

MONTEREY COLLEGE OF LAW

**CONTRACTS**

FINAL EXAMINATION

SPRING 2018

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Instructions:

There are three (3) questions in this examination.

You will be given three (3) hours to complete the examination.

**Contracts Examination**  
**Spring 2018**  
**Profs. Patterson & Borges**

**Question 1**

Box Co. manufactures cardboard boxes used for storing household goods during moving. On February 1, Moving Co. telephoned Box Co. and said it needed 5,000 boxes from Box Co.'s catalogue at the price listed in the catalogue. Moving Co. asked that each box be imprinted with Moving Co.'s address in black ink, and that the boxes be delivered to Moving Co. on May 1. Because this was to be the first transaction between the parties, Moving Co. asked Box Co. to send it a box for inspection prior to making their order. On February 15, Box Co. delivered to Moving Co. a box with the requested black ink imprint with a note stating "We look forward to filling your order and doing business with you."

On February 16, Moving Co. sent its order form for 5,000 to be delivered on May 1. The following was printed at the bottom of the order form:

"Strict adherence to the terms and color sample is required."

Box Co. delivered 4,500 boxes on May 1 and the remaining 500 on May 2. The imprint on most of the boxes was a murky grey. Moving Co. refused to pay for any of the boxes and requested that Box Co. correct the imprints.

Box Co. sues Moving Co. for breach of contract for non-payment.

What are the rights of the parties? Discuss.

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**Question 2**

On June 1, 2016, Louie agreed to purchase one (1) acre of land from ABC Construction and Development and have ABC build a 5,000 square foot custom home according to plans, and complete the home no later than August 1, 2017 for a price of \$500,000. The plans included specific brands of fixtures to use in the construction. You may assume valid offer, acceptance and consideration in your answer.

Louie was presented with a written agreement on ABC letterhead containing all of the essential terms including a time of the essence clause which Louie initialed "L.L." ABC did not sign this document. ABC proceeded with construction according to the plans submitted by Louie. Louie called ABC in October to make sure they were proceeding as per the contract and plans which ABC acknowledged.

On July 30, 2017, ABC notified Louie that the house was completed and Louie did an inspection and discovered the following problems: The light switches in five rooms were installed on the opposite wall from the plans; bathroom fixtures were the incorrect brand although similar to those called for in the plans; the roofing was incomplete and would require an extra four days to seal and complete. This last item (the roofing) was delayed because rain in the summer months, which was quite unusual, caused delay to the painters and roofers, and resulted in Louie having to move into a hotel for the four (4) days of delay. In addition, ABC refused to move the light switches and replace the bathroom fixtures with the correct brand. Louie refused to pay for the house at all.

ABC consults you and request that you advise them as to the rights of both parties.

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**Question 3**

Abe, a scientist, invented a machine which produced children's toys from a rubber compound that Abe discovered from recycled rubber. The machine was used extensively by toy manufacturers and duplicate models of the machine were available for purchase. Abe manufactured the rubber compound in California.

In 2017, Abe agreed in writing with BK Toys to sell to BK ten (10) of the machines and promised to keep the machines in repair for one year for a total of \$20,000. In the same agreement, Abe agreed to supply the rubber compound needed for one year at the rate of \$10 per 100 pounds. The agreement also stated that "this contract cannot be assigned."

Abe delivered the 10 machines and BK paid him \$20,000. For four months, Abe delivered the required compound. At the start of the fifth month, Abe sold his manufacturing plant, his inventory and his BK contract rights to Company for \$100,000. Abe's agreement with Company stated that Company assumed sole obligation for the BK contract and that Abe shall no longer be obligated to perform any of the contract with BK.

Abe continued to work for Company for two months after the sale, servicing the rubber machines used by BK and by others. Abe became ill and decided to retire after those two months. In the last month that Abe worked for Company, Company failed to deliver any rubber compound to BK and BK lost profits of \$5,000 per machine for that month. At the end of that month, Abe said to BK "I've sold out to Company and I'm no longer bound for anything on your contract. Company is. I'm retired."

BK then contacted Company and Company promised to deliver the required contract amount of rubber compound in the future. For one month, Company delivered, and BK received the correct amount of compound. But then Company ceased all deliveries because a small earthquake damaged the rubber compound manufacturing plant and it became twice as expensive for Company to produce the compound.

Discuss the rights and obligations of Abe, BK and Company. You may assume a valid contract was formed between Abe and BK.

## Outline - Contracts Question 1- Spring 2018

- I. *Formation*
  - a. *Offer*
  - b. *Offer Open*
  - c. *Acceptance*
  - d. *Consideration*
  - e. *Statute of Frauds*
- II. *Breach*
  - a. *Perfect tender rule*
    - i. *quality*
    - ii. *quantity*
    - iii. *right to cure?*
    - iv. *Did Moving Co. accept the goods? Revocation of acceptance?*
    - v. *Delivery on 1<sup>st</sup> and 2<sup>nd</sup> – substantial performance constructive condition (not time of the essence).*
- III. *Breach*
- IV. *Remedies*

*Issue Outline Contracts- Q2- Spring 2018*

- I. *Statute of Frauds*
- II. *Substantial performance*
- III. *Time of essence-relief from forfeit?*
- IV. *Bathroom fixtures-damages for difference? Relief from forfeiture? Substantial performance.*

*Contracts Outline - Question 3 – Spring 2018*

- I. *Assignment & Delegation – IF company CO can repair machine and supply compound can be delegated.*
  - a. *UCC-*
    - i. *cant prohibit assignment*
    - ii. *Can prohibit delegation*
- II. *Attempted Novation*
- III. *Impracticable? 2x cost increase – No – not impossible because didn't need to retire.*
- IV. *Breach damages lost profits*

1)

Box Co. ("Box") v. Moving Co. ("Moving")

### Contract

In order to determine the rights of the parties, we must first determine if there is a valid and enforceable contract. A valid and enforceable contract is comprised of an offer, open to acceptance, and supported by adequate consideration.

### Offer

An offer is a promise to do or refrain from doing an act in exchange for performance by the other party. An offer must include intent by the party to be bound to specific terms. The specific terms include the parties of the contract, the subject, the terms (price/quantity) and time for performance communicated to the offeree. An advertisement, auction, statements of hope, intentions, estimates, expressions of opinion, price quotations (unless in response to an inquiry), and solicitations to bid. Here, Moving telephoned Box on February 1 to state that they needed 5,000 boxes at the price listed in the catalogue, that the boxes be imprinted in black ink with their return address, and that they be delivered by May 1, and that a sample box be provided to Moving prior to placing the order. This is an offer that specifies certain and definite terms, except the price, but that is listed in the catalogue.

### Offer Open

An offer is open and revocable prior to acceptance except in an options contract, a merchants firm offer, if there has been detrimental reliance, or start of performance. An



offer can also be revoked through rejection, a counter-offer, death of the offeror, destruction of the subject matter, a triggering event or a supervening illegality. Here there is not indication that any of these apply, except the Merchants Firm Offer rule.

### Merchant Firm Offer

A merchants firm offer occurs when an offer is made between two merchants and it will remain open until the date specified in the offer and if no date has been provided, then the offer is revoked on the 90 day. Here Box and Moving are both Merchants and there is no date specified as to how long this offer will be open, but it is likely open until May 1, which is 90 from the time the offer was made, which is the longest an offer can remain open under a Merchants Firm Offer.

The offer was not revoked and therefore it is open until May 1.

### Acceptance

Acceptance is the unequivocal assent to each and every term of the contract communicated to the offeror. Acceptance can be expressly stated (orally or in writing), it can be implied by conduct, or start of performance. Here, Box delivered one pre-printed sample box to Moving for their inspection that included the Moving's address in blank ink on February 12. This was acceptance implied by conduct and a start of performance. Box replied with a note, presumably sent in the mail that they "Look forward to doing business with you." This implies acceptance, however it could be ambiguous. In this case, referring to the UCC can provide guidance on acceptance.

### UCC or Common Law

The Uniform Commercial Code governs the sale of goods and the Common Law governs contracts of service. Here we have the sale of goods (boxes), therefore this contract will

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be governed by the UCC. UCC states that when you have acceptance of certain and definite terms with minor or additional terms, those minor or additional terms will be deemed proposals and must be assented to in order to become part of the contract, unless the parties are merchants and those minor or additional terms will become part of the contract if they are not objected to within a reasonable period of time. If they are majorly different terms, then the knock out rule applies and the terms will not be automatically part of the contract. Here, the minor and additional terms could be the imprinting of the return address in black ink. Box did not object to the terms and in fact within 12 days of receiving the order, they sent a sample box to Moving and this implies that they have unequivocally assented to the minor and additional terms of the contract.

✓ Therefore we have a valid acceptance.

Consideration is the mutually bargained for exchange of contemporaneous legal detriment. Here, Moving wants to purchase 5,000 boxes at the price listed in the catalogue. Box will provide the boxes and Moving will pay for them. We have adequate consideration.

#### Convenant or Condition

A covenant is a promise to do or refrain from doing some act at some point in the future. A promise must be fulfilled or there is a breach. A condition sets the time and order for performance in a contract. Conditions are defined by time (precedent, concurrent, subsequent), type (express, implied, and constructive), and conditions of satisfaction. Here we have conditions, not covenants.

Moving sent an order for for 5,000 boxes to be delivered by May 1 with a statement at the bottom of the form "strict adherence to the terms and color is required." The condition precedent is a condition that must occur prior to performance. Here, the condition

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precedent was that Box sent a sample box with a black ink imprinted return address label. Box complied with this condition precedent and was therefore able to perform as evidenced by the February 16 order form requesting 5,000 boxes by May 1. There are no concurrent conditions in this contract. There is a condition subsequent, that Box would be paid for the imprinted boxes if they meet the criteria specified on the form.

An express condition requires strict adherence to performance, failure to perform an express condition can be a material breach of a contract. There are two express conditions in this contract: 1) Strict adherence to the color sample is required 2) Must be delivered by May 1. A time certain condition is an express condition. Here, Box sent 4500 boxes to Moving on May 1 and 500 boxes on May 2. The boxes' address that was to have been in blank ink, was in murky gray. This is not adhering to the express condition in the contract that the ink must adhere to the color specifications that were requested. Another breach of the the express condition is that 500 boxes arrived after May 1.

Under the Rule of Perfect Tender (UCC 2-507), a buyer is entitled to refuse any product that has been shipped or delivered that is not perfectly matched to the tender ordered. Here, Moving as the buyer can reject that boxes that were sent based on the murky gray ink on of the address on the outside of the boxes.

### Conditions of Satisfaction

There are three types of conditions of satisfaction: personal which reflects a party's fancy, taste or judgment and is a subjective standard; non-personal which is utility, fitness, or value and is judged by an objective standard; and third party which is an objective standard imposed by a third party such as a court. Here, Moving can assert that the boxes fail to meet the objective standard of non-personal satisfaction based on the ink being a murky gray and not the blank ink expressly requested by Moving. Box will assert that the

labels provide the purpose for which they intended and are functional (although no facts state if it is legible).

#### ✓ Breach

A breach occurs when one party fails to perform a material condition in a contract and they do not have a valid excuse for the condition not being performed. There are material and immaterial breaches, material breaches are breaches that occur through willful negligence, occur early in the contract and lead to the non-breaching party suing for breach of contract. An immaterial breach would not prevent the contract from being performed, such as a late payment and can be remedied or the non-breaching party can be compensated for the damages they incurred based on the minor breach.

Here, Box breached an express condition of the contract by failing to adhere to the ink color requirement. They also did may not meet the conditions of satisfaction for personal satisfaction, as they do not meet the standard based on Moving's judgment of the color. This is not a non-personal breach of personal satisfaction as the boxes can still be used despite the murky gray color, unless the murky gray color makes the address illegible, and then it does meet the non-personal conditions of satisfaction as they have no value to Moving and Moving will assert that they are not required to pay Box.

#### ✓ Defenses to Conditions

There are defenses to conditions that the breaching party may assert. They are prevention, estoppel, waiver, impossibility, and repudiation. Here, Moving did not wrongfully prevent the performance of Box and this is not a defense. They did not promise to waive a condition precedent, therefore there is no defense of estoppel, they did not waive a condition after its performance had matured, there is no legal or physical obstacle that is preventing Box from printing the label correctly, and Moving did not repudiate their

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performance, which would be a reason for Box cease their performance and await a cure or sue for breach. Therefore Box does not have any defenses to breaching the conditions of the contract.

If they are unable to assert of defense of conditions, then Box can attempt to discharge the contract.

### Discharge

To discharge a contract, the breaching party may assert impossibility, impracticability, or frustration of purpose. Impossibility is an unforeseen physical or legal obstacle that makes in impossible to fulfill the contract and anyone would from an objective standpoint also be able to claim the impossibility. There is no defense of impossibility.

Impracticability is when there is an unforeseen impairment of ability, undue risk or grossly disproportionate costs to complete the contract (at least 10x)

Frustration of purpose is when both parties are aware of the purpose of the contract and an unforeseen event has made it impossible to fulfill the purpose of the contract to the benefit of both parties.

Here, there are no facts to support that Box can claim any defense to discharge the contract.

Damages: Damages are intended to make the party whole. They must be foreseeable, unavoidable and certain. There are general damages (sustained losses or profits unrealized, injuries if foreseeable or the cost of cover-- substitute performance by another party) and special damages which are also foreseeable and must be known by both parties. Here, Moving must have needed the boxes for some purpose by May 1. Based on the breach of the contract and they may have to seek cover expenses and any other charges that may

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result from the incorrect order. However, these costs are unknown and are not likely to be awarded.

Conclusion: Moving is the non-breaching party and can be assert a breach of contract based on non-performance of an express condition in the contract and Box is not entitled to payment for failure to meet the Perfect Tender rule and the boxes should be returned to Box.

**END OF EXAM**

2)

In order to determine the rights of the parties it must first be determined if there is a valid and enforceable contract. A valid and enforceable contract is one that contains an offer that is open for acceptance, acceptance and it must be supported by adequate consideration. As this is a land sale contract, common law applies.

There was a valid offer, acceptance and it was supported by consideration.

### ✓ Statute of Frauds

The nature of certain subject matter makes them easy targets for fraudulent activity. Therefore contracts in consideration of marriage, contracts whose performance will exceed one year, land sales, executorships, sale of goods over \$500 and suretyships are required to be supported by a memorandum of essential terms signed by the party against whom enforcement is sought. As this is a contract for the sale of land and the performance of the construction is set to run for longer than one (1) year, the Statute of Frauds also applies in determining validity of the K. Here, ABC may assert this defense in order to avoid a covenant discussed below.

#### Memorandum

Here there is a memorandum with the official letterhead of the ABC company.

#### Essential Terms

The memorandum contains all of the essential terms and a 'time is of the essence' clause.

#### Signed by the Party Charged

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The memorandum is initialed by Louie but it is not signed by the ABC company, although their letterhead being official may not satisfy the statute of frauds, complete performance does. Louie will assert that ABC--by their own admission--had 'completed' the construction of the house and therefore had completely performed thus taking the contract out of the statute of frauds. However, ABC will assert that the contract is still a land sales contract that must be signed. The courts will have to determine whether or not the contract is substantially a construction or land sales contract. Objectively, the sale of land is the first step in the process, whereas the construction will take the bulk of the time and much of the costs.

Ultimately it will be up to the courts to decide whether or not to grant this statute of frauds defense when the party asserting the defense has completely performed by their own admission and is merely awaiting payment or preparing to make modifications to the home.

## **Covenants and Conditions**

### Covenant

Covenants create an absolute duty to perform, here the term "time is of the essence" creates an absolute duty to complete the construction of the home no later than the specified date or there is a breach. ABC failed to complete the home to the plans specified by August 1, 2017. Therefore they breached this covenant, but only if it can be shown (supra) that the contract was not rendered invalid by a statute of frauds defense.

### Conditions

Conditions set the time and order for performance. They either trigger or extinguish a duty to perform. They are categorized by time (precedent-triggering a duty, concurrent, or subsequent-extinguishing a duty) and type (express, implied, or constructive).

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### Time

Here, there is a condition precedent to the rendering of payment. The home must be built to plans (using specific brands of fixtures).

Here, there is a condition precedent to the rendering of payment. The home must be built to plans (light switches on the right side of the room)

Here, there is a condition precedent to the rendering of payment. The home must be built to plans (the roof must be completed on time)

### Type

The conditions precedent above is an express condition that are expressly stated and must be satisfied by strict performance.

### Satisfaction of Conditions

Conditions may be satisfied in order to mature a duty to perform or extinguish it. Conditions may be satisfied by personal taste (subjective), non-personal (utility and function based on an objective standard), and 3rd party judge. L appears to claim the fixtures condition precedent and the light switches condition, are not to plan, and therefore not satisfied. He does not articulate the reason why he wants them changed or why. Here, the condition should be satisfied by a non-personal standard that takes into account the utility and function of the thing in question. The brand name of the similar fixtures likely serve the same utility and function. The light switches likely still turn on and off the lights, regardless of what side of the room they are on. However, the roof must still be completed and therefore, that final condition will require an excuse if the courts find the other two to be satisfied.

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### Excuse of conditions

Conditions may be excused by prevention, estoppel, waiver, relief from forfeiture, impossibility and repudiation. Here ABC will argue that the condition of completing the roof was excused by impossibility. That is that it was unforeseeable and impossible for it to be completed on time. ABC will argue that the summer rains that were "quite unusual" caused a delay for the painters and roofers for four days after the date of 'completion'. Louie will argue that it was not impossible to complete, and that the roofers and painters could have or should have been able to reasonably foresee the summer rains, even if they were "unusual" and that they could have planned accordingly. If the courts do excuse this condition, then ABC will be able to claim that Louie breached by failing to pay for the house.

### **Discharge**

By the operation of the law, certain events will discharge ones duty to perform as contracted: impossibility that arises before the start of performance, impracticability an increase in cost beyond ten fold arising after the start of performance making completion of performance impracticable, and frustration of purpose. The summer rains did not occur prior to the start of performance rendering their performance impossible and thus able to be discharged by the operation of the law. The fixtures were not impossible to find or necessarily impracticable to install as in the Kent case. There was no destruction of the subject matter that frustrates the intended purpose of the contract (to construct a home on land). Therefore the duties should not have discharged by the operation of the law under these circumstances.

### **Breach**

A breach arises when one party fails to perform their duties to a contract. A breach may be minor or material depending on whether or not the aggrieved party has received the substantial benefit of the bargain.

If the courts do not excuse the conditions above, then ABC may be in minor breach for failing to correct their errors.

If the courts do excuse the conditions above, ABC may sue for major breach of the contract as the substantial benefit is to be paid in full for their performance.

### ✓ Damages

Damages are intended to put the non-breaching party in as good a position as they would have been had they been given the substantial benefit of the bargain. They must be foreseeable, unavoidable and certain. They are categorized by expectancy and reliance damages. Expectancy being those flowing naturally from the breach (lost profits, wages) and reliance (out of pocket costs).

#### Foreseeable

It was foreseeable that adverse weather may strike causing a four day delay and added costs.

It was foreseeable that the construction company could mistakenly fail to conform to the plans as stipulated "written agreement".

#### Unavoidable

It was unavoidable as ABC has no ability to control the weather and no crew could sub in to contract for the work in those conditions.

It was unavoidable as ABC had the power to correct the fixtures if it would not be substantially burdensome to do so (as in *Kent*)

### Certain

The costs are not speculative here. The additional time to complete the house is certain and reasonably able to be calculated. The cost to install new fixtures is also certain and not speculative.

### **Conclusion**

Louie may sue for breach and request specific performance by the courts forcing ABC to conform to the specification of the plans because this is the sale of a home and you can not cover on the sale of house as a "custom" home is unique. However, the cost to make the modifications must not be unduly burdensome to ABC. However, it is unlikely that Louie will be excused from payment for the home as substantial, nearly complete performance has been rendered. The covenant, time is of the essence if found to be valid and satisfied by the statute of frauds may be a breach unto itself, but the damages of that are unclear as it is unclear as to why time is of the essence, so calculating the damages is difficult. If anything, the damages will be recovery of nominal damages. ABC will likely prevail in recovery of the sale price of the home forcing Louie to pay ABC the \$500,000.

**END OF EXAM**

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3)

Abe, BK and Company.

UCC or Common Law

The Uniform Commercial Code governs the sale of goods and the Common Law governs contracts of service. Here we have the sale of goods rubber and the sale of machines. However, the primary purpose of the contract is to service the machines for one year and provide the rubber. Therefore this contract will not be governed by the UCC.

Assignment

An assignment is there is a voluntary manifestation of an intent to transfer the contractual rights to a another party. Generally all contractual rights can be assigned, unless it is based on a personal relationship of trust with the obligor, it materially alters the obligee's expectations, it is for unique or personal services. A no assignment clause is not valid under the UCC and under the Common Law it does not have to be in writing unless it is California.

Here, Abe agreed to sell BK ten (10) machines he invented and promised to keep the machines in good repair for 12 months and he agreed to supply the rubber compound needed for one year at the rate of \$10/100 pounds. Abe sold the machines to BK and then commenced the servicing contract. At the start of the fifth month, Abe sold his manufacturing plant, inventory, and his BK rights to Company for \$100,000 dollars. Abe's agreement with Company stated that the company had sole obligation for the BK contract and that Abe shall no longer be obligated to perform any contract with BK. Abe

did not notify BK that he has assigned the rights of the contract to BK, which is violation of California law. The contract also contained a "no assignment clause."

No assignment clause can be included in a contract, however when that clause is included, it means that the party has the power to assign, not the right to assign and if there is any breach to the contract, the assignor remains liable for any damages that may result.

### Third Party Beneficiary

A third party beneficiary is when the performance flows from the promisor to the third party and the promisee confers a right directly to the to promisee. When Abe assigned the contract to Company, BK became a third party beneficiary. Here, the promisor is Abe and the promisee is Company. The third party beneficiary is BK. BK is not a donee beneficiary as they are not being "gifted" the services of Abe, but receiving consideration from Company, therefore they are a creditor beneficiary. A donee third party beneficiary is vested when they have knowledge of the contract and assent, they have knowledge and rely, or they have knowledge and they sue. A creditor beneficiary is automatically vested and has the right to sue the promisor and if they detrimentally relied on the promisee then they may also sue the promisee.

### Abe v. BK

Abe remains the obligor and assignor under the contract. He is liable for any damages that BK asserts against Company. Abe will state that he assigned the rights to Company has retired and is no longer liable for any damages that BK may suffer. BK will assert that the contract contained a "no assignment clause" and that Abe did not have the right to assign the contract to Company they will also assert that the assignment was not compliant with California law and therefore Abe has no standing to refute his liabilities under the assignment. Abe will assert that he has the power to assign and that because the

assignment with Company included that he is no longer liable for any obligations to BK and the Company accepted it they are liable for any damages that BK has suffered. The court will not agree to Abe's assertions that he is absolved of his liabilities due to not providing BK notice in writing of the assignment and of violating California law.

BK will further assert that Abe promised to service the machines and provide them with rubber for one year. They will assert promissory estoppel. (see below). As this is service contract that does not exceed one year, the Statute of Frauds does not apply as a defense.

Defenses:

Promissory estoppel: BK will assert promissory estoppel, which ensures that when an individual makes a promise that induces the other party to act, the promise does induce the other party to act and detrimental reliance occurs, then the party is entitled to compensation or an unjust result will occur. Here, Abe promised to keep the machines in repair for one year. When he assigned the contract during the fourth month, Abe did continue to service the machines for two months. Company ceased to provide services and rubber to BK for one month and BK lost \$5,000 dollars worth of profits. Abe made effort to re-engage Company and the provided rubber for one more month. Following that they did not provide any. Therefore seven months of the 12 contract, BK received services and rubber. During the one month that they did not received rubber, they lost \$5,000 dollars for a total loss of 25,000 in one month for a total of 5 months. In order to prevent an unjust result, the court will conclude the promissory estoppel will prevent an injustice from occurring and may award damages to BK for Abe's failure to fulfill his promise.

Discharge:

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To discharge a contract, the breaching party may assert impossibility, impracticability, or frustration of purpose. Impossibility is an unforeseen physical or legal obstacle that makes it impossible to fulfill the contract and anyone would from an objective standpoint also be able to claim the impossibility. There is no defense of impossibility.

Impracticability is when there is an unforeseen impairment of ability, undue risk or grossly disproportionate costs to complete the contract (at least 10x). Abe will also try to assert a defense of impracticability. However, the earthquake that damaged the rubber compound manufacturing plant only caused the Company to pay for twice the normal price to produce the rubber compound and this is not grossly disproportionate. The court is not likely to discharge the contract under the defense of impracticability.

Frustration of purpose is when both parties are aware of the purpose of the contract and an unforeseen event has made it impossible to fulfill the purpose of the contract to the benefit of both parties.

Here, will assert that even though he assigned the contract, he intended to live up to his promise and continued working on servicing the machines for two months, but was forced to stop when Abe became ill and was forced to retire. He continued to work to fulfill his promise to BK for two months but then was forced to stop due to his health issues. Abe can assert a defense of impossibility as it was not foreseen that he would become ill and be unable to work. However, it is not clear if his illness was permanent and he may have been able to continue working a short time after his recovery. Impossibility is not likely to be asserted by the court as a means to a defense.

Damages: Damages are intended to make the party whole. They must be foreseeable, unavoidable and certain. There are general damages (sustained losses or profits unrealized, injuries if foreseeable or the cost of cover-- substitute performance by another party) and special damages which are also foreseeable and must be known by both parties. Here, BK



lost \$5,000 dollars in profits in one month and there were a total of 5 months that the services and rubber were not provided for a total loss of \$25,000 dollars. These are certain and foreseeable expenses based on we assume their prior profits for the first seven month of the contract.

Conclusion: as Abe has retired and potentially few assets, BK may not be able to recover damages from Abe. However, he was paid \$100,000 dollars for the sale of the company and may have assets that BK can collect.

BK v. Company

As the assignee under the contract, BK can sue for damages. Company can assert the same defenses as the assignor under the contract.

Company will assert that impracticability as a defense (see supra). However, it is not grossly disproportionate as it is only twice as expensive to make the rubber and it must be at least 10x the cost to qualify a contract to be discharged. Company as the assignee will be held liable for damages suffered by BK as they have no known defenses for not providing rubber for one month and there reason to discharge the contract does not meet the criteria of impracticability. BK will only be able to recover from one party. The assignor or the assignee and it is likely to be the Company as they probably have greater assets than Abe who has retired.

**END OF EXAM**