. ("Startup"). The order did not contain sufficient details for CI to determine exactly which model computer Startup wanted.

On June 5, CI's order department sent a letter to Startup stating:

Received your order. However, we have over 16 different computer models; please review the enclosed catalog and fax us with the exact model number of the computer you want to purchase. We require payment in full, including shipping charges, before we will ship.

On June 8, CI received an order by mail from Startup stating, "Send us your model 100 with a Delta Operating System. Enclosed is our check for \$4,500." CI immediately shipped to Startup a model 100 computer, which, as stated in CI's catalog, came equipped with a Gamma Operating System, and cost \$7,000. Startup actually intended to order a CI model 10 computer, but it had made a typographical error on its June 8 order.

Upon discovering the error, CI billed Startup for an additional \$2,500, the difference between the \$4,500 Startup payment and the \$7,000 cost of the model 100. Startup refused to pay.

Startup has been unable to use the model 100, and CI refuses to take it back.

In a suit for breach of contract by CI against Startup to recover the \$2,500 differential, what defense might Startup reasonably assert, and who should prevail in the suit? Discuss.

## Answer A to Question 1

1)

This contract is for the sale of goods. As a result, the Uniform Commercial Code (UCC) will govern it.

CI v. Startup

CI will only have a case against Startup if there was a valid contract. A contract is an agreement between parties of which the law recognizes a remedy for a breach. For a contract to be formed, CI must show that there was a valid offer, a valid acceptance, and consideration.

Offer?

An offer is a manifestation of intent to enter into a contract that contains definite terms and creates the power of acceptance in the other party. On January 3, Startup sent a request to CI for a computer. However, the order did not contain sufficient details for CI to determine which computer Startup wanted. Therefore, this communication was not an offer since it did not have definite terms. On June 5, CI sent a letter to Startup explaining this to them. CI told Startup to choose from the catalog what model Startup wanted. This was not an offer either. This was simply sending a catalog, which is more of a request for an offer if it is anything. Once Startup sent the order by mail on June 8 to CI, that communication was an offer. If [sic] contained definite terms explaining what computer Startup wanted, and it clearly manifested an intention to be bound; it included payment for the computer. Thus, on June 8 an offer was made.

Acceptance?

An acceptance occurs when the offeree accepts the terms and manifests an intention to be bound to the contract. This is a bilateral contract, so an acceptance is required to be promise to perform. However, the UCC allows acceptance of the contract to occur by sending conforming goods. Once CI had received the offer, CI shipped the requested [sic] to Startup. When CI sent the computer, it did not immediately bill for the additional \$2,500. As a result, CI accepted the offer for the stated computer at the named price of \$4,500.

Consideration?

Consideration is a bargained [-] for exchange by the parties. Each party must incur a new legal detriment as a result of the agreement. Here, CI sent Startup a computer and Startup paid CI \$4,500. This is sufficient consideration by both parties.

Statute of Frauds (SoF)?

The SoF requires that certain types of contracts be evidenced by a writing including the subject matter, the parties, material terms, and a signature by the party to be charged: contracts for the sale of land, contracts in consideration of marriage, suretyships, contracts which by their terms cannot be completed within one year, and contracts for the sale of goods with a value of \$500 or greater. The contract in question falls in the last category. Thus, the SoF applies. The agreement between CI and Startup has a sufficient writing. When Startup placed the order to CI, a check was included which named the parties, the price term, and was signed by Startup. In addition, the actual request named the subject matter, and the other material term: the computer model. There is no signature by CI, however, in this case, CI is not the party to be charged. CI is suing Startup, so only Startup has to have signed a writing. Since there is a sufficient writing between the check and the request, the SoF is satisfied.

All of the requirement[s] for the formation of a valid contract are present. Thus, CI has a potential claim against Startup. However, Startup has a defense that it can assert.

Mistake?

Mistake is a valid defense to the formation of a contract. There are two types of mistakes: bilateral mistake, where both parties were mistaken; and unilateral mistakes, where only one party was mistaken. This mistake is a unilateral mistake: only Startup was mistaken. When Startup sent the request for the computer to CI, it was a request for a model 100 computer, and Startup paid \$4,500. The price of the model 100 was actually \$7,000, which CI knew as shown by the fact that CI later is trying to sue for the difference. Startup, however, was attempting to order a model 10 computer but made a typographical error. This was the Startup's mistake: the typographical error. This is a unilateral mistake. The result of a unilateral mistake is normally that the mistaken party cannot avoid the contract unless the other party knew or should have known of the mistake. CI should have

known of the mistake. Clearly the payment amount did not match the computer that Startup ordered. CI could have easily discovered that Startup intended to buy a model 10 by looking in their catalog and finding a computer that cost \$4,500. In any event, the discrepancy in payment versus price operated to give constructive notice to CI. In addition, the model 100 game [sic] with a Gamma operating system, not the Delta operating system that Startup requested. This also should have tipped off CI as to the mistake in the order made by Startup. As a result, they should have known of Startup's mistake and Startup can avoid the contract.

After discovering that the model 100 does not work for their purposes, Startup has tried to return the computer to CI. This is an attempt to avoid the contract, a power they have due to mistake in the request. Since CI should have known of the mistake, they do not have the right to refuse the avoidance. Therefore, there is no contract.

The defense of mistake will mean that there is no contract, so CI will not prevail in their suit. Startup will prevail.

However, assuming that the defense of mistake will not work because CI should not [sic] have known of Startup's mistake, the performance of the parties must be examined.

#### Performance

#### Perfect Tender Rule

If there was a contract, then each party must substantially perform the contract. However, in the case of a contract for the sale of goods, the UCC requires that the seller provide "Perfect Tender." This means that the seller must give the buyer exactly what was requested, or the buyer can reject the nonconforming goods and sue for breach. Startup performed the contract by paying \$4,500 for the requested computer. They requested a return performance of a model 100 computer with a Delta Operating System. CI performed the contract by sending Startup a model 100 computer with the Gamma operating system. This is different from the requested operating system. Therefore, the computer is considered to be a non-conforming good. This is not perfect tender, so Startup can reject the performance.

Since Startup can reject the performance due to the “Perfect Tender Rule,” Startup is not in breach for not paying an additional \$2,500. Since they are not in breach, CI will not prevail in this suit.



## Answer B to Question 1

1)

### COMPUTER INC. ("CI") v. STARTUP UNIFORM COMMERCIAL CODE (UCC) vs. COMMON LAW

UCC governs contracts for the sale of goods. Goods are items which are moveable, tangible, and identifiable at the time of formation[.]

This is a contract for the sale of a computer.

A computer is an item which is tangible, moveable, and identifiable at the time of formation. Thus it is a good.

This is a contract for goods; the UCC governs.

### MERCHANTS

Those who deal in the product in question or hold themselves out by means of their occupation as having knowledge or expertise peculiar to the goods in question.

CI is a manufacturer of computer equipment. Thus it is one who deals in the goods in question, and will be a merchant.

Startup is a newly formed company, and the exact nature of its business is not clear from the facts. However, it is a business which makes use of computer equipment requiring a special computer with advanced internet capabilities. This may suggest that Startup is in the computer business, or at least is specializing in such a way as to be holding itself by occupation as having skill or expertise in computers. More facts are needed to determine Startup's status.

Thus at least CI (and possibly Startup) is a merchant within the UCC. Merchants are held to a higher standard of good faith and fair dealing.

### **OFFER/PRELIMINARY NEGOTIATIONS**

An outward manifestation of present contractual intent which is definite in terms and which is communicated in such a way as to create in the offeree a reasonable expectation that the offeror is willing to enter into a contract.

Startup faxed an order to CI on January 3 for a computer. This is a communication of contractual intent.

The terms of definiteness[sic] are as follows:

Quantity – 1

Time for performance – not stated; the UCC will fill in a “reasonable time”

Identity of Parties – CI and Startup

Price – not stated

Subject Matter – CI computer with advanced internet capabilities.

However, the subject matter was ambiguous because CI manufactured 16 different computers.

Under the common law, this would be fatal to an offer, because all terms were required in order to have a valid offer.

Under the UCC, the trend is toward leniency, and a court will fill in missing terms as long as it has reasonable grounds for doing so. However, here the court does not have reasonable grounds upon which to decide which of the several computers manufactured

by CI would be the computer which Startup is requesting. Thus, even under the UCC, the court will not fill in the terms, and the offer will thus be invalid.

Thus the terms are not sufficiently clear to find an offer. It will [,] however, be an invitation to deal, and be part of the course of dealing.

### **PRELIMINARY NEGOTIATIONS 2**

CI mailed a letter to Startup on June 5, stating that they received the order but could not fulfill it with the ambiguous terms. However, this is not a clear rejection (it could not be a rejection of the offer, because the offer was invalid). It is more likely to be construed as continuing negotiations[.]

### **OFFER #2**

On June 8, Startup mailed an order to CI. This was a present communication of contractual intent.

The terms are as follows.

Quantity – 1

Time for performance – not stated; the UCC will fill in a “reasonable time”

Identify of Parties – CI and Startup

Price - \$4,500

Subject Matter – CI computer model 100 with Delta operating system

A reasonable person in the position of the offeree would understand this to be an offer.

## **ACCEPTANCE**

An outward manifestation of unequivocal assent to the terms of the offer.

CI immediately shipped the computer as ordered. The computer shipped was a model 100, but it ran on a Gamma operating system and cost \$7,000.

Under the UCC, an offer can be accepted in any manner reasonable under the circumstances, either by acceptance or prompt and current shipment. CI made a prompt shipment. Thus, this is a valid acceptance under the UCC rules.

However, the item shipped did not conform in all respects to the order. But under the UCC, shipment of a non-conforming goods is still a valid acceptance but it is also at the same time a breach.

## **CONSIDERATION**

That which is bargained for and given in exchange for performance or a return promise, requiring mutual benefit and detriment to both parties.

Here, CI shipped a computer, thus incurring a detriment but receiving the benefit of payment by Startup.

Startup paid a monetary price, incurring a detriment, but receiving the benefit of the computer.

Each performance was the inducement for the other.

There is a valid consideration[.]

## **DEFENSES**

### **Statute of Frauds**

UCC requires contracts for the sale of goods of \$500 or more (or \$5,000 under the 2003 UCC revision) to be in writing to be enforceable.

Here this is a sale for \$4,500 and thus would be within the original UCC statute of frauds.

### *Sufficient Memorandum*

A sufficient memorandum is a writing evidencing the formation of a contract, containing a quantity term, which is signed by the party to [be] held to the contract.

Here, the offer was made by mail by Startup. This is a writing evidencing a contract.

UCC requires it to be signed. But because it came with a check which must have been signed, and the order referred to the check, the documents together will be considered an integration and the contract will be enforceable.

### *Performance*

Because there has been performance by part payment, this is sufficient to remove the contract from the Statute of Frauds to the extent of the payment.

The Statute of Frauds will not be an effective defense.

### **Unilateral Mistake**

Where one party is mistaken as to a basic material fact upon which contract is based, and the other party knew or should have known this fact, the contract resulting is voidable by the mistaken, adversely affected, party.

Startup was mistaken in its offer, accidentally requesting the model 100 instead of the model 10 as they intended. The type of computer which was ordered is a basic fact of the contract.

Startup will argue that CI should have known of the mistake, because while requesting the model 100 Startup referred to the operating system and the price, which were not the operating system and price of the model 100 but apparently applied to model 10.

This makes it appear that CI reasonably should have known of Startup's mistake. Because the law does not allow one to "snatch up" an offer known to be mistaken. CI snatched up the offer by immediately shipping. This evidences an occasion when unilateral mistake would be an effective defense.

*Unilateral mistake is a valid defense, rendering the contract voidable by Startup.*

## **CONDITIONS**

An act or event not certain to occur which unless excused, gives rise to or extinguishes a duty to perform under the contract.

### **1. Express Condition Precedent**

In the negotiations, CI's letter of June 5 required payment in full, including shipping, before shipment. As part of the course of dealing, this statement is admissible to show the parties' intent on the issue of time-of-payment.

### **Excuse of Condition**

#### **Waiver**

Here, Startup paid only \$4,500 for the model 100, which actually sold for \$7,000. Because CI accepted the check in part payment and shipped the Model 100 anyway, this was a waiving of the right to insist upon full payment before the duty to ship arose.

#### **Implied in Law (Constructive) Condition**

2.

A longer performance is a constructive condition precedent on a shorter performance.

Thus, because the delivery of computer would be longer than the performance of paying, the duty of completing delivery must occur first before the duty to pay the balance arises.

### **Excuse of Condition**

### **Perfect Tender Rule**

Startup's duty to pay the balance never arose, because the performance did not occur in conformity to the contract. Here, CI shipped a computer which did not conform in all respects to the contract: the computer ordered was to run on a Delta operating system, but the computer shipped ran on a Gamma operating system. Under the UCC, shipment of a non-conforming goods is still an acceptance but is also breach.

UCC requires perfect tender of performance. The failure of the shipment to conform justifies the buyer to either:

- (a) reject the whole,
- (b) accept the whole, or
- (c) accept any commercial unit or units and reject the rest.

There are three exceptions to the perfect tender rule. CI will try to argue for application of an exception:

(a) Delivery is made before the duty to perform is expired. The buyer must notify the seller of the nonconformity and must then give the seller time to cure. However, here the time for performance was not specified by contract and so upon receipt of the goods by Startup, CI had no further time in which to cure.

(b) Installment contract. This is a shipment of only one item and is not an installment contract. This exception is inapplicable.

(c) Where the seller ships nonconforming goods, but states that it is only an “accommodation” to the buyer, the buyer may reject the goods, but must give seller reasonable time to cure. Here, the nonconforming goods were shipped without any mention of it being an “accommodation.” This exception will not apply.

No exception applies.

Thus, the failure of the sale to conform to the contract excuses the duty of Startup to perform by tendering payment.

### **BREACH**

No duty is likely to be found to have been breached by Startup, due to (1) the fact that the contract is avoidable due to mistake, and (2) the fact that the duty to tender payment of the balance likely did not arise. Thus, Startup will not be found to have breached.

### **REMEDIES**

#### **General Damages**

General damages attempt to compensate for the loss of expectancy under a contract, by placing the nonbreaching party in the position he would have been in had the contract been fully performed. The normal measure of damages for a breach by a buyer is for the seller to recover either (a) the difference between the market price and the contract price, or (b) the profits expected under the contract (particularly when the goods sold are of an unlimited supply).

CI cannot recover general damages where the contract is voidable, and no breach is found.



## **Restitutionary Damages**

Even where the contract is voidable, a plaintiff can recover for the reasonable value of the benefit conferred under the contract.

However, CI cannot recover for the computer in this case, because it has refused to take back the computer when Startup offered to return it. Under the avoidable consequence rule, the plaintiff cannot recover damages which he reasonably could have avoided. Because CI could have avoided the damage of losing their model 100 by accepting its return, and refused to do so to mitigate, CI cannot recover for its loss.

## Question 2

Pete is a salesperson at XYZ Real Estate Company ("XYZ"). Vic owned a parcel of industrial real estate that he wanted to sell. Vic retained Pete as his agent to sell the parcel for him, and they agreed to list the parcel for a price of \$100,000. Developer contacted Pete and expressed interest in buying Vic's property.

Pete falsely told Vic that a soils test report revealed serious toxic contamination on the parcel and that, because of high cleanup costs, the most Vic could hope to get for the parcel was \$15,000 to \$17,000. Vic said, "OK. Do your best."

About a week later, Pete persuaded his friend, Frank, to sign an offer to Vic, offering to pay \$17,000 for the parcel. When Frank asked why Pete wanted him to do this, Pete told him, "The actual buyer is traveling in Europe and can't get back in time to sign the papers, so he authorized me to find someone to sign for him. I'm designating you as that person, but, don't worry, you won't be liable for anything." Believing Pete's explanation, Frank agreed to sign out of his friendship with Pete. Pete presented the offer signed by Frank, and Vic accepted it.

Pete, figuring he would temporarily "borrow" \$17,000 from XYZ, wrote a check on the XYZ bank account for \$17,000 and gave it to Frank to deposit into Frank's account. Frank attended the real estate closing, obtained the deed, and gave Vic his personal check for \$17,000. Two days later, Pete sold the property to Developer for \$100,000. From the proceeds of that sale, Pete returned the \$17,000 to XYZ's account and kept the balance for himself.

1. Of what crimes, if any, can Pete be convicted? Discuss.
2. With what crime might Frank be charged, and is it likely he would be convicted? Discuss.

## Answer A to Question 2

### 1. Is Pete guilty of solicitation?

Solicitation[,] under criminal law, is urging another person to commit an illegal act and /or crime.

Here, Pete urged his friend Frank to make an offer to Vic. On its face this is not an illegal act although it was part of a big illegal fraudulent scheme that Pete was planning. Furthermore, here Frank had no idea that there was any illegal tasks that he was taking part in.

Therefore, Pete is not guilty of solicitation[.]

### 2. Are Pete and Frank guilty of conspiracy?

Under criminal law, a conspiracy is formed when 2 or more people agree to commit a criminal act. Conspiracy does not merge with other offenses. Here, as explained above, Frank had no idea that he was helping Pete towards committing a criminal act. And, since conspiracy is a specific intent crime, it would require the person committing it to be aware of the crime. Here although Frank agreed to help Pete but he did not know of the nature and illegality, therefore Frank is not guilty of conspiracy, and since you would need 2 or more guilty minds to commit conspiracy, Pete is not guilty of conspiracy either[.]

Therefore, they are not guilty of conspiracy[.]

### 3. Is Pete guilty of false pretense? For the land?

False pretense is an intentional misrepresentation of material fact causing one to gain title to a property by fraud. It is done with the intention that the other party relies on the false information, and in fact the person does rely on it.

Here, Pete intentionally made a misrepresentation of material facts because he falsely told Vic that a soils test report revealed serious toxic contamination on the parcel and that, because of high cleanup costs, the most Vic could hope to get for the parcel was \$15[, ]000 to \$17[, ]000. Also his actions were intentional for the purpose of inducing the

results he wanted, knowing that Vic would rely on it because Pete was the sales agent of Vic and, he knew that Vic would rely on Pete's statements.

Here, Vic did rely on Pete's statements because he said "Do your best" in response to Pete's false statements.

Here, because of the false misrepresentation that [is] explained above, and because of Vic's reliance on the misrepresentation of the materials [sic] facts as Pete expected, Pete was able to proceed with his plans towards obtaining title as explained below.

Here, Pete obtained title to Vic's property because he first had his friend, Frank to purchase it, and then he bought it from Frank at the low price of \$17,000. Had he not lied to Vic, Vic would not have accepted the \$17,000 offer on the property that he had listed for \$100,000. Therefore, Pete obtained the property through false pretenses and he has the title.

Therefore, Pete is guilty of false pretense[.]
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#### 4. Is Pete guilty of embezzlement? For the \$17,000?

Under criminal law, embezzlement is trespassory conversion of a property that one is entrusted with.

Here, Pete was entrusted with money from XYZ because he was able to write checks on the XYZ bank account.

Here, Pete trespassor[il]ly converted \$17,000 from XYZ because he wrote a check on the XYZ account for \$17,000 and gave it to Frank to deposit into Frank's account. Here, Pete will argue that he only "borrowed" the money because he later returned it as he had initial[l]y intended to do so, but this argument will not hold because one who is entrusted with a property can borrow it if and only if he returns the exact item back. In case of money, this is not true because although the amount may be exact but that does not qualify as the same item being returned. Therefore he will be found to have converted the property being money here. Even though it was just for 2 days but it will be considered substantial influence with the property and therefore conversion took place as explained

above by giving the mon[e]y to Frank. This conversion was trespassory because it was unauthorized by XYZ.

Therefore, Pete is guilty of embezzlement[.]

5. Is Pete guilty of larceny? For the \$17,000?

Larceny under criminal law is defined as trespassory taking and carrying away of the personal property of another with intent to permanently deprive/steal.

Here, there was no trespassory taking of the money because Pete was in the pos[s]ession of the \$17,000 in the XYZ bank account for which he had signatory rights to withdraw.

Here, there was carrying away because he took the \$17,000 and deposited it to Frank's bank account there was personal property because it was for money. Here, he had no intend[sic] to permanently deprive because he intended to return the money.

Therefore, Pete is not guilty of larceny[.]

6. Can Frank be guilty of conspiracy?

As explained at the begin[in]g, neither Frank nor Pete are guilty of conspiracy because we don't have two guilty minds here. And note that if they were found guilty, conspiracy would not have merged with other substantive crimes.

7. Is Frank an accomplice?

An accomplice is one which [sic] aids or encourages another in committing a crime. The acts must be done with the knowledge and awareness that the party he is helping is part of an illegal scheme.

Here, although Frank has essentially helped Pete in implementing the fraudulent plan, but he has no idea he is aiding in a criminal act. In some jurisdictions, the mere fact that one party substantially benefits by aiding and abet[t]ing a criminal could be held as a reason to be called an accomplice even though it is done without the knowledge of the crime taking place. But here, not only Frank does not know but he also is not benefiting in any way.

Therefore, Frank is not an accomplice[.]

8. Would Frank be guilty of the crimes committed by Pete?

An accomplice and/or a party to a conspiracy is guilty of all the crimes committed by the principal in the furtherance of the crime that one [is] foreseeable. However, here Frank is neither an accomplice nor a conspirator as explained above.

Therefore, Frank will not be guilty of Pete's crimes[.]

9. Is Frank guilty of rece[i]ving stolen goods?

Receipt of stolen goods is a specific intent crime and since Frank did not know the \$17,000 money was stolen he is not guilty of it.

In conclusion, Pete is guilty of false pretense and embezzlement; and Frank is not guilty of any crime.

## Answer B to Question 2

2)

### **STATE V. PETER**

#### **SOLICITATION – to commit forgery and uttering**

Solicitation is an act of counseling, inciting, or enticing committed with the intent to induce another to commit an illegal act.

Peter told his friend Frank that the actual buyer was traveling in Europe and can't get back in time to sign the papers, so he authorized me to find someone to sign for him. I'm designating you as that person, but you don't have to worry, you won't be liable for anything. When Peter persuaded his friend Frank to sign an offer to Vic, offering to pay \$17,000 for Peter's parcel, Peter counseled and incited Frank to commit the crime of forgery and uttering [,] which are illegal acts.

#### **CONSPIRACY – to commit forgery and uttering**

Conspiracy is an agreement between two or more persons to commit an illegal act.

Believing Peter's explanation, Frank agreed to signed [sic] out of his friendship with Peter. When Peter was unable to persuade Frank to sign the papers, Frank agreed to commit forgery. Normally, an agreement to commit an illegal act would [sic] between two or more persons would be a conspiracy. Frank, however, did not know, based on Peter's assurance, that he was committing an illegal act. Since Frank did not have the specific intent to commit an illegal act, at common law, there would be no conspiracy between Frank and Peter.

At common law, Peter would not likely be guilty of conspiracy.

Under the Model Penal Code (MPC), the MPC recognizes a unilateral conspiracy. Peter would likely be guilty of a unilateral conspiracy.

## **EMBEZZLEMENT**

Embezzlement is the fraudulent conversion of rightfully entrusted personal property with the specific intent to defraud.

Peter, figuring he would temporarily “borrow[“] \$17,000 from XYZ, wrote a check on the XYZ bank account for \$17,000 and gave it to Frank to deposit in Frank[‘]s account. Since Peter was able to sign a check on the XYZ bank account, Peter would have been a rather high level employee with the firm. Since Peter was a high level employee, when he signed the check for the \$17,000, he fraudulent[ly] converted the fund[s] which were entrusted to him, with the specific intent to use those funds to give to Frank and eventually defraud Vic.

Peter will likely be guilty of embezzlement.

## **LARCENY**

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

If Peter is not considered to be a high level employee, he would be charged with the crime of larceny rather than embezzlement. Peter used the funds to give to Frank to defraud Vic. The checking account funds were not intended to be used for this purpose[;] thus it was a trespassory taking. Furthermore, when Peter wrote the check to Frank, he “carried away” the funds, which were the property of XYZ. Peter, however, did not have the specific intent to permanently deprive XYZ Real Estate of the funds as evidenced by Peter returning the funds to the XYZ bank account.

Peter will not likely be guilty of larceny as he did not have the specific intent to permanently deprive.

## **UTTERING**

Uttering is the offering as genuine an instrument known to be false with the specific intent to deceive.

Peter had Frank attend the real estate closing, obtained the deed, and gave Vic his personal check for \$17,000. When Frank gave Vic the check and obtained the deed, Frank



offered the papers for the real estate transaction as if he actually intended to purchase the property. As such, Peter used an innocent agent to offer the papers as genuine, knowing them to be false, with the specific intent to deprive Peter of title to his property.

Peter will argue that the papers were in fact genuine and represented a valid agreement for the sale of the parcel.

Peter will likely be guilty of uttering.

### **FALSE PRETENSES**

False pretenses is the procurement of title to property by means of false representation with specific intent to permanently deprive.

### **MISREPRESENTATION**

Misrepresentation is a false statement of material fact knowingly made with the intent to induce plaintiff's reliance, causing plaintiff to justifiably rely thereon and be damaged.

**False statement of material fact:** Peter falsely told Vic that a soils test report revealed serious toxic contamination on the parcel and that because of high cleanup costs, the most Vic could hope to get for the parcel was \$15,000 to [\$]17,000. This statement by Peter to Vic was a false statement.

**Knowingly made:** When Peter falsely told Vic that the soils test report revealed serious toxic contamination on the parcel, Peter knowingly made the false statement to Vic.

**Intent to induce reliance:** Originally, Peter and Vic agreed that Peter would list Vic's parcel for a list price of \$100,000. Peter falsely told Vic the parcel had serious contamination[,] intending to induce Vic's reliance to reduce the price of the parcel.

**Causing plaintiff to justifiably rely thereon:** Originally, Peter and Vic agreed that Peter would list Vic's parcel for a list price of \$100,000. After Peter told Vic that the most Vic could hope to get for the parcel was \$15,000 to \$17,000, Vic replied, "O.K. Do your best." As such, Vic justifiably relied on the false representation by Peter and reduced the price of the parcel.

**Damages:** Peter sold the property which was worth \$100,000 for \$17,000.

As discussed supra, Peter obtained title to Vic's property by means of false representation. Furthermore, as evidenced by Peter[']s plot and utilization of his friend Frank, [he] utilized the false representation with the specific intent to permanently deprive Vic of his property. Peter then resold the property two days later to a developer for \$100,000.

Peter will likely be guilty of false pretenses.

## ***STATE V. FRANK***

### **CONSPIRACY**

Defined supra

Peter told his friend Frank that the actual buyer was traveling in Europe and can't get back in time to sign the papers, so he authorized me to find someone to sign for him. I'm designating you as that person, but you don't have to worry, you won't be liable for anything. Believing Peter's explanation, Frank agreed to sign out of his friendship with Peter. When Peter was able to persuade Frank to sign the papers, Frank agreed to commit forgery. Normally, an agreement to commit an illegal act would [sic] between two or more persons would be a conspiracy. Frank, however, did not know, based on Peter's assurance, that he was committing an illegal act. Since Frank did not have the specific intent to commit an illegal act, at common law, there would be no conspiracy between Frank and Peter.

Frank will not likely be guilty of conspiracy.

### **FORGERY**

Forgery is the making or altering of a writing of legal significance with the specific intent to defraud or deceive.

Believing Peter's explanation, Frank agreed to sign out of his friendship with Peter. When Frank signed the paperwork for the real estate transaction, Frank made a writing of legal significance as the paperwork would be used to purchase the parcel from Vic. Furthermore, Frank did not actually intend to purchase the parcel for himself[;] therefore, it was a writing intended to deceive Vic. Frank, however, did not have the specific intent

to defraud or deceive Vic; Frank was acting out of his belief of Peter's statements and their friendship.

Frank will not likely be guilty of forgery.

**UTTERING**

Defined supra

### Question 3

During a severe thunderstorm, Alice sought shelter inside Walton Grocery Store (“Walton”). Alice slipped on a bunch of grapes that she failed to notice and that had fallen from a display near the entryway. After Alice’s fall, witnesses described the grapes as “smashed,” “flattened,” “squished,” and “gritty.” The store manager told Alice that the area where Alice’s fall occurred had been swept no more than 35 minutes before she fell. As a result of the fall, Alice suffered a broken arm and a broken ankle.

Later that same day Betty, while shopping in Walton, accepted an offer to sample a new product, “Mom’s Whole Berry Pie,” baked and distributed by Mom’s Bakery, Inc. As she was chewing what she thought were blueberries, she bit down on a pebble the size of a blueberry and broke a tooth.

On what legal theories, if any, can Walton be held liable for personal injury to Alice and Betty? Discuss.

### Answer A to Question 3

3)

ALICE V. WALTON

NEGLIGENCE

To prevail under negligence, the plaintiff must show duty, breach, causation, and damage.

DUTY

Under the majority Cardozo view, a duty is owed to all foreseeable plaintiffs in the zone of danger. Under the minority Andrews view a duty is owed to all. Here, Alice is a shopper in W's grocery store. Because negligence on the part of W is likely to cause injury to customers, A is a foreseeable plaintiff in the zone of danger and is thus owed a duty. She would be owed a duty under the Andrews view as well.

All people must act as a reasonably prudent person under the circumstances. At common law a landowner's duty of care is based on the plaintiff's status as a trespasser, licensee, or invitee.

Invitee

A would be considered an invitee because she was on W's property for the economic benefit of W. W's store is open to the public and therefore A would be a public invitee in that she was in the store during store hours. W will likely argue that because she wasn't in the store for business purposes, she was a trespasser. However, because his store was open to the public, she is likely a public invitee regardless of the reason she was in the store. Because she will probably be considered an invitee, W owes a duty of ordinary care along with a duty to inspect or repair in a reasonable manner[.]

Trespasser.

W will try to argue that A was a trespasser because she was just there for shelter.

However, because people often seek shelter in buildings during thunderstorms A has an argument that [sic] she is at least a known trespasser. If she is a known trespasser then W owes her a duty to warn of latent defect on his property that she is not likely to discover. If she is just a trespasser then she is owed no duty at all. However, the court will probably find A has [sic] a[n] invitee and thus W will owe her a higher duty of care.

## BREACH

A breach occurs when a person fails to meet their standard of care.

Here, if W failed to find the bunch of grapes that were on the floor and failed to reasonably clean it up, then he will be found to have breached his duty of care. A will argue that the grapes had to have been on the floor a long time in that they were flattened, squished, and gritty. W will argue that the floor was swept no more than 35 minutes ago. A utility test may be used to determine whether W's conduct was reasonable. The most common test being the learned hand test. Under this test, then [sic] gravity of the harm and probability of the harm is weighed against the social utility of the conduct and the cost of preventing the harm. Here, the gravity of harm caused by smashed grapes on the floor is fairly high in that people could slip, fall, and break [sic] bones. The probability of that occur[ing] is high in that many people walk through stores and may not be looking at the floor because they are looking at the products on the shelf[sic]. The social utility of not cleaning up the grapes sooner is probably small in that it would be easy to check the aisles in a more timely manner. The cost of preventing the harm is also low in that W probably will not have to hire another employee solely for the purpose of checking the aisles, but he could have just checked them on a more regular basis. Therefore, because the gravity and probability are probably higher, there is probably a breach on W's part.

## CAUSATION

The but-for test is used to check for actual causation. But-for the smashed grapes being left on the floor, A would not have slipped and fell on them and would not have broken her arm or ankle. Therefore actual cause is met.

Proximate cause is the legal theory that extends or limits liability based on intervening causes and foreseeable harm to the plaintiff. Here, there were no intervening causes between the time the grapes were left on the floor and the time A fell and her injuries were foreseeable and therefore proximate cause is met.

#### DAMAGE

A suffered a broken arm and broken ankle, and thus the damages element is met.

#### DEFENSES

##### CONTRIBUTORY NEGLIGENCE

If the plaintiff is found to have negligently contributed to her injuries then in this type of jurisdiction it would be a complete bar to her recovery. Here, W will argue that A was negligent in not looking at the floor while she was walking and thus should be a bar to her recovery. However it is probably not reasonable for someone to look at the floor for every step they take and therefore she was probably not contributorily negligent.

##### COMPARATIVE NEGLIGENCE

Most courts, however, use a form of comparative negligence. In a pure comparative neg jurisdiction, A will be able to recovery [sic] up to the level of her negligence, as long as W was at all negligent. In a modified comparative negligence jurisdiction, she would only be able to recover up to the statutory threshold (usually 50 to 51%).

##### ASSUMPTION OF THE RISK

A person assumes the risk of their conduct when they have actual knowledge of the risk and understand the risk they are taking, and voluntarily assume it anyway. Here, there are no facts that indicate that A knew of the risk of grapes on the floor. Therefore, she did not voluntarily assume the risk because she did not know she was stepping onto grapes. Therefore, this defense will fail.

BETTY (B) v. WALTON (W)

## PRODUCTS LIABILITY

A plaintiff may recover under three general theories of products liability, 1) Strict Liability, 2) Negligence, 3) Warranty.

### STRICT LIABILITY

Any commercial supplier that places a defective product into the marketplace is liable for the damage caused by the defective product. They owed this duty to any consumer of the product and to all foreseeable bystanders. They are strictly liable even if they took all reasonably adequate precautions.

### PROPER PLAINTIFF

B is a consumer of the sampled berry pie in W's store and thus she is a proper plaintiff.

### PROPER DEFENDANT

Walton is a retailer and seller of foods and is thus liable under strict liability for products defective when it left there [sic] hands. They may, however, recovery [sic] under indemnification if it was not there [sic] fault. W may argue that he did not sell the goods to B. However, he is a seller of the goods which they offered to B in the hopes they will sell it to her, and thus they are still a proper defendant[.]

### DEFECTIVE PRODUCT



A product is defective if it contains a manufacturing defect, design defect, or warning defect.

#### MANUFACTURING DEFECT

A man[u]fac[t]uring defect is evident when one product of the many that the manufacturer produces contains a defect. Here, the pie contained a pebble the size of a blueberry, which broke her tooth. Under the consumer expectations test, this product would be defective. A reasonable consumer would not expect a blueberry pie to contain a pebble, and thus it would be defective.

#### CAUSATION

But for the pebble in the pie, B would not have broke [sic] her tooth, and this it was the actual cause of her injuries. Furthermore, because there were no intervening causes the pebble was the direct cause of the injury, and thus was the proximate cause as well.

#### DAMAGE

B broke her tooth and thus she suffered adequate damage.

#### DEFENSES

Contributory negligence is not a defense under a strict liability theory and thus the only defense available in this cause was assumption of the risk.

## ASSUMPTION OF THE RISK

Defined supra.

Here there is no indication the [sic] B knew there was a pebble in the pie and decided to eat it anyway, and thus this defense will fail.

## BREACH OF WARRANTY

B may also recover under a warranty theory.

## EXPRESS WARRANTY

If the seller of a product makes an express warranty about a product and the product fails to stand up to the warranty, then the plaintiff may recover. Here, B may argue that W made an express warranty that the pies were edible in that they were offering samples for eating in their store. If so, then there is a warranty that they are edible and contain no defects. A piece [,] however, contained a pebble and therefore W may have breached an express warranty that the pie was safe for consumption.

## IMPLIED WARRANTY OF MERCHANTABILITY

All products contain an implied warranty of merchantability if they [sic] good is sold by a merchant of the kind. Here, W sells blueberry pies and is a merchant of the kind and thus there is an implied warranty that the pie would be fit for its ordinary purpose. B will argue that blueberry pies were made for safe eating and therefore because the piece contained a pebble it was not safe for eating. Therefore the implied warranty of merchantability will be breached by W. W will argue again that he did not sell the product, and therefore is not liable. However, as stated above, this argument will fail. Furthermore, this would fail the consumer expectations test as well.

The implied warranty of fitness for a particular purpose will not apply here in that W did not make any statement that B relied upon to make the purchase.

## CAUSATION

Supra

## DAMAGES

Supra.

## DEFENSES

### ASSUMPTION OF THE RISK

Supra. B did not assume the risk.

### UNFORESEEABLE MISUSE

B did not misuse the product in any way and thus this will not be a defense[.]

### NEGLIGENCE/PRODUCTS LIABILITY

#### DUTY

All commercial suppliers of goods have a duty of due (reasonable) care to all foreseeable plaintiffs.

W is a retailer and thus it will be harder for B to prevail under this theory against W.

W has a duty to inspect products only if there is an obvious problem with the product, such as a broken seal or damaged package.

#### BREACH

Supra.

There are no facts that indicate that W was negligent in selling (offering a sample) of the pie. Nothing indicates that there was a reasonable need to inspect the pie in that there is no evidence of obvious dangers.

Had B sued Mom's Bakery she may assert a breach under RES IPSA LOQUITOR as this was something that would only occur because of some negligence, it was under the exclusive control of the manufacturer, and B did not contribute in any way to the injuries.

#### CAUSATION

There is no indication that W's negligence caused her injuries.

#### DAMAGE

Supra

#### DEFENSES

B did not assume the risk nor was she contributorily negligent[.]

### Answer B to Question 3

3)

#### Question #3 Torts

##### Alice P. v. Walton (D).

Negligence. Negligence is a duty to conform to a standard of care that is breached by the D, which is the actual and proximate cause of the P's harm.

Duty. The P must show that the D owed her a duty of care. A D who acts affirmatively owes a duty of care to all foreseeable P's (within zone of danger created by the D's conduct). Here, the P was inside the D's grocery store when she was injured by slipping on grapes that the D's sells. So the P is a foreseeable P and thus the D owes her a duty of care.

Standard of Care. The standard of care is the measure of the duty owed. The general standard of care is a duty owed to act as a reasonable prudent person would under similar circumstances. A land occupier owes a duty of care depending upon the status of the land entrant as a trespasser, licensee, or invitee. For an invitee, the duty owed is one of reasonable due care with concern to activities, and duty to inspect, warn or make safe natural and artificial conditions on the D's land that is held open to the public or for general economic benefit of the D, such as business (grocery store). However, the D may argue that the P was a trespasser because she only entered the land to get out of the rain. This will not prevail, as a duty for D, a grocery store since a [sic] is generally open to the public, will be to inspect, warn or make safe the artificial and a natural condition on the land. So D owed P a duty to clean up or inspect the area such [as] fallen product on the floor, like grapes.

Breach of Duty. The P must show that the D failed to meet the standard of care owed, thereby breached the duty the[y] owed. Breach of duty can be established by negligence per se, the Hand Formula or Res Ipsa Loquitur. Here, the Hand formula provides the basis for showing whether the D's conduct was unreasonable under the circumstances. If the gravity and likelihood of harm outweigh the burden on the D to act

differently and the utility of D's conduct then the D will be deemed to have acted unreasonably (breached duty of care owed). Having grapes on the floor near the entryway is definitely a high likelihood that someone coming into the store could slip and fall. However, the issue is [sic] whether it was unreasonable for the D to have left grapes on the floor for that long of a period of time, as a witness reported that the grapes were smashed and squishy. Since P is an invitee, the D owes her a duty to inspect and to make safe or warn of such danger. So gravity of harm of slipping and falling on grapes is high for [sic] could be serious risk of injury such as P's broken arm [sic] and ankles. Thus it is likely that the burden on the D to have swept the area sooner, and utility of having the grapes right up front to entrance is low, so the D breached a duty of care owed to the P.

Actual Cause. The D is the cause in fact of the P's harm. If but for the D's conduct the P would not have been injured. Here, the P would not have been injured but for the grapes not being on the floor making the floor slippery. So the D is the actual cause of harm

Proximate Cause. The D is proximate cause (legal responsible) of P's harm if the results are foreseeable and there are no unforeseeable intervening acts that supersede to break the chain of causation. Here, the D would argue that the severe thunderstorm was intervening act because Alice could have been wet when she walked in the door and the water could have contributed to her slipping. However, Acts of God like a thunderstorm, especially since this was a grocery store[,] will generally not break the chain of causation if foreseeable. So [the] fact that it may rain and created slippery floor issues is a foreseeable intervening act, so D is the proximate cause of the P's harm

Damages. To recover in negligence the P must have suffered property or personal harm. Here, the P suffered a broken arm and broken ankle so she suffered sufficient harm to recover under negligence.

Defenses.

Contributory Negligence. If the P contributed to her harm [sic] such that she failed to meet her duty and was partial cause then the P will be barred from recovery under contributory negligence. Here, the D could argue that the P was contributory because she came in out of the rain, and might have been soaking wet. However, it is unlikely to prevail

because there are no facts to state that it was the [sic] her soaking wet that contributed to her falling.

Comparative Negligence. The P's recovery is reduced by the percentage of fault. Modified comparative negligence means that P cannot be 50% or more at fault in order to recover. Pure comparative negligence means the P recovery is reduced by the exact percentage of fault. Here, if there is any fault at all on the part of the P then her recovery could be reduced.

Assumption of the risk. If the P knows and appreciates and voluntarily continues into the know[n] risk then she will have assumed the risk and her recovery will be barred. Here, there are no fact[s] to state that the P knew of the risk and voluntarily continued, so this will not be a defense to negligence.

Remedies. The P can recover for general damages, the pain and suffering of the injuries of broken arm and ankles. She can also recovery [sic] special damages for monetary expenses such as medical bills.

#### Betty (P) v. Walton (D).

For a defective product that is put in the stream of commerce and the P, such as Betty is injured by it, then the P can make a cause of action for Negligence, Strict Liability in Tort and Breach of Warranty of Merchantability.

Negligence. Supra

Duty. Supra

Standard of care. Supra. Here, the D owes a duty to act [as] a reasonably prudent grocery store would to inspect products, correct defects. In addit[i]on, Betty was a[n] invitee and grocery store was a land occupier. He also owes a duty to act with reason[a]ble care with activities, such as sampling.

Breach of Duty. Supra. Here, the D breached the duty if he acted unreasonably to inspect the product before serving it to the P as a sample. It is likely that if the burden of inspecting a product such [in] detail and fact it destroy[ed] the ut[i]lity of D's conduct of serving the sample if high, then the D did not act unreasonably if he inspected the pie on how it looks. So it[']s likely that the D did not act unreasonably if he inspected the goods

because it[']s too high of burden and would destroy the goods to go through each pie to find if one has a pebble [in] it. So D did not breach a duty owed, and without a breach of duty owed the P cannot recover under negligence.

Strict Liability in Tort. A P may recover in strict liability in tort if the D, a person in chain of distribution, releases a defective product into the stream of commerce. Since the D owes an absolute duty to make safe the products it releases into the stream of commerce.

Proper Plaintiff. A proper P is consider[e]d to be a purchaser, consumer, or foreseeable bystander. Here, the P is considered a consumer of the product. As such she is a foreseeable P that she can recover under this tort of strict liability in torts.

Proper Defendant. A proper D is one who is in the chain of distribution, such as manufacturer or wholesaler or retailer. Here, the D will argue that Mom's Bakery was the company that baked and distributed the pie so they should be held strictly liable. However, the D is a retailer, so he is a part of the chain of distribution since he sells these pies, so he is a proper D.

Defective Product. A product can be defective by design, manufacturing, or because of inadequate warning. A product is deemed defective if it is unreason[a]bly dangerous to what the average consumer expects (Consumer expectation test). Here, the ordinary consumer would not expect to bite into a piece of pie and find a[n] unnatural object such as a pebble. It is likely that the average consumer would think it[']s a blueberry and continue to eat it, until [he] bite[s] down and find[s] it[']s a pebble. So this blueberry pie is unreasonably dangerous since average consumer would not expect to find such a pebble[;] thus it is considered a manufacturing defective product.

Actual Cause. Supra. Here, but for the pebble being in the pie from a manufacturing defect the P would not have [sic].

Proximate Cause. Supra. Here, there are no unfor[e]seeable intervening acts to break the chain of causation, so D is the proximate cause.

Damages. supra. The P suffered personal injury when she broke her tooth so she can recover.

Remedies. supra.



Breach of Warranty of Merchantability. An[y] product sold by a merchant has a[n] implied warranty of merchantability, fit for general purposes. The implied warranty of merchantability means the product must be able to be used as it was intended. Privity is an issue, since P are purchasers, family or guest. Here the P was a consumer so it is likely she is within privity. As well the the [sic] product was not fit for general purposes of consumption because it had a pebble in it, which cannot be eaten [sic] and it [is] not usually expected to be found in pie. So the D breached the implied warranty of merchantability.

## Question 4

Upon completing his PhD studies, Cooper embarked on a nationwide search for a job as an instructor at various universities.

Cooper had an all-day interview on the campus of North University (“NU”) in his home state, State A. At the conclusion of the interview, the dean of NU offered Cooper a position as a tenure-track assistant professor. Cooper accepted immediately, and the dean told him a written contract with details would be sent to him shortly.

Cooper received the written contract from NU, read it carefully, and confirmed that the position title, tenure-track status, salary, and courses to be taught were all in conformity with the oral agreement he and the NU dean had agreed upon. He signed the contract and returned it.

Several months before the beginning of the school year, the NU dean called Cooper and informed him that he had been assigned to the newly-opened State B campus of NU and that he would need to move to State B prior to the start of the September term. Cooper was unaware that NU had opened the new campus in State B. There had been no mention of the State B campus during his interview. The written contract that Cooper signed did not indicate at which campus he would be teaching.

Cooper refuses to move to State B, which is over 1,000 miles away from the State A campus.

Cooper sues NU for breach of contract, and NU cross-complains, alleging an implied term in the NU/Cooper contract that Cooper would teach at either of the NU campuses, seeking a decree of specific performance requiring Cooper to teach at the State B campus.

How should the court rule on:

1. Cooper’s breach of contract claim? Discuss.
2. NU’s request for specific performance? Discuss.

## Answer A to Question 4

4)

### Cooper (C) v. NU (N)

#### CHOICE OF LAW

A contract for the sale of goods is governed by the UCC, whereas a contract for services is governed by the common law. This contract was an employment contract and is thus governed by the common law as well as any statutory employment acts.

#### CONTRACT

A contract is formed when there is mutual assent (offer and acceptance), and consideration or some substitute for it.

#### OFFER

An offer is a manifestation of present intent to be bound that contains definite and certain terms. It creates the power of acceptance in the offeree. At common law, the required terms were quantity, time for performance, identification of parties, price, and subject matter.

Here, NU offered a tenured track position that contained all the essential terms. It contained the quantity (one job), time (next school year), parties (C and N), subject matter (tenured professor) and price (the offered salary). Therefore this is a valid offer.

#### ACCEPTANCE

An acceptance is a manifestation of agreement to the terms of the offer in the manner required and intended by the offer. Here, C agreed to all the terms, read it carefully, signed it, and returned it. Therefore he objectively and subjectively agreed to the terms of the offer and thus there is a valid acceptance.

## CONSIDERATION

Consideration is a bargained[-]for exchange with either a benefit to the promisor or detriment to the promisee but usually both.

Here, the consideration was a tenured track job bargained for a salary. This contains the necessary bargain and detriment elements. C gained employment, and N gave up money for salary.

## DEFENSES TO FORMATION

### STATUTE OF FRAUDS

The statute of frauds requires that certain contracts be in writing and signed by the party to be charged. Here, theoretically, the contract was for a tenure track position. However, because C could possible [sic] perform within a year (as there is no stated number of years) this contract does not fall within the statute. If it did fall within the statute (if the tenured position was meant to be for more than one year and there is no way that N could have fired him before the year was up), the contract was signed in a writing and thus satisfied the statute.

### MISTAKE

C may be able to defend on the grounds of unilateral mistake. If one party is mistaken as to a material fact of the contract and they didn't assume the risk of the mistake, and the non-mistaking party knew or had reason to know of the mistake, then a contract may be excused. Here, if the court finds there was an implied term, then C will argue that he was mistaken about that fact. C will argue that it was material in that it required him to move 1,000 miles away. Furthermore he will claim that he didn't assume the risk in that there was no indication in the interview that he would be required to move to State B and it wasn't indicated in the contract. N should have known about the mistake in that they didn't mention it in the contract nor include it in the contract. It could be a reasonable

assumption that if it wasn't specified in the contract then it wasn't included in the contract. If, however, the term was implied and relied upon by N then the mistake defense would not prevail.

## PERFORMANCE OF THE CONTRACT

### IMPLIED TERMS

Usually courts will look to course of dealing, course of performance, or usage of trade to imply a term under a sales contract. Under a service contract a court may do something similar and look to past employment contracts of the school and within college tenured track contracts in general. If the court finds that it is customary or very usual to imply that term, then they may insert it. It must be reasonable[,] however. A contract will generally not fail if a reasonable term may be implied into the contract.

### UNCONSCIONABLE

If the term was implied, but unconscionable, then the court may strike that term and enforce the rest of the contract. A term is unconscionable if it was so one [-] sided that it would be unfair to enforce the contract. Here, it was probably not procedurally unconscionable in that there seems to be no unfairness in the bargaining. C will argue that implying that term would be unconscionable. He would argue that forcing him to move over a thousand miles away without notice that he would be assigned to that campus is so one[-] sided that it would be unfair to enforce it. Forcing C to accept a contract that requires him to move a thousand miles away without notice may very well be unconscionable, and thus unenforceable.

### MODIFICATION

At common law a modification of a contract requires new consideration to be binding, unless there were unforeseen[n] circumstances that came to be that would make it fair and equitable for the modification to take place. Here, a contract was formed on the terms of the contract. The contract did not state that C will be assigned to State B and

because it would probably be unconscionable to force C to move a thousand miles without prior notice, the contract is formed on the stated terms. N trying to modify would be to no avail as there was no new consideration. N will probably [be] found to have assumed the risk by not mentioning the specific place of employment in the contract[.]

#### ANTICIPATORY REPUDIATION

An unequivocal statement by one party that they will not perform there [sic] side of the contract gives grounds to the other side to suspend performance and sue for breach, or wait a reasonable amount of time [and] then sue for breach. Here, by informing C that he would have to move, C may argue that it was an unequivocal statement that they would not perform and thus C would then have a right to not perform and sue.

#### PAROL EVIDENCE

The court will probably find that the contract was an intended final integration of the contract and thus no prior or contemporaneous oral evidence may be allowed. If it was only a partial ingeration [sic] in that place of performance was ambiguous, then the court may allow introduction of course of performance, course of dealing, and usage of trade to sort out ambiguities.

#### SPECIFIC PERFORMANCE

2.

Specific performance of a contract is only allowed w[h]ere there would not be an adequate damages (money) remedy at law. Fu[r]thermore, courts will not use specific performance if it was a unique good or it would be hard to supervise the remedy. The[sic] will generally only allow them in employment contracts if there was a trade secret or covenant not to compet[e]. Courts generally do not allow specific performance in employment situations to avoid possible constitutional issues relating to involuntary servitude.

Here, the court will probably find that N breached the contract by anticipatorily repudiating the contract and there was no implied term. It will probably not grant

specific performance in that this is an employment contract and would find it hard to enforce or supervise. C had no trade secrets and there was no covenant not to compete[.] The remedy will probably be rescission of the contract based on the mistake that C made that N should have known [it] might be relied upon. Furthermore, if N prevails, they would probably only recover the cost of finding substitute employment and other reasonably foreseeable consequential (Hadely v. Baxendale) damages.

END OF EXAM

## Answer B to Question 4

### HOW SHOULD THE COURT RULE ON COOPER'S BREACH OF CONTRACT CLAIM?

#### Contract

Is a promise or set of promises, the breach of which the law provides a remedy.

This is an employment contract, therefore common law rules apply.

#### Offer

Is an outward manifestation of present contractual intent to [be] bound by definite and certain terms communicated to the offeree.

After Cooper's interview with NU (Northern University), the Dean offered Cooper a position as a tenure track assistant professor. The facts are not specific as to salary but has the necessary terms for an offer and we will assume the missing terms exist.

#### Acceptance

Is an unequivocal assent to the terms of an offer communicated to the offeror.

Per the facts Cooper immediately accepted the Dean's offer.

#### Written Confirmation

Cooper received the written contract from NU. He read it to ensure all the necessary terms and previous oral agreement were contained within. This contract indicated the position title, tenure status, salary and courses to be taught. Cooper signed and returned it to NU.



### Consideration

Is that for which it is bargained for in exchange of legal detriment.

Cooper's consideration is his teaching at NU in return for his salary and NU's consideration is getting Cooper to teach and they will pay him the salary.

Therefore, there is consideration on both sides and a valid contract exists.

### Parol evidence

A final written contract cannot later have oral testimony to contradict terms of the written offer.

Per the facts, when Cooper interviewed at State A's campus, there was no mention of a State B campus. Nor does the written contract mention anything about Cooper going to teach at State B's campus. Cooper's argument here is over a missing term or detail of the written contract indicating state designation.

Therefore, there is no contradiction between Cooper's statements and the written contract so Cooper will be allowed to introduce evidence and statements interpreting the true meaning of the contract as it pertains to the missing term.

### Mutual mistake

Is where both parties err on a term of a contract.

Cooper believes that he is going to be working at State A campus while NU believes he will be working at State B campus which is 1,000 miles away. This is a material difference to the believed contract and the mistake is on both sides.

Therefore, since there is no true meeting of the minds, there is no mutual assent and Cooper may avoid the contract.

### Ambiguity

Is an uncertainty to a term of a contract.

At the time of contract formation, Cooper was aware of only one NU campus which was the one in State A which he applied and interviewed at. When being notified Cooper [sic] of the State B campus it was newly opened and Cooper was unaware of the campus. In fact there was no mention of the State B campus during the interview. Furthermore, the written contract Cooper signed made no mention as to a State B campus.

NU will argue that the job position was working for the university more so than a location and that as Cooper's potential employer, he would have to work at whichever campus they had a need for him and at this time it is at Campus B.

Cooper will argue that campus knew of State B, however, failed to mention it to him and that by him being an innocent party to the ambiguity, his interpretation shall be used.

Therefore, Cooper may be able to teach at Campus A because of the ambiguity.

### Unconscionability

The court may choose not to enforce a portion of a contract or the entire contract if it is found to be oppressive and incomprehensible.

Cooper will ask that he remain at State A where he interviewed, lives and was aware of being the only campus for NU. He will further argue that it is unreasonable for him to move 1,000 miles to help staff NU's State B campus.

If the court feels that this forced move is oppressive to Cooper, he may avoid that term.

### Modification

Is an agreement between the contracting parties to modify a contract and it requires consideration.

Per the facts, Cooper is intending to teach at Campus A. He feels that this is the true contract and if he wins his arguments as discussed above, he will be granted his position at the State A campus. For NU, to get Cooper to teach at Campus B would be a modification of their current contract and in doing so would require mutual assent to the modification as well as new consideration.

### Breach

Is a failure to perform that goes to the essence of the contract.

Several months before the beginning of school, NU's Dean called Cooper and told him that he had been assigned to the newly opened State B campus which is over 1,000 miles away and told Cooper that he would have to move there to be able to teach by September.

Cooper's expectations were that he would teach at NU's State A campus which is in his home state and near his house. NU was not going to allow Cooper to teach at the State A campus as they had contracted.

### Rescission

The court may use the equitable relief of rescission to place the parties in the position they would [be] in had the contract never been formed.

Since Cooper does not want to go to State B and NU only wants him to teach at State B, they may both choose to rescind the contract by which neither party will have a duty to perform.

Therefore, the court may find that the original contract with its implied assumption will allow Cooper to work in his position at the State A campus.

## **HOW SHOULD THE COURT RULE ON NU'S REQUEST FOR SPECIFIC PERFORMANCE?**

Specific Performance is a court-ordered remedy generally retained for property injunctions and employment contracts. However, in employment contracts it is used as injunctive relief for one employer losing its trade secrets to its competitor through an employee. There are no special relations between Cooper and NU to [sic] as he would have special knowledge of their trade secrets. Furthermore, they are seeking to force Cooper to work for them. It is illegal and against public policy to use the courts for forced services. NU will also be able to seek other proper remedies other than Cooper's involuntary servitude.

### Impracticability

If a contract isn't practical to perform, the court may excuse its duty to perform.

Cooper lives near the State A campus and has grown up in that town, he wants to live in that town. For him to uproot and move to State B would be very detrimental to him socially and economically because he would have to sell his home, leave his friends and family, and move over 1,000 miles away to State B campus. This would be a grievous hardship and very impractical for Cooper.

NU will argue that it is not impractical for Cooper to move[;] however, for Cooper to keep his professor position with NU he would have to move and teach at Campus B.

NU has several months to locate a professor for their State B campus and they can easily advertise and locate someone to take the position rather than attempt to force

Cooper into moving to and teaching at State B. There, NU does not have any damages and has other relief available to them.