

MONTEREY COLLEGE OF LAW

**CONTRACTS (SECTION 1)**

FINAL EXAMINATION

SPRING 2021

Professors R. Patterson & D. Kutter

Instructions:

There are three (3) questions in this examination. You will be given four (4) hours to complete the examination.

Questions 1 and 2 are Essays. Question 3 consists of 20 MBE questions. Please answer the 20 Multistate Bar Exam (MBE) questions posted on Exemplify. Read each question carefully and choose the best answer even though more than one answer may be “correct”. Review your answers for accuracy before you finish.

\*\*\*\*\*

Question 1

Paulie and Donny, who were old time friends, resided in communities 100 miles apart. On January 1, Paulie wrote Donny as follows:

“I have decided to give up my farm, Blackacre, and move to town. I thought you might consider buying it from me because you have often said that you were going to move to a farm after retiring from your business. I will sell you Blackacre for \$10,000. I’ll let you have 10 days to think about it and to talk it over with your wife. In other words, I’ll keep the offer open and will not withdraw it during this time.”

Sincerely yours,

/s/P

January 1, 2021

As a result of a delay in the mails, Paulie’s letter to Donny did not arrive in the normal course on January 2 but was received by Donny on January 4, 2021.

On January 8, 2021, Paulie deposited in the mail a letter addressed to Donny in which he said, among other things, “Blackacre deal off.” This letter was not received by Donny until January 12, a few hours after he (Donny) had posted an acceptance of the offer. The letter of acceptance was received in due course on January 13. In the correspondence that followed, Paulie denied that any contract resulted, and Donny did not tender any money to Paulie.

On January 20, Donny delivered to his friend Anthony a writing that stated, "I hereby transfer to Anthony my right to Blackacre under my contract with Paulie for \$100, receipt of which is hereby acknowledged. /s/D."

On January 25, Donny gave an identical instrument to Benny, who immediately presented it to Paulie. The next day Anthony presented his claim to Paulie.

What are the rights and liabilities of all the parties? Discuss

\*\*\*\*\*

## Question 2

On November 1, 2020, Claire, a young television personality signs a contract with Eye Roll Television Network (“Eye Roll”) to perform December 1, 2020, in a one-hour “live” television show from 8:00 p.m. to 9:00 p.m. Eye Roll agrees to pay Claire \$10,000 for this performance. The contract also provides that if for any reason Claire does not appear as scheduled, she will “forfeit the sum of \$125,000 to Eye Roll as liquidated damages.”

On November 10, 2020, Claire informs Eye Roll that she is suffering from acute fatigue and that her physician probably will not allow her to appear as scheduled. Eye Roll immediately urges her in writing to fulfill her contractual obligations.

On November 15, 2020, Claire tells Eye Roll that she has miraculously recovered and will appear as scheduled on the December 1 show.

On November 23, 2020, the network informs Claire that, due to her unpredictability, it has hired actress John Smith as of that date and will not require Claire’s services.

On November 28, 2020, John Smith breaks his leg in an accident. Eye Roll immediately wires Claire that it has reconsidered the entire matter and will hold her to the original contract to perform on December 1, 2020.

On the evening of December 1, Claire appears at the studio ready to perform, but Eye Roll, acting upon orders from the United States Federal Government, cancels the show in order to broadcast a special address by the President of the United States.

Discuss legal implications of the foregoing events.

\*\*\*\*\*

QUESTION 1

1. Assignment – transfer to Anthony and Benny from Donny. Which assignment prevails? Both assignments are for consideration. 1<sup>st</sup> assignee in time prevails (Anthony). Benny can sue Donny for breach of implied warranty.
2. Offer – Paulie made offer to Donny (Discuss intent, terms, communicated)
3. Offer open/acceptance/consideration – Termination of offer due to lapse of time?
  - a. 10 days runs from receipt in normal course of post (1 day). Reasonable person would have seen date of 2/1/21 and received on 2/2/21 – 10 days. Donny did post an acceptance on 2/12/21 – effective acceptance on dispatch.
  - b. Revocation – although Paulie promised to keep offer open, it was revocable because it was not an MFO, detrimental reliance, option contract, or partial performance. The revocation was effective on receipt – here, the revocation was on 2/12/21, but after acceptance was effective on dispatch. Thus, valid contract formed between Paulie and Donny.

Question 2

1. Conditions
  - a. Voluntary disablement – rescinded, ok because no change in imposition
  - b. Anticipatory repudiation – repudiation by Claire? Request for assurances by Eye Roll? Assurances given by Claire? Repudiation by Eye Roll?
2. Discharge
  - a. Impossibility – government action
  - b. Implications of impossibility?
3. Liquidated damages clause
  - a. Reasonable forecast of damages?
  - b. Damages too difficult to ascertain at contract formation?

1)

**Donny ("D") v. Paulie ("P")**

Governing Law. The Uniform Commercial Code governs the formation of Ks dealing with the sale of goods. Goods are defined as tangible, moveable objects. Common Law ("CL") governs all other Ks, including those for real property. Here, the agreement at issue deals with the sale of a farm, which is real property, so CL will govern the formation and performance of the K.

Formation. In order to determine the rights and remedies of the parties, we must first determine whether a valid and enforceable K was formed between D and P. A valid and enforceable K consists of an offer that is open for acceptance, an acceptance and adequate consideration.

I. Offer. An offer is a promise to do or not to do something. A valid offer contains (1) intent to enter into an agreement, (2) terms that are certain and definite, and (3) is communicated to a specified offeree.

1. Intent. Intent is objectively measured by assessing the offeror's outward conduct from the shoes of the offeree using the reasonable person standard. P initiated the correspondence with D which is demonstrative of his intent to make a valid offer. Furthermore, the two were friends and had a relationship previous to the present issue.

2. Terms. The material terms of a K include parties, subject matter, time, and price. At CL, any missing term would render the offer invalid for indefiniteness; however, at modern law, when parties intend to be bound but are silent, the court can fill in a reasonable price or time for performance. Here, the parties are P and D; the subject of the offer is Blackacre farm; and the price for which it is offered is \$10K. Although P states he

---

---

will keep the offer open for 10 days, no time for the transaction is expressly mentioned. In this case, the court will be able to supply a reasonable time for performance. ✓

3. An offer must be communicated to an offeree to give them the power of acceptance. Here, the offer was written by P to D and reached D by mail on 1/4.

In sum, it is likely a court will find that P's correspondence to D was a valid offer.

II. Offer Open. An offer is open unless it is revoked or terminated. When the offeror is silent, an offer is open for a reasonable amount of time. An offer may be revoked at any time prior to acceptance unless there is partial performance, detrimental reliance, payment of some considerations (option K), or a merchant's firm offer.

1. Mailbox Rule. The mailbox rule states that (1) acceptance is valid on dispatch; (2) an offer, rejection, revocation, etc. are not effective until receipt; and (3) an offeror's revocation must be received before the offeree posts acceptance. ✓

Here, P expressly stated in his correspondence that he would "keep the offer open and not withdraw it" for ten days. Although the letter was written and sent on 1/1, D did not receive it until 1/4 as a result of a delay in mail. Consequently, the offer's ten day "clock", as contemplated by P's writing, does not start until D's receipt. As a result, P will successfully argue that this means D's offer was open until 1/14. ✓

2. Detrimental Reliance. Occurs when a party is reasonably induced to rely on a promise made by another party; this makes an offer irrevocable. In addition to the mailbox rule, D will argue that he detrimentally relied upon P's promise to keep the offer open; and thus, the offer was irrevocable until 1/14 despite P's attempt to revoke the offer via 1/8 letter.

Based on the foregoing, it is likely a court will find the offer was indeed open pursuant to the language of P's offer.

---

---

III. Acceptance. At CL, a valid acceptance is a voluntary act of unequivocal assent to each and every term communicated back to the offeror.

The facts state that D "posted an acceptance to the offer" on 1/12 mere hours before D received P's attempted revocation by mail. Pursuant to the mailbox rule, D's acceptance was valid upon dispatch. Furthermore, at the time of acceptance, D was not yet on notice that P desired to revoke his offer. *Revocation effective on receipt*

Assuming the acceptance was a mirror image to the terms of the offer (facts are silent on the acceptance's substantive content), a court will likely determine the acceptance was valid.

IV. Consideration. A K must be supported by adequate consideration. In a bilateral K, consideration is the mutually bargained for exchange of contemporaneous legal detriment. Legal detriment is incurred when a party relinquishes some legal right, does something they're not obligated to do, or forbears from a legal right. Gifts, past performance, pre-existing duties, or moral duties are inadequate.

Here, we have the exchange of P's farm for D's \$10K. As this is essentially a promise for a promise, we have a bilateral K. A court will determine this consideration is adequate.

In sum, it is likely that a valid and enforceable K was formed between P and D.

Statute of Frauds. SOF requires agreements pertaining to executorship, suretyship, marriage, an interest in land, performance longer than a year, and for the sale of goods \$500+ to be evidenced by a writing. The writing requirement is liberally construed; it need not be a formal K. All that is required is a memo that reasonably identifies the subject matter and essential terms of an agreement that is signed by whom enforcement is sought.

---

Because Ks creating an interest in real property (test - land and anything growing on, affixed to, or built upon land) are within the scope of SOF, and the subject of the K is Blackacre farm, this K falls within the scope of SOF. To comply with SOF, D needs to provide a writing as discussed supra to enforce the K. D will provide the 1/1 letter containing the initial offer as a writing. The writing contains subject (Blackacre), price (\$10K), parties (P and D) and is signed ("/s/P") by P.

As the SOF requirements are present, it is likely that if P attempts to raise the defense of SOF, it will not be persuasive. ✓

Breach. Under CL, if a party does not substantially perform, they may have breached the K. A material breach occurs when the breach is so substantial that it impairs the K as a whole.

The facts state that P "denied that any K resulted". If the court finds there was indeed a valid K, and P still refuses to fulfill his K duty of tendering the farm for \$10K, he will have certainly breached the K as the farm is the main subject thereof.

Damages. The purpose of damages is to allow an aggrieved party to recover the benefit of their bargain so long as the damages are foreseeable, unavoidable, and certain. Upon breach, an aggrieved party is entitled to recover general damages (lost profits flowing from K), reliance damages (preparations or part performance) and special damages (if applicable). Where damages at law are inadequate, an equitable remedy may be appropriate.

Although there is no mention of money damages in the fact pattern, an equitable remedy may be available because real property is considered unique.

Specific Performance. SP may be an appropriate remedy when the following are present: ✓  
(1) breach of K; (2) K has certain and definite terms; (3) inadequate legal remedy; (4)

---



---

feasible - court can supervise enforcement; and (5) mutuality - both parties are read, willing and able to perform. With these elements in mind, the court will balance the interests of the parties to determine if SP is a suitable remedy.

1. If P indeed refuses to tender Blackacre, he will be in breach.
2. Terms are certain (supra).
3. As there are no money damages and real property is considered unique, legal damages will not suffice.
4. Courts can enforce the K.
5. As long as D has the \$10K to hold up his end, the parties seem to be able to perform despite the conflict.

It is likely that the instance at issue qualifies as one where SP would be a suitable remedy.

### **D's Subsequent Assignment of K Rights**

An assignment is the manifestation of present and immediate intent to transfer K rights to performance to a third party. The rights in an assignment need be adequately described orally or by writing, but need not be supported by consideration. Generally, rights are assignable unless they would materially alter the obligor's risk or duty or otherwise diminish the value of the original K to the obligor. An effective assignment makes the assignee stand in the shoes of the assignor. In contrast to rights expected to arise, future rights in an existing K can be assigned.

---

Under CL, the rights to assignment cannot be curtailed, and although D does not presently possess Blackacre, his assignment of the K rights thereto is nevertheless valid (supra). Here, D delivered an instrument to Anthony on 1/20 with a writing expressly assigning his right to Blackacre for consideration (\$100). D's written instrument is clear and convincing evidence of his intent to assign the rights (to the degree it would also be considered a SOF writing). Several days later, D delivered the same instrument to Benny.

✓ An assignment for consideration is irrevocable. When an irrevocable assignment is assigned twice, the first assignee will prevail. Here, although Benny presented his instrument to P first, Anthony was the first in fact to receive an irrevocable assignment of the K rights. Essentially, upon that 1/20 to Anthony assignment, the rights became effectively no longer assignable to anyone. Although Anthony's assignment is likely invalid, he may be successful in pursuing an action against D for breach of implied ✓ warranty or promissory estoppel.

In conclusion, a court will likely find Anthony has the rights to the Blackacre K due to D's irrevocable assignment.

### **Conclusion**

In summary, it is likely a court will find (1) a K was formed between P and D; (2) SOF is not a valid defense thereto; (3) specific performance may be an appropriate remedy; and (4) the assignment to Anthony was valid and irrevocable.

**END OF EXAM**

2)

### **Claire v. Eye Roll**

Governing Law. The Uniform Commercial Code governs the formation of Ks dealing with the sale of goods. Goods are defined as tangible, moveable objects. Common Law ("CL") governs all other Ks, including those for real property. Here, the agreement at issue deals with a performance which is a service, so CL will govern the formation and performance of the K.

Formation. In order to determine the rights and remedies of the parties, we must first determine whether a valid and enforceable K was formed between Claire and Eyeroll. A valid and enforceable K consists of an offer that is open for acceptance, an acceptance and adequate consideration.

I. Offer. An offer is a promise to do or not to do something. A valid offer contains (1) intent to enter into an agreement, (2) terms that are certain and definite, and (3) is communicated to a specified offeree.

1. Intent. Intent is objectively measured by assessing the offeror's outward conduct from the shoes of the offeree using the reasonable person standard. The facts indicate there was an agreement between the two parties.

2. Terms. The material terms of a K include parties, subject matter, time, and price. At CL, any missing term would render the offer invalid for indefiniteness; however, at modern law, when parties intend to be bound but are silent, the court can fill in a reasonable price or time for performance. Here, the parties are Claire and Eye Roll; the time is 12/1 from 8 PM - 9PM; the subject of the offer is a performance; and the price for which it is offered is \$10K. All requisite K terms are present.

3. An offer must be communicated to an offeree to give them the power of acceptance. The facts imply this occurred.

In sum, it is likely a court will find that there was a valid offer.

II. Offer Open. An offer is open unless it is revoked or terminated. When the offeror is silent, an offer is open for a reasonable amount of time. An offer may be revoked at any time prior to acceptance unless there is partial performance, detrimental reliance, payment of some considerations (option K), or a merchant's firm offer.

The facts imply the offer was indeed open.

Based on the foregoing, it is likely a court will find the offer was indeed open.

III. Acceptance. At CL, a valid acceptance is a voluntary act of unequivocal assent to each and every term communicated back to the offeror.

The facts imply the offer was indeed open.

Based on the foregoing, it is likely a court will find the acceptance was valid.

IV. Consideration. A K must be supported by adequate consideration. In a bilateral K, consideration is the mutually bargained for exchange of contemporaneous legal detriment. Legal detriment is incurred when a party relinquishes some legal right, does something they're not obligated to do, or forbears from a legal right. Gifts, past performance, pre-existing duties, or moral duties are inadequate.

Here, we have the exchange of Claire's one-hour performance for \$10K by Eye Roll. As this is essentially a promise for a promise, we have a bilateral K. A court will determine this consideration is adequate.

---

In sum, it is likely that a valid and enforceable K was formed between Eye Roll and Claire.

✓ Performance. Having established an enforceable K exists, we must now determine what performance is due and whether any non-performance is excused. Covenants are non-conditional promises that create an absolute duty to perform. Conditions are acts or events that set the time and order of performance. The occurrence of a condition either triggers or extinguishes a duty to perform. The satisfaction of a condition matures the other party's duty to perform. Failure to perform a matured duty is a breach of K which excuses counterperformance and is subject to K remedies.

Express C/P for Liquidated Damages of \$125K Upon Breach ✓

Express conditions are those that are expressly stated by parties orally or in writing. A matured express condition is only satisfied by strict compliance. Here, the K provided that if Claire failed to appear she would forfeit the sum of \$125K to Eye Roll as liquidated damages. On its face, this seems to be a valid express condition as both parties assented to it and included it in the K. However, a liquidated damages clause *is not* enforceable unless at the time of formation (1) damages are difficult to ascertain, and (2) the amount is a reasonable forecast of compensatory damages, and not a penalty or punishment. The party seeking to enforce the clause has the burden to prove the aforementioned two-prong test, therefore Eye Roll carries this significant burden. As Claire's consideration for performance is only \$10K, a \$125K penalty for not performing would likely be deemed punitive to a reasonable trier of fact. Furthermore, the performance is only for one hour and there are no facts to indicate that the damages for a "no-show" would be difficult to calculate at the time of formation. Overall, the stakes for Eye Roll pale in comparison to what enforcement of this clause would mean for Claire.

---

As it is grossly disproportionate, the court would likely not enforce the damages provision.

Prospective Inability to Perform/Voluntary Disablement ("VD") ✓

A duty to perform can be excused by wrongful prevention, anticipatory repudiation, VD, divisibility, relief from forfeiture, waiver, or estoppel.

VD occurs when a party has reasonable grounds to believe the other party will be unable or unwilling to perform when performance is due. VD is distinguishable from anticipatory repudiation because in VD there is no unequivocal indication of non-performance, only that of an RPP would believe the other party won't perform. If VD arises, the innocent party may request assurances from the other and may suspend counterperformance until receipt of adequate assurance that performance is forthcoming. If adequate assurances are not received, the innocent party may treat it as a repudiation.

Here, on 11/10 Claire informed Eye Roll her physician "probably will not allow her to appear" due to acute fatigue. Clearly, this is not an unequivocal indication that she was not going to perform. Eye Roll in response, urged her to fulfill her obligation, which indicates they did not detrimentally rely on Claire's correspondence at this point. VD can be withdrawn if the party regains her ability or willingness to perform. However, this must be communicated to the other party in order to be effective. Five days after the initial correspondence, Claire informed Eye Roll she had recovered and intended to appear pursuant to the K. This is likely a valid withdrawal of her initial VD and provided adequate assurance to Eye Roll performance was indeed forthcoming.

The position of the parties at this point during the correspondence was likely status quo - no performance was excused or discharged for either party and K duties were still executory.

---



### Estoppel Waiver of Claire's Services

One having the benefit of a condition or performance can indicate by words or conduct that they will not insist on them. When a condition does not occur or a duty of performance is not met, the benefitting party can waive it. These cannot be withdrawn. If a party indicates they are waiving a condition before it happens or performance before it is to be rendered, and the other party detrimentally relies upon it, a court will enforce this as a binding estoppel waiver. In contrast to a waiver, these can be withdrawn if no detrimental reliance is present.

Eleven days after Claire's retraction of VD, Eye Roll informed her that "due to her unpredictability", they hired a replacement actress and would not require her services. This seems to be an estoppel waiver because Claire was clearly planning on performing at this point. However, several days later on 11/28, the substitute actress broke her leg and Eye Roll declared they would hold Claire to her original K duties. This is an effective withdrawal because the facts don't state Claire relied on the initial waiver to her detriment.

The position of the parties at this point during the correspondence was still likely status quo - no performance was excused or discharged for either party and K duties were still executory.

### Impossibility ✓

A duty to perform can be discharged by operation of law (performance, occurrence of C/S, defense to formation, impracticability, impossibility, frustration of purpose); by agreement of the parties (accord, mutual rescission, novation or substitute K, account stated, or modification); or by unilateral act of a party (cancellation, written release).

---

Impossibility occurs when a duty cannot physically be performed any longer due to unforeseeable circumstances. Performance is impossible, and ultimately discharged, when (1) the non-occurrence of an event was a basic assumption of the parties, and (2) neither party impliedly or expressly assumes the risk. The impossibility must arise after K formation.

Here, the fraught transaction of events culminates in a special and unexpected address by POTUS. Eye Roll, "acting upon orders from the federal government", was forced to cancel the show and air a special broadcast from POTUS. Seemingly also unaware was Claire, who had appeared "at the studio ready to perform". The facts indicate that this broadcast was last minute and to the detriment of both parties. Claire's duty of performance, which by term of the K was during a specific 8PM - 9PM slot, became objectively impossible due to the federal government's involvement. Furthermore, the facts state that the performance was intended to be live; this purpose is ultimately defeated.

Ultimately, a court will likely find that the K was discharged due to impossibility because of the supervening involvement of the federal government.

### Frustration of Purpose

An alternative theory for discharge is frustration of purpose, which occurs when a duty can still be performed, but unforeseeable circumstances have frustrated the purpose thereof. Clair could possibly make the argument that she could perform, but Eye Roll would argue that the performance needed to be "live".

### Cancellation

As discussed, the unilateral act of a party can also discharge K duties. Cancellation occurs when a party expressly or implicitly manifests an intent to discharge by cancellation.

---



When Eye Roll told Claire that they would not require her services after hiring a new actress, a reasonable person in her position may have relied on this testament. This could be viewed as a cancellation, especially because the correspondence was so decisively worded and Claire's time for performance had not fully elapsed. However, this theory is weaker and more unlikely than the estoppel waiver analysis presented supra.

Damages. The purpose of damages is to allow an aggrieved party to recover the benefit of their bargain so long as the damages are foreseeable, unavoidable, and certain. Upon breach, an aggrieved party is entitled to recover general damages (lost profits flowing from K), reliance damages (preparations or part performance) and special damages (if applicable). Where damages at law are inadequate, an equitable remedy may be appropriate.

### Conclusion

A court will likely find that (1) a K existed between Eye Roll and Claire; (2) the liquidated damages clause is unenforceable despite being an express C/P; (3) Claire initiated voluntary disablement (which would have excused Eye Roll's counterperformance), but then withdrew it; (4) Eye Roll waived Claire's performance, but then reinstated it; and (5) the K was ultimately discharged due to impossibility. ✓

**END OF EXAM**

*well done.*