

San Luis Obispo College of Law
Contracts Final Examination
Spring 2020
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Question ¹/₂

On January 3, 2020, "Amy Designs," a producer of fine and unique dresses, orally agreed to make and sell to Barbara a "one of a kind" dress with a "special fabric from China" for \$1,000. A few days later, a viral infection struck the province in China where the special fabric was produced, and production was suspended. A similar special fabric was available from Thailand but was twice the cost.

On January 20, 2020, Amy emailed Barbara the following:

"Barbara, due to unforeseen circumstances, I will be unable to sell you the unique Chinese fabric dress for \$1,000 but I can sell it to you for \$1,600. Amy."

Barbara immediately responded by email:

"Amy, we made a deal and I expect you to honor it. Barbara"

On February 2, 2020, Amy purchased the special fabric from Thailand and made the dress. Amy had another customer, Claire, who saw the dress and agreed to purchase it for \$1,600.

Barbara learned of this when she called Amy on February 3, 2020 to inquire about the delivery of the dress and Amy told her: "I am selling the dress to someone else as my lawyer told me that because our agreement was oral, I don't have to honor it."

Discuss formation; possible defenses; and, damages.

Answer Outline

Sale of Goods contract – predominant factor test, purpose of contract, oral agreement

1. SOF – sale of goods over \$500
 - a. Memo,
 - b. Essential terms
 - c. Signed by party against whom enforcement is sought

*original agreement – oral but memo can be later as here (emails satisfy SOF)
2. Rule of Perfect Tender
 - a. Condition to payment
3. Discharge – Impracticability
 - a. Not gross increase in cost so does not apply
4. Remedies
 - a. Equitable Remedies
 - i. specific performance (unique item)
 - ii. Injunction
 1. Prohibit sale to Claire
 - b. Legal remedies/Damages
 - i. Cover
 1. Contract difference or difference in market price and contract price

Question 2

Danielle, a world known guitarist, operated a successful guitar teaching class called, "Finger Pickin' Good." Danielle's classes were always packed with students and guitar aficionados frequently. Danielle needed her Gibson SG lead guitar repaired because the pickups on the guitar snapped off. Danielle needed her guitar repaired by June 1, the first day of Finger Pickin' Good guitar classes.

On March 1, Danielle signed a writing with Kelsey, a guitar repair specialist to repair the guitar for \$2,000, with completion to be done no later than May 15. The contract stated that "time was of the essence."

On March 15, Kelsey called Danielle and told her that she was having trouble repairing the guitar because of the classic design of the unique soapbox pickups the guitar required. Danielle reminded Kelsey that meeting the May 15 deadline was important and imperative. Kelsey responded, "I'll look and see again, but it is a hard job."

Danielle, concerned that Kelsey would not be able to repair the guitar in time sent her the following email:

"I am worried and anxious that you will not repair and complete the task by May 15. Please confirm that the Gibson SG guitar will be repaired and completed on time. I need ample time to modify the guitar to my specifications before my classes start. If I have to delay my classes, I will lose money."

Kelsey read Danielle's email that same day, disregarded it, and did not respond.

On May 14, Danielle, not having heard from Kelsey, purchased a replacement guitar from another vendor for \$3,000 after having frantically searched for one since Kelsey was unresponsive. The replacement guitar was similar but lesser in quality to her Gibson SG. The vendor charged Danielle an extra \$500 for one day delivery.

Kelsey finally repaired the guitar and brought it to Danielle on May 22, but Danielle refused to pay Kelsey for her services stating that Kelsey breached the contract by not completing the performance by the deadline. Danielle told Kelsey that her class was delayed by 2 weeks because of the failure to repair the guitar in time. Danielle estimates that she lost \$10,000 in revenue because of the delay in her classes.

Discuss formation; possible defenses; and, damages.

Answer Outline-Contracts-Spring2020-MCL-Kutter/Patterson

1. Governing body of law – C/L for services contract
2. Contract formation – there is a valid written contract (nothing else here)
3. Conditions – ‘time is of the essence’
4. Anticipatory repudiation – Kelsey’s 3/15 correspondence to Danielle a repudiation?
5. Request for assurances – Danielle’s 3/15 call a request for assurances? Kelsey has reasonable amount of time to give assurances, if not, can treat failure to respond as anticipatory breach.
6. Breach of contract – Kelsey failing to repair the guitar by 5/15 a material breach? If material breach, Danielle not obligated to perform? Material because of “time is of essence clause?” Minor breach? Kelsey did deliver repaired guitar on 5/22, thus reasonable amount of time to make it a minor breach? Time is of the essence clause analysis.
7. Damages – FUC for damages analysis, expectation and consequential damages for Danielle? Cover? Fair market value of guitar v. cover price? Quasi recovery for Kelsey for services rendered?

1)

GOVERNING LAW

In considering a contract action, courts must first determine which body of law will govern.

UCC

The Uniform Commercial Code was developed in the 1950s to standardize the rules for a variety of commercial transactions including sales of goods under its now ubiquitous Article 2. By the end of the 1960s, almost every state had adopted its own version of the UCC.

Common Law

Common law was "discovered" by ancient English rulers as divine judgments that were codified through repeated application. Modernly, common law overwhelmingly forms the basis of English and American jurisprudence. It governs all contracts that are not subject to the UCC, most notably those for services and sale of real property.

Predominant Factors Test

When a contract is for both goods and services, majority courts apply the predominant factors test to determine which body of law will be applicable. They look to contract language, billing terms, allocation of cost, and the nature of the final product. Minority jurisdictions bifurcate the hybrid contract and apply common law or UCC respectively.

The contract between Amy Designs and Barbara includes Amy's services to construct the one-of-a-kind dress. However the language of the contract focuses on the dress, rather than Amy's work. The \$1,000 price is for the dress itself, rather than the time spent sewing it. Therefore a majority court would likely find that the balance of the contract puts it under UCC.

CONCLUSION: The contract will be considered under UCC rules.

FORMATION

Offer

An offer is a manifestation of intent to be bound that creates the power of acceptance in the offeree and corresponding liability in the offeror. It must contain clear and definite essential terms, e.g. price, subject, parties, etc., and be communicated to the offeree.

Details of the negotiations between Amy and Barbara are not included in the facts, so it is impossible to say for sure who made the initial offer. Presuming Amy, via her business "Amy Designs," makes her wares and services available to the general public, it is likely that Barbara responded to Amy's advertisement -- not generally an offer unless it meets certain standards of specificity -- as an invitation to make an offer. If that is the case, Barbara made the offer to buy a dress from Amy.

CONCLUSION: Regardless of who made it, it is logical to infer that a valid offer was made based on the fact that it was accepted and an oral agreement resulted.

Acceptance

Acceptance of the offer by the offeree must be voluntary, intentional, and unequivocal. It may be express or implied by conduct, including silence when there is a duty to speak. Under the UCC, any definite and seasonable expression operates as acceptance. Additional terms may be added during the acceptance under UCC, provided they are not contradictory.

Presuming that Barbara made the offer to purchase a bespoke dress (though the scenario would work just as well if Amy were to make the offer), then Amy accepted the offer when she agreed to procure the special fabric and make the dress.

CONCLUSION: There was a valid and seasonable acceptance of the offer during the discussion between Amy and Barbara.

Consideration

Consideration is the mutual obligation agreed to by the parties, the quid pro quo exchange of the contract. It must be supplied by each party in the form of legal benefit or detriment.

In return for agreeing to make a bespoke one-of-a-kind dress from special imported fabric for Barbara (a legal detriment since she was under no pre-existing obligation to do so), Amy

will receive the benefit of \$1,000. In return for paying \$1,000, Barbara will receive a very special dress.

CONCLUSION: There is sufficient mutuality of obligation to support the contract.

Defenses to Formation

Statute of Frauds

The Statute of Frauds is an archaic concept designed to prevent fraud by requiring that certain oral agreements be memorialized in writing, lest the parties later forget or attempt to go back on their word. Modernly, the UCC Statute of Frauds provision require that any sale of goods over \$500 be put into a writing, signed by the party to be charged. Any written memorandum that includes the essential terms will suffice. The signature need not be official either, letterhead, email, or other mark is sufficient.

There is, however, an exception to UCC 2-210 for the sale of specialty goods, not suitable for sale to the general public. Even when the cost is over \$500, the Statute of Frauds does not apply to such sales.

Because the purchase price is \$1,000, the Statute of Frauds is automatically in play. The key question then becomes whether, in the case of Barbara's dress, the oral agreement (which would otherwise be unenforceable due to the lack of a written memorandum of the agreement) was for a specialty good, not suitable for general sale. The fact that the dress was "one of a kind" and presumably made to Barbara's size and possibly even specification, though nothing in the facts confirms this, could lend support to the argument that the dress was indeed a specialty good.

CONCLUSION: If the dress is found to be a specialty good, the Statute of Frauds will not bar the contract from being formed or enforced. If however the dress is not a specialty good, the oral contract is not enforceable because it is for sale of goods over \$500.

CONCLUSION TO OVERALL FORMATION DISCUSSION: A court would likely find that a valid contract was formed on January 3, 2020 between Amy Designs and Barbara for the purchase of a one-of-a-kind dress for \$1,000, pending the determination as to whether the dress was a specialty good. If not, the Statute of Frauds will be a valid defense to formation.

MODIFICATION

Under the UCC, modifications, if in good faith, may generally be binding without additional consideration. Additionally, unforeseen circumstances may permit modification when they render performance difficult or impossible and the other party agrees without duress or coercion.

After the virus hit the Chinese province where the dress material was produced, causing its production to be suspended, Amy found another source for the material in Thailand, but the price was significantly higher. Amy's email of January 20, 2020 seeking a modification in price was based on this unforeseen event, and is therefore likely in good faith, presuming that the additional \$600 was indeed due to the doubling of the price of the material. If Amy used the virus as an excuse to raise her prices however, e.g. if the fabric only cost \$100 to begin with, the attempted modification will be in bad faith.

Barbara however refused to agree to the proposed modification in price, which she communicated by return email. Her refusal negates the requirement that the other party agree to the modification without duress or coercion. Whether Amy will be able to use an argument of commercial impracticability to force the modification over Barbara's objections is likely a matter for the court to decide.

CONCLUSION TO MODIFICATION DISCUSSION: The attempted modification lacked agreement by the other party. Therefore it is likely that the court will find the modification was unsuccessful and the original contract remained in force.

Note that a modification to an agreement subject to the Statute of Frauds must also be made in writing if the contract as modified also falls within the Statute. In this case, the modification attempt was in writing so Statute of Frauds is not an issue.

PERFORMANCE

Performance is the carrying out of the duties under the contract, including compliance with any promises or conditions.

Use of Special Fabric: Condition or Promise?

A condition is an event or occurrence, other than the passage of time, that conditions a duty of performance. They may be express or constructive, precedent, concurrent, or subsequent. Failure to

fulfill or excuse an express condition causes the contract to fail because the conditioned performance simply never becomes due. Courts prefer to interpret ambiguous conditions as promises or constructive, implied-in-law conditions to avoid forfeiture. Constructive conditions and promises need only be substantially performed.

The agreement to make a dress out of special fabric from China suggests that there is a condition to use that particular special fabric. Since the language of the agreement is unrecorded, it is impossible to know what form this covenant took during the negotiations. However it is likely a court would find that the use of the special fabric was, at most, a constructive condition or even a mere promise. Amy's substitution of a similar fabric from Thailand will not cause a condition precedent to payment to fail.

Impossibility

When the occurrence of an unanticipated, extraordinary event that the parties did not assume the risk of, either through the contract or by custom, renders satisfaction of a condition or performance of a promise impossible, it will be excused or discharged.

Even if the court did interpret the condition to use the special fabric as an express condition precedent to Barbara's duty to pay for the dress, it is likely that Amy could raise impossibility as an excuse to discharge her duty to comply with the condition. Neither she nor Barbara could have foreseen the virus shutting down production in the Chinese province, and it is very unlikely that either of them assumed the risk. Though Barbara could argue that it is customary for a manufacturer using unusual materials to both foresee and assume the risk that those materials may be impossible or impracticable to import at any given time.

BREACH

When a promisor is under an absolute duty to perform that has not been discharged, then failure to perform in accordance with the terms of the contract is breach. Under the UCC Perfect Tender Rule, if the goods and delivery fail to conform to the contract in any way, the seller has breached and the buyer may bring action to recover.

On February 2, 2020, despite Barbara's refusal to accede to the desired modification, Amy purchased the fabric from Thailand and made the dress. However another customer, Claire, saw the dress and agreed to pay the desired \$1,600 for it. By selling to Claire the dress that Amy had made

for Barbara, she was unable to provide the conforming goods, i.e. the custom-made dress, to Barbara. Therefore Amy is in breach.

Note that Amy's continuation of the dress construction is not necessarily inconsistent with her theory that the contract was invalid. Under UCC, a seller who becomes aware of the buyer's breach (or in this case unwillingness to make necessary modifications) is normally required to mitigate damages by ceasing production. However there is an exception if the finished goods will be more valuable than the raw materials. It is even possible that Amy thought she was mitigating her prospective losses if Barbara wasn't going to be the purchaser after all!

As to delivery, since that was not a term that was specified in the contract, UCC gap-filler provisions would be used to designate Amy's place of business (or her home if she does not have a store or office) as the place for delivery. Amy is required to hold the dress there at Barbara's disposal in order to satisfy her obligation to delivery. Because Amy has no dress to deliver to Barbara, she has breached her delivery obligation as well.

CONCLUSION: Amy's sale of the dress to Claire resulted in total breach of her January 3, 2020 contract with Barbara.

REMEDIES

A party seeking remedy under a breach of contract may look to both nonmonetary remedies as well as compensatory damages to place in the position they would have occupied had the contract been fully performed.

Specific Performance

Under the UCC, a buyer has the right seek specific performance (court ordered performance under threat of contempt of court) where goods are rare and unique.

The custom-made dress of special fabric imported from Asia is very likely a rare or unique item. The fabric is likely to be found rare, made even more so by the loss of production in China, and the dress, if made to measure for Barbara, is unique.

However, specific performance may not be available if the item in question has been sold to a bona fide purchaser for value. If Claire was unaware that the dress had been made for Barbara and has already paid the \$1,600, her claim will be prioritized by the court. The question then becomes if Amy

is capable of making a second dress out of the same special fabric, however courts are very hesitant to give orders that compel services due to constitutional prohibitions on slavery.

CONCLUSION: Barbara has a right to seek specific performance, but whether she will get it in this case is much less certain.

Replevin

A buyer who, after reasonable effort, is unable to secure adequate cover for the desired purchase may replevy identified goods from the seller. In a successful replevin, the court will order the return of property.

Similar to specific performance, Barbara has the right to replevy the dress, provided she can show reasonable effort to obtain a substitute for the dress sold to Claire, but Claire's claim may stand in her way.

CONCLUSION: Replevin is possible, but may be blocked by Claire's claim

Compensatory Damages

Monetary damages are based on plaintiff's actual loss due to breach and may include expectancy interest, reliance, consequential damages, and incidental costs associated with the contract breach. They may also be punitive in rare cases where conduct has been reckless, wanton, fraudulent, etc. Some contracts include a liquidated damages clause, which if found valid, will provide monetary compensation without actual proof of loss.

The plaintiff has a duty to mitigate their losses, including by seeking "cover" or an alternative purchase to the goods that were unavailable due to seller's breach. A buyer who is able to obtain substitute goods may recover the difference in cost.

Barbara has not paid for the dress, nor was she expecting to be paid, so her monetary damages will be limited to any reasonably foreseeable reliance damages, e.g. if she purchased the dress to compete in a pageant and Amy knew it, the pageant fees might be recoverable, and the incidental costs associated with "covering." There is nothing in the facts to suggest that Barbara made any attempt to mitigate her damages by seeking a different dress.

CONCLUSION: Barbara will have a hard time proving a financial loss based on these facts, so her monetary damages may be minimal unless she is able to find cover. In that case, her damages will be the difference in the price of the other dress vs. the original contract, plus any costs associated with finding or arranging cover.

END OF EXAM

2)

Danielle v. Kelsey

GOVERNING LAW

A contract is a promise or set of promises for the breach of which the law gives a remedy, or for the performance in which the law recognizes as a duty.

Contracts that are for services, real estate and intangibles are governed by common law. Contracts for the sale of goods are governed by UCC. Here, the contract was a service contract for the repair of her guitar. Therefore, common law is the governing body.

OFFER

A promise to do or refrain from doing something specified in the future. Offer must consist of intent to enter into an agreement with certain and definite terms, which are communicated to the offeree, giving the offeree the power of acceptance.

Here, Danielle intending to get her guitar repaired, hired Kelsey, who was guitar repair specialist. Kelsey intended on fixing the guitar. The terms of the offer were as followed:

- Price: \$2000
- Subject Matter: Fix broken guitar
- Time: by May 15th
- Quantity: 1 guitar
- Parties: Kelsey and Danielle

The offer was signed on March 1st, inferring the offer was communicated. Thus, there was a valid offer.

OFFER OPEN

Offers can be either revoked or terminated due to rejection, death/incapacity, or lapse of time.

Here, the facts indicate there was no termination or revocation. Therefore, the offer was open for acceptance.

ACCEPTANCE

Offeree's manifestation of assent to the terms of the offer, communicated in a manner invited or required by the offer.

Here, the offer was accepted on March 1st when Danielle entered into a valid written agreement with Kelsey to repair the guitar by May 15th. Thus, there was valid acceptance.

CONSIDERATION

Mutual bargain for exchange which has legal value.

Here, Danielle would pay Kelsey \$2000 and in exchange, Kelsey would fix Danielle's guitar. Thus, there was valid consideration.

Conclusion: There was a valid offer that was open for acceptance, supported by consideration. Therefore, there was a valid contract between Danielle and Kelsey.

Conditions- Express

An condition is an act or even which, that unless excused, either must occur before a duty to perform becomes due or discharges a duty of performance that has already arisen. A condition precedent must be performed before a duty to perform a promise is due.

Here, the Kelsey's (K) performance of repairing the guitar was a condition precedent to Danielle's (D) performance of paying her. If Kelsey did not do anything, D would be discharged of her duty. K did perform her condition of repairing the guitar. Unless excused (discussed below), repair of the guitar would trigger D's duty to pay K.

Express Condition

Parties explicitly agree that a duty is a condition upon the happening of some event. Strict compliance with an express condition is ordinarily required.

Here, the time of the essence clause was a express condition. The express condition was stated in the contract and D reminded K of the condition during the March 15th communication, stating the May 15th deadline was "important and imperative". D needed the guitar repaired by that date because she taught a successful guitar teaching class, which was always packed. If she did not have a working guitar, she would be unable to teach the class.

K broke the time of the essence clause when she returned the guitar to D on May 22nd. Payment to K was expressly conditioned upon D receiving the guitar returned by May 15th. D never gave any inclination that the express condition would be waived.

Defense- Relief from Forfeiture

Avoidance of the strict express condition rule when a forfeiture would result. Equity abhors a forfeiture.

Here, K will request the court to not enforce the express condition because she would fail to receive the benefit of the bargain and D would be unjustly enriched. K will argue she spent hours fixing the specialty guitar and if the court enforces the express condition, D would be unjustly enriched with a fixed guitar that she received for free and K will be out the money and time she spent fixing the guitar.

Anticipatory Repudiation

If a party makes it clear, even before performance is due, that he cannot or will not perform, he is said to have anticipatorily repudiated the contract. Party receiving notice of the anticipatory repudiation can sue immediately, even before repudiator's time of performance has arrived.

On March 15th, K called D to tell her she was having trouble with the guitar repair. K's statement of having trouble was indicative that she may not be able to fully perform by repairing the guitar by May 15th. D then reminded K of the time of the essence clause and K responded with "I'll look and see again, but it is a hard job". K's statement was not a confirmation that the job would get done. It was a vague statement that K *may not* be able to perform, rather than *she cannot or will not*. Since vague statements are not enough to conclude anticipatory repudiation, D then followed up seeking assurances.

D then followed up with an email informing K that she was worried that K would not be able to perform by May 15th. She again stressed the importance of the express condition, the time of the essence clause, and informed K of the risk if the date is not met (classes being delayed). Parties facing anticipatory repudiation are not required to seek assurances but due to the K's vague statement, D did. K read the email and failed to respond. K's failure to respond within a reasonable time meets the factors for anticipatory repudiation, which allow D to suspend her performance and/or sue. D does not have to wait until May 15th to file suit. Even if K argues that she couldn't reassure D she could fix the guitar when she was not sure, ignoring her does not make the problem go away. She could have communicated with her and followed up when she made progress. As long

as D has not filed suit or detrimentally relied on the repudiation, K had the option to revoke the repudiation.

Therefore, the court will likely rule that K repudiated the contract.

Breach of K: Material or Minor?

A breach occurs when a promisor fails to perform a duty or performance under the contract. A material breach is one that undermines the essential benefit of the bargain. If a party has materially breached their duty under a contract, they have not substantially performed. A minor breach is a slight deviation from the promised performance and does not excuse the other party from their obligations.

Defense of K- Minor Breach

Here, K will argue that the breach was minor. She will say that the classes didn't actually start until June 1st and D received the guitar back on May 22nd. She will argue that D is still under obligation to pay K the \$2k because she substantially performed under the contract. However, D will argue that K materially breached the contract by failing to meet the May 15th deadline. She is a guitar teacher who was teaching a guitar class, making the guitar the tool of her trade. She was not required to wait until the last minute to ensure she had a working guitar and was within her right to contract to have the guitar back in advance to prepare for her classes.

Thus, the court will likely agree that breach of the time of the essence clause was material.

Damages

The purpose of damages is to put the non-breaching party in the position they would have been had the contract been performed. A party is not entitled to damages unless they are able to show that damages are reasonably certain, foreseeable, and were unavoidable.

Expectation Damages

Damages that occur as a result of the breach. The Primary interest protected by the expectancy interest, which is the interest in being put in the same position as full performance.

Here, D is claiming that had the contract been completed, she would not have had to pay the \$3500 for a new guitar (with delivery). D sought assurances of the contract being completed before purchasing a new guitar and after not hearing back from K, she had to purchase a new guitar.

Special/Consequential Damages

Indirect results from breach that are special to the plaintiff or situation. Recovery of consequential damages must have been made foreseeable at the time of contract formation.

Here, D claims that because she did not have her guitar by the May 15th date, she had to delay her classes 2 weeks, which costed her \$10k in revenue. D made the delay known at the time of the contract and during the contract. D would have to show that the \$10 k was reasonably certain by showing how she came up with the \$10k. She would be able to show the delay was foreseeable, which is why she contracted for her timing and it was unavoidable by making the deadline. D can also say she mitigated the damages by purchasing a guitar to prevent any further delay than two weeks.

Conclusion: Therefore, D may show she is entitled \$1350 in damages. If the court applies the \$2k she owes for the repair, K would be left owing \$1150 in damages.

END OF EXAM