SLO
Contracts Final Examination
Spring 2021
Prof. M. Loker

Question 1

Pete's Publishing is a new company whose corporate mission is to publish nature books. Pete's Publishing contacted Ernest, a talented writer and illustrator, to write and illustrate a series of book about birds.

On February 1, Ernest and Pete's Publishing's corporate president Pete met and orally agreed to the following:

1. Ernest will write and illustrate a three-book series about birds in the United States.

2. The first book will be about birds in the western United States, the second book will be about books in the eastern United States, and the third book will be about birds in the rest of the United States.

3. Each book will have 12 chapters.

4. The first two chapters of the first book will be delivered to Pete's Publishing within three months and two additional chapters are due every six months thereafter until all three books are completed.

5. Pete's Publishing will pay Ernest a total of $400,000 for all three books, with $100,000 paid immediately and $100,000 paid when each of the three books are completed to the satisfaction of Pete's Publishing.

6. Pete's Publishing can cancel the contract at any time if it is not satisfied with the illustrations or the writing.

7. Time is of the essence.

Ernest was very happy with the terms but a little uneasy about whether Pete's Publishing would be able to make the last three payments, since they were not due until each book was completed. To address Ernest's concern, Pete promised to personally pay Ernest in the event Pete's Publishing failed to pay. Satisfied with that promise, Ernest and Pete shook hands, and Pete handed Ernest a Pete's Publishing corporate check for $100,000.

On February 15, Ernest moved from New Orleans, Louisiana to Seattle, Washington to investigate and observe birds in the northwest United States, and begin working on the first book. Ernest's plan was to travel the country and bird watch as he wrote and illustrated each chapter.

On March 1, the first COVID-19 pandemic cases were discovered in Washington state, and by April 1, the entire state was subject to a state government-ordered pandemic-related lockdown prohibiting residents from traveling more than five miles from their homes. As a result of the lockdown, Ernest was able to observe only a few birds from his Seattle apartment, and he fell behind in writing and illustrating the first book.

On April 1, Ernest called Pete and explained that he was unable to make much progress on the first book because he was stuck in his apartment due to the lockdown. Pete encouraged Ernest to stay the course, and they agreed to touch base again when the first two chapters were due on May 1.

On June 1, Ernest submitted the first two chapters to Pete's Publishing. His work was one month late.

On June 2, Ernest received an email from Pete's Publishing informing him that the contract was cancelled because Ernest failed to meet his first deadline.

Question: On June 15, Ernest walks into your law office, tells you the forgoing facts, and asks you if he has grounds to sue Pete's Publishing and Pete. What is your advice to Ernest? Please explain all causes of action and defenses, if any.

Contracts Final Examination Answer Outline Question One

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1. Is there a valid contract between Ernest and Pete's Publishing?

A. This is a bilateral contract. Ernest and Pete's Publishing exchanged promises.

B. The basic formation elements are present, i.e., offer, acceptance, intent, and consideration.

2. Is the contract subject to the statute of frauds?

A. The statute of frauds requires certain contracts to be evidenced by a writing signed by the party to be charged to be enforced. The signed writing must identify the subject matter of the contract, show that the parties have made a contract has been made between the parties, and state the essential terms with reasonable certainty. This is an oral contract, not a written one.

B. To be subject to the statute of frauds, a contract must fall within six categories: marriage, incapable of being fully performed in one year, concerns an interest in land, is an executors agreement to answer for the estate's debts, is for the sale of goods for $500 or more, or is a surety contract.

C. The oral agreement between Pete's Publishing and Ernest is not subject to the statute of frauds for two reasons: it is capable of being performed within one year because it is possible that Ernest could complete all three books within one year, and also because Pete's Publishing may execute the termination clause in one year.

D. Bonus issue – is the $50,000 check a sufficient writing to bring the agreement out of the statute of frauds? No, because the check does not state all of the essential terms of the agreement.

3. Is Pete's promise a valid surety or guaranty?

A. A surety is an agreement to be primarily responsible and directly liable for paying a debt or performing an obligation of another. A guaranty is an agreement where the guarantor promises to satisfy an obligation the promisor under the primary agreement in the event the promisor fails to perform.

Pete personally promised to pay Pete's Publishing's debt to Ernest in the event Pete's Publishing fails to pay. Pete's promise is a guaranty. Bonus: California abolished the distinction between sureties and guarantors.

B. Elements.

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A promise to be a guarantor or surety is binding if it is in a signed writing and recites consideration, or if the promisor should reasonably expect and foresee the promisee will undertake an action or forbearance of a substantial character in reliance on the promise. Here, there is no writing, but Ernest reasonably and foreseeably relied on Pete's oral promise as an inducement to proceed with the three-book deal.

An oral promise to pay the debt of another is enforceable when the promisor has a personal, immediate and pecuniary interest in the transaction and the promise is supported by sufficient consideration.

C. Was Pete's guaranty supported by sufficient consideration?

Consideration is presumed where, as here, the promise is made at the time of the primary agreement. Pete may also benefit from his promise because he is the president of the publishing company that will be publishing Ernest's books and has an interest in the company's success.

D. Bonus issue: Is Pete's promise enforceable under the doctrine of promissory estoppel?

Promissory estoppel can be used to enforce an oral promise that cannot be enforced as a contract under the statute of frauds. Ernest would have to show that Pete's promise was made with the reasonable expectation that Ernest would rely on it, that Ernest did justifiably rely on it, and that injustice can be avoided only by enforcing Pete's promise.

4. Did Pete's Publishing wrongfully terminate the contract when Ernest was two months late delivering his first two chapters?

A. The contract requires Ernest to deliver the first two chapters by May 1, which he failed to do. That failure was a breach of contract by Ernest. Whether Ernest's breach of contract allows Pete's Publishing to terminate the contract depends on whether Ernest's breach is a material breach.

If it is a material, breach, Pete's Publishing can cancel. If it is not a material breach, Pete's Publishing can sue for damages.

A material breach is one that is so significant that the nonbreaching party will not receive the central value of the contract. If a material breach has occurred, then the nonbreaching party's performance is excused.

In addition to terminating performance under the contract, a material breach also gives rise to a claim for damages incurred as a result of the breach.

B. Criteria

The criteria to decide materiality are: the extent to which the breach deprives the other party of reasonably expected benefits under the contract, the degree to which that party can be compensated for the loss of those benefits, the extent to which the breaching party will suffer forfeiture if the breach is held to be material, the possibility and likelihood of the breaching party curing the breach, and the good faith or bad faith of the breaching party

Ernest was one month late delivering his manuscript for the first two chapters. The first book is twelve chapters. This means that to date, Pete's Publishing was deprived of less than 20% of the manuscript it was owed, for one month. This is not a substantial deprivation of the benefit that Pete's Publishing bargained for, and it is possible that Ernest could deliver the remaining chapters on time, depending on the length of the pandemic lockdown. Termination will cause Ernest to suffer a complete forfeiture. Strict enforcement may be excused by disproportionate forfeiture. Ernest's breach was not a material breach.

5. Time is of the essence

The parties' oral agreement included a term that time is of the essence.
Time is of the essence means that completion of performance is an important element of the performance under the contract and typically indicates that failure to timely complete performance will be considered a breach.

The time is of the essence terms gives Pete's Publishing a stronger argument that Ernest's breach is a material one, but it does not automatically change the materiality determination.

6. Repudiation and Anticipatory Repudiation

A *breach* of contract occurs when a party fails to perform a promise when the time for that performance is due. A *repudiation* is an indication of prospective breach that occurs before the time that a party's performance is due.

A repudiation occurs when a party makes clear by words or actions that his promised performance will not be rendered when it becomes due. Repudiation can consist of a statement of intention to breach or a voluntary, affirmative act that renders the party unable or apparently unable to perform when the performance becomes due.

An anticipatory repudiation occurs when one party to a contract communicates to the other party that he will not be performing an obligation under the contract. A party can repudiate a contract through a statement that clearly indicates an intent to breach, or a voluntary, affirmative act that renders a party unable to perform. Anticipatory repudiation must be an unambiguous indication that the party will not perform. A mere expression of doubt or statement that party might not perform is not an anticipatory repudiation.

On April 1, Ernest called Pete and explained that he "was unable to make much progress" because he was stuck in his apartment lockdown. Pete encouraged him to "stay the course." Ernest's words were not a repudiation or an anticipated repudiation because they do not constitute an unambiguous indication that Ernest will not perform.

Bonus Issue: Request for Assurances

Pete's Publishing should have considered making a request for assurances to determine whether Ernest was likely to get back on the contract schedule, before it terminated the contract.

A party may suspend performance and demand adequate assurances when he has reasonable grounds to believe that the other party will breach, and the other party has not communicated any anticipatory repudiation with an unambiguous indication that he will not perform. Demanding adequate assurances is a way to clarify the parties' rights and responsibilities without waiting for the other party to provide an unambiguous anticipatory repudiation. If adequate assurance is not provided within a reasonable amount of time, the suspending party may proceed as if there had been an anticipatory repudiation.

7. Good faith and fair dealing

Did Pete's Publishing's termination violate the covenant or implied duty of good faith and fair dealing?

Every contract has a constructive covenant or implied duty, of good faith and fair dealing that requires the parties to follow standards of decency, fairness, and reasonableness in performing and enforcing the contract. This duty requires each party to a contract not to do anything that will deprive other parties of the benefits of the contract. A breach of this duty gives rise to an action for damages.

Pete's Publishing terminated the contract when Ernest's two chapters were delivered one month late, but with the knowledge that Ernest was subject to a government lockdown that was making it harder for him to get his work done on time. If Ernest establishes that the lockdown was a significant factor is causing him to be late in his work, he will have a legitimate cause of action for breach of the covenant or implied duty of good faith and fair dealing.

8. Frustration of Purpose

Did the state government's COVID-19 lockdown order frustrate the principal purpose of the contract?

Frustration of purpose is a defense that excuses a party from performing when events or changed circumstances make performance worthless. It applies when an unexpected event that is beyond the party's control completely undermines the party's primary purpose in making the contract. The event or circumstances that caused the frustration of purpose must not be within the possible risks that each party assumed by entering into the contract, non-occurrence of the event must be a basic assumption under which the contract was made, and the event's occurrence must not be the breaching party's fault.

All three criteria are present here, provided that the lockdown legitimately prevented Ernest from the type and extent of bird-watching necessary for him to write and illustrate the first book. This was a temporary frustration of purpose during the lockdown which excuses Ernest for the rest of the lockdown.

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Question 2

Betsy's mother Alice passed away and left all of her belongings to Betsy. Betsy planned to have a yard sale of the small household items she inherited from her mother.

Connie lived next door to Alice for 50 years. They were close friends. Every week for the last decade, Alice invited Connie to her home where they did watercolor painting together. During those art sessions, Alice sometimes showed Connie items she had collected over the years. Once, she showed Connie a small blue-and-white floral bowl that she described as “very special.”

A few days before the yard sale, Betsy asked Connie to help her with the sale. Betsy promised Connie that if she would help her that day, she would let Connie select and keep any one item she wanted, provided that it had not already been sold. Connie readily agreed. She planned to attend the sale anyway, and hoped to find something special to remember her friend by.

Thirty minutes before the sale began, Connie noticed Alice’s small blue-and-white floral bowl was sitting at the front of one of the sale tables. Connie moved the small bowl behind larger bowls on the table, hoping that no one would notice it and want to buy it. The sticker price was $35, which Betsy had placed there the day before.

Connie worked all day at the yard sale. When it was over, Connie was delighted to discover that no one had purchased the small blue-and-white floral bowl. She picked up the small bowl and asked Betsy if it was OK for her to select and keep that item, to remember Alice by. “Of course it’s OK” replied Betsy, with misty tears in her eyes. “I know that it would make Mother happy to know that it will be with you.” Connie thanked her, took the bowl home, and put it on her kitchen table next to the salt and pepper shakers.

A week later, as Connie was watching a television show about antique auctions, she was reminded of the small blue-and-white floral bowl in the kitchen. She wondered if it was an antique. On a whim, Connie telephoned a local auction specialist, who suggested that she send photographs of the bowl. After receiving Connie’s photographs, the auction specialist identified the bowl as an item of historical significance and offered to contact Sotheby’s New York auction house to determine the bowl’s potential value.

Within weeks, Sotheby’s Chinese art department inspected the small blue-and-white floral bowl and identified it as a rare15th-century Chinese bowl from the Ming Dynasty. Sotheby’s agreed to include the bowl in its upcoming Important Chinese Art auction. At the auction, the bowl sold for $721,800, exceeding its top estimated sale price of half a million dollars.

After the sale, the head of Sotheby's Chinese art department said in a press statement: "Today's result for this exceptionally rare floral bowl, dating to the 15th century, epitomizes the incredible, once-in-a-lifetime discovery stories that we dream about as specialists in the Chinese Art field... it is a reminder that precious works of art remain hidden in plain sight just waiting to be found."

Question:

Upon learning of the Sotheby's sale, Betsy walks into your law office, tells you the foregoing facts, and explains that if she had known how valuable her mother's small blue-and-white floral bowl was, she would never have included it in the yard sale, and she would never have agreed to let Connie have it. She asks you what her legal options are. What is your advice to Betsy? Please explain all causes of actions and defenses, if any.

SLO - Contracts Final Examination Answer Outline Question Two

Spring 2021

Betsy v. Connie (to avoid the contract) and

Connie v. Betsy (to enforce the contact)

1. Do Betsy and Connie have a valid contract?

A. Formation -yes, all elements established.

B. Valid consideration – yes, a Connie's promise to work for one day at the yard sale in exchange for Betsy's promise to let her select and keep one yard sale item..

2. Can Betsy avoid the contract?

A. Avoidance based on a mistake in the value of the bowl

In contracts, a mistake **is** a belief that is not in accordance with the facts as they exist at the time the contract is entered. Predictions or judgments about future events that turn out to be incorrect are not mistakes under contract law.

A mistake is not required to be expressly stated to provide grounds to avoid a contract. A mistake may consist of an assumption about facts that a party makes without being aware of other alternatives.

The mistake

The issue is whether Betsy and Connie made a mistake about the value of the bowl. Betsy valued the bowl at $35, because she place a $35 sales sticker on it. There is no indication that Connie placed a monetary value on the bowl. Rather, Betsy wanted the bowl for emotional reasons, i.e., to remind her of her deceased friend. Betsy made a serious mistake of value.

The elements

To avoid a contract based on a mistake, the mistake must:

A. Go to a basic assumption on which the contract was made and

B. Have a material effect on the agreed exchange of performances.

Betsy tells you that she never would have let Connie have the bow if she knew how valuable it was. The issue is whether the $35 estimated value of the bowl was a basic assumption of the agreement to exchange the bowl for a day's work at the yard sale, and whether Betsy would have agreed to the exchange if she knew its true value. The answer is yes, given Betsy's statement after the auction.

Who bears the risk of the mistake?

A party will be found to bear the risk of the mistake if:

A. The terms of the contract have expressly allocated the risk to that party,

B. A court has allocated the risk to that party because the allocation is reasonable under the circumstances, or

C. The party has conscious ignorance of the relevant facts .

Conscious ignorance exists where the party knows he has limited knowledge of the relevant facts but treats that limited knowledge as sufficient.

The issue is whether Betsy was consciously ignorant. She thought the bowl was worth only $35, but there are no facts indicating that she was aware of other facts that would suggest the bowl was particularly valuable. Connie, knew that Alice considered the bowl to be "very special,' but there is no indication that Alice ever told her why it was very special. This is a mutual mistake.

3. Mistake as a defense to Connie's cross-complaint against Betsy.

Mistake is also a defense. The foregoing analysis applies to using mistake as a defense.

A. Unilateral mistake

One party's mistake at the time a contract is made, as to a basic assumption of the contract that has a material effect on the agreed performances, excuses the

mistaken party's performance if enforcing the contract despite the mistake would be unconscionable, or the other party had reason to know of the mistake or his fault caused the mistake.

If this is a unilateral mistake and Connie knew or had reason to know the bowl's true value, Betsy would have a valid defense based on mistake.

If this is a unilateral mistake Betsy would also have a compelling unconscionability argument regardless of whether Betsy knew or had reason to know the bowl's true value, because enforcing a contract despite the mistake is unconscionable where it would be oppressive or unreasonably favorable to one party. No party applying common sense would enter into a contract to exchange a $700,000 bowl in return for one day's work at a yard sale. And no party acting fairly would enforce it.

B. Mutual mistake

When there is a mutual mistake, the adversely affected party can void the contract if it meets the criteria discussed above and so long as the party did not assume the risk of the mistake.

3. Likely outcome

When parties fail to expressly allocate the risk of mistake in their agreement, the court will allocate the risk to the party on whom it is most reasonable, considering all of the circumstances of the transaction and in light of the general expectations and practices in the market.

In sales transactions, the usual expectation is that the seller bears the risk of mistakenly underpricing the item sold, and the buyer bears the risk of mistakenly overpaying for it.

The issue is whether it is reasonable to allocate the risk of mistakenly underpricing the bowl to Betsy because she was in the best position to determine its true value before she decided to include it in the yard sale with a $35 sales price sticker.

If Betsy bears the risk of mistake, Betsy cannot avoid the sale or successfully defend against enforcement of the agreement.

1)

THOREN GH w/ STRONG ANALYSIS

E = Ernest

PP = Pete's Publishing

P = Pete

E v. PP

Applicable Law

Generally, common law governs contracts, however, the UCC governs all contracts for the sale of goods. Goods are considered movable, tangible items. If a contract is for both goods and services, the court will apply the law that relates to the primary focus of the contract.

Here, the contract is for E to write books for PP. This is a service so common law will apply

Formation - Is there a valid contract?

A contract is a promise that is enforceable by law. Offer, acceptance and consideration are required to form a binding contract. We first must determine whether a valid contract was formed.

Offer

An offer consists of words or conduct showing intent to commit, with definite and certain terms, which are communicated to the offeree.

Intent

Here, PP intentionally reached out to E to ask him to write and illustrate a series of books about birds. PP clearly had an intent to contract with E.

Terms

On Feb 1, E and PP met and orally agreed to specific terms. Common law requires that the following specific terms are listed in a valid offer: parties, subject, quantity (time), and price. PP and E were the parties agreeing to the terms in the offer, they specifically noted the subject as bird books, the timing of delivery was specifically laid out (first 2 chapters of 1st book by May 1, 2 additionally chapters due every 6 months thereafter), and the price was specified as $100k up front and $100k upon delivery of each complete book.

Communication

A reasonable person in the position of the offeree would need to believe his assent creates a contract. Here, E clearly received PP's communicated offer as he was able to accept it.

Offer Conclusion

PP made an offer to E.

Acceptance

Acceptance is an outward manifestation of agreement to the terms of the offer, in a manner invited and time required. Under common law, the acceptance must be the

"mirror image" of the offer. An acceptance that specifies different terms will be considered a rejection and a counter offer and will terminate original offer.

Here, E responded to PP's offer with concern that PP might not be able to make the last 3 payments. However, P was able to satisfy E's concern by personally guaranteeing E's payments if PP failed to pay (more to come on this separate agreement). Once satisfied with this assurance, E shook hands with P and accepted PP's offer. PP could try to argue that E added a term in his acceptance (that P would personally guarantee E's payments) which therefore acted as a rejection and counter offer and terminated the original offer. However, even if this were the case, E's new offer with the new term was accepted by PP during their following handshake, assent, and payment of initial $100k check.

E accepted PP's offer.

Consideration

Consideration is the bargained for exchange of legal detriment or benefit. An illusory promise will not be a valid contract.

Here, PP was going to pay E for his writing and illustrating services. E may try to argue that the contract was an illusory contract because PP was permitted to cancel the contract at any time. However, this ability for PP to cancel is conditioned on PP's satisfaction which is permissible as long as it is exercised reasonably and in good faith. The exchange for book writing/illustrating for payment is valid consideration.

Contract Formation Conclusion

E and PP formed a valid contract on Feb 1.

Terms of Contract

Modification of Terms

Under common law, modification of the terms of the contract requires new consideration.

On April 1, E called P to explain that he was behind on writing the book due to being stuck in his apartment because of Covid. However, E did not explicitly state that he wanted to change the terms of the contract, he just seemed to hint at the fact that he might not be able to make the first deadline of May 1. At this point P encouraged E to "stay the course" and stay on schedule and check back in on May 1st and there is no mention of any push back from E regarding this plan. Also, there was no consideration even mentioned in this conversation.

The terms of the contract were not successfully modified by E.

Defenses to Contract Formation

Even if offer, acceptance and consideration are all present, a contract may still be unenforceable because there is a defense to the formation of the contract. If a formation defense exists, the contract may be voidable.

Statute of Frauds

Statute of frauds is a potential defense to contract formation. The general rule is that a contract need not be in writing and that oral and written agreements are equally enforceable. But, the statute of frauds requires 6 categories of contracts to be in writing, contain essential terms, and be signed by party seeking to be bound in order to be

enforceable. The categories are as follows: marriage, contracts that take longer than 1 year to perform, land transfers, executors, contract for sale of goods $500 or more, suretyship.

Here, we are dealing with a contract that takes longer than 1 year to perform and was made only orally. The first 2 chapters are due by May 1 (within 3 months), and 2 chapters are due every 6 months thereafter until all 3 books are completed. Given that there are 12 chapters in each books and 3 books total, the books may take up 9 years to complete. E could argue that it is possible for him to finish all 3 books within 1 year and PP is just giving ample time. In this case, the statute of frauds would not apply because the statute of frauds will only apply if there is no possible way to complete the contract within 1 year. PP would argue that they intended 2 chapters to be submitted every 6 months and not earlier. If E can prove that the statute of frauds does not apply since he could possibly complete all the books in 1 year, that would be a great argument for him since it would render the contract void for lack of writing. Since I am advising him on June 15th, he still has a good portion of the 1 year remaining to complete contract performance of all books (until Feb 15 of the following calendar year).

Statute of frauds is a possible defense for E to use.

Has Performance Been Excused?

Conditions

A condition is an event, not certain to occur, that will either trigger (condition precedent) or terminate (condition subsequent) a party's performance obligation. Express condition precedents are satisfied by strict, literal compliance, not substantial performance.

This contract contained express conditions that E must first complete each book to the satisfaction of PP before receiving $100k for each book. PP will argue that the "time is of the essence" clause is a condition precedent to E's payment as well. The explicit "time is of the essence" clause shows the importance of the chapter deadlines. PP will try to argue that this is an express condition precedent since E did not strictly comply by missing the deadline first deadline of May 1. It will be in E's best interest to show that this was a material term rather than an express condition (more to come on this).

If PP successfully proves that the deadlines are explicit condition precedents, then E could argue that they were waived by PP (by P as PP's corporate president) in his April 1 phone call with P. When E expressed concern that he might miss the first deadline due to covid, P encouraged E to keep to the schedule but was okay with not touching base again until the due date of May 1. It seems as though P was possibly okay with E not making the deadline. If P were insistent that E make that deadline he would have likely specified that at this time or set their follow up date for touching base on a day prior to the deadline. A waiver cannot be revoked once it is detrimentally relied upon by the other party so E could argue that he relied on P's lack of concern in this phone call and did not rush to meet the deadline. E could argue that he thought they would just continue the discussion on May 1 if E was not able to complete the first 2 chapters by then. This is not a very strong argument for E though since P did explicityly state that E should "stay the course".

Was There an Anticipatory Repudiation?

An anticipatory repudiation occurs when a person unequivocally states that they will not perform the contract before the time performance is due.

Here, on April 1, E expressed concern that he might not make the deadline. However, he did not unequivocally state that he would miss the deadline.

E did not repudiate the contract on April 1.

Has the duty to perform been discharged?

Discharge of a contract can occur due to an unforeseen event that rises to the level of impossibility, impracticability, or frustration of purpose.

Here, E may try to argue impossibility or frustration of purpose due to covid.

Impossibility

When an impossibility occurs, nobody can get the job done anymore.

Here, E can't get the job done in the way he initially planned, but that doesn't make it impossible. He had planned to travel the country and birdwatch as he illustrated each chapter. Covid left him unable to travel but he could have found other ways to illustrate the chapter. He could have used books or the internet for his research perhaps. Or he could have found people in different locations to help him, perhaps by recording birds in their location for E. Contract completion may have been subjectively impossible from E's perspective but it was not objectively impossible.

Impossibility is not a good argument for E.

Frustration of Purpose

A party's duties are discharged where a party's purpose is frustrated without fault by the occurrence of an event, which the nonoccurrence of which was a basic assumption on which the contract was made.

This contract was not made for E to travel the country while writing the books. It was just made for the writing and illustrating of the books. E had just planned to accomplish the goal by traveling. While covid was not an expected event and did hamper E's ability to perform the contract, it likely did not frustrate the purpose.

Frustration of purpose is not a great argument for E either.

Has the contact been breached?

A breach occurs when one of the parties to a contract does not perform and that performance was not excused. A breach may be minor or material. Under common law, only a material breach will excuse performance. If a 'substantial benefit of the bargain' is delivered, it will likely only be considered a minor breach.

E would try to argue that PP breached the contract by cancelling it. However, the "time was of the essence" clause in their contract will be considered a "material" term and therefore E missing the deadline will be considered a material breach. E will argue that he only slightly deviated from his promised performance since the deadline he missed was only for the first 2 chapters which is small and insignificant when considering that he was to write 36 chapters total. Additionally, E will argue that he was only late by 1 month which is very small and insignificant when considering that the contract could have lasted up to 9 years (2 chapters due every 6 months). The court may ultimately side with PP here because of the "time was of the essence clause" in the contract which put E on notice of how important the deadlines were.

If PP's cancellation is found to be valid, E might have recovery under a quasi contract in order to cover his work for the first 2 chapters.

If E's statute of frauds defense fails him, he will likely be found to have materially breached the contract.

E v P

Applicable Law

rule see supra

Contract formation

rule see supra

Offer

rule see supra

P offered to personally pay E if PP failed to pay.

Acceptance

rule see supra

E accepted P's offer to back up PP's payment. E was satisfied with P's offer, shook hands, and agreed to the PP contract.

Consideration

rule see supra

The court would likely find that there was no consideration to this agreement between P and E.

With no consideration, P and E would not have a valid contract so E would have no grounds to personally sue P.

E may argue that P's personal guarantee of PP's payments was a condition to E agreeing to the contract with PP. However, if this argument is successful, this condition would apply to the E v PP contract and E would still have to grounds to sue P personally.

END OF EXAM

2) THANK YOU. I WAS FEELING DEPRESSED UNTIL I READ YOUR ANSWER. THIS IS WHAT I WANTED. EXCELLENT WORK THROUGH & THROUGH

Question 2:

APPLICABLE LAW:

A contract is an agreement that is legally enforceable. Generally, the Common Law governs contracts, however, the UCC governs all contracts for the sale of goods. Goods are "moveable tangible items." Here, the contract requires that Connie help Betsy with the yard sale and in exchange, Connie may select and keep any on item she wanted. Thus, the Common Law applies and will govern this contract because the contract is for a service and not for goods.

To decide what Betsy's legal option are, one must determine whether or not a valid contract exists.

FORMATION:

Contract formation requires a valid offer, acceptance, and consideration. Here, it is necessary to evaluate whether each of these elements were met in order to form a valid contract.

OFFER:

An offer is words or conduct showing an intent to contract that is communicated to the offeree with definite and certain terms.

Here, an offer is made when Betsy asks Connie to help her with the yard sale and in exchange offers to let Connie select and keep any one item from the sale that had not yet been sold.

Thus, a valid offer exists.

ACCEPTANCE:

An acceptance is an unequivocal assent to the terms of the offer, either verbally or by performance, made by one with the power of acceptance.

Here, the facts state, "Connie readily agreed."

Thus, the offer has been accepted.

CONSIDERATION:

Courts will enforce a promise as a valid contract if it is supported by consideration. Consideration is a bargained for exchange of legal detriment or legal benefit. Additionally, courts do not consider the adequacy of the consideration.

Here, consideration exists because Betsy agrees to allow Connie to select and keep any unsold item from the garage sale in exchange for Connies help with the sale.

Thus, consideration can be established as well.

FORMATION CONCLUSION:

Given the above facts, rules, and analysis, it is likely that a valid contract exists.

DEFENSES TO FORMATION:

Even if an agreement is supported by consideration, a contract may still be unenforceable because there is a defense to formation of the contract.

MISRREPRESENTATION/FRAUD:

If a party induces another to enter into a contract using unintentional misrepresentation, the contract is voidable only if the misrepresentation was material. If a party induces another party into a contract using intentional misrepresentation, the contract is voidable.

Here, there are facts to support both a possible unintentional and an intentional misrepresentation. The facts state that Alice had once shown Connie a small blue and while floral bowl that she described as "very special." When Betsy offered to allow Connie to keep one unsold item for her services, Connie immediately knew she wanted to take the floral bowl home after the yard sale. Although Connie may not have known the actual value of the bowl, it could be argued that she intentionally wanted to keep that bowl because her friend would not have considered it "very special" unless it were worth some monetary value over the $35 that Betsy had priced it at for the yard-sale. There are further facts to indicate that the misrepresentation was intentional because the facts indicate that "Connie moved the small bowl behind larger bowls on the table, hoping that no one would notice it and want to buy it." This fact shows Connie manipulating the scene of the garage sale in order to avoid the clause of their contract that stipulated she could have whichever *unsold* item she wanted after the yard sale was complete. Betsy could argue that the only reason Connie felt the need to hide the bowl was because she knew that it was of some sort of monetary value over $35. Even if it were found that Connie's misrepresentation was unintentional, the contract would likely still be voidable given these facts because the misrepresentation about the bowl's value becomes a material fact when it gets appraised at $721,800, which is much higher than the $35 that Betsy had priced it at prior to the garage sale.

Thus, under a theory of misrepresentation, whether intentional or unintentional, Betsy likely has a defense to the formation of their contract.

MISTAKE:

Generally, there is no relief for a mistake because parties assume the risk of mistake when contracting. However, if only one party knew about the mistake (unilateral mistake) at the time of the contract it will be voidable. Or, if both parties entering into a contract make a mutual mistake about existing facts relating to the agreement, the contract may be voidable if the mistake concerns a basic assumption on which the contract was made, the mistake has a material effect on the contract, and the party seeking avoidance did not assume the risk of the mistake.

Here, the facts indicate a unilateral mistake because Connie was aware that the bowl was "very special" to Alice and Betsy thought it only to be worth $35. Because Connie withheld the information about the bowl from Betsy, it can be argued that there was a unilateral mistake that put Connie at an unfair advantage when selecting the item she wanted to keep after helping with the yard sale.

There are also facts to suggest that it was a mutual mistake because neither Connie nor Betsy were truly aware of the bowl's monetary value. Connie would likely argue that when Alice said it was "very special" she assumed Alice meant "very special" for sentimental reasons and not monetary reasons. Under this theory, in order for the contract to be voidable, the elements for mutual mistake must be met.

Here, the mistake does concern a basic assumption on which the contract was made because if either woman knew of the bowl's actual monetary value, there was no way that it would be traded simply for helping with a garage sale. Also, this mistake would have a material effect on the contract because likely Betsy would ask for more of a consideration

in exchange for the rare, priceless floral bowl and even more likely the bowl would not have been included in the garage sale and therefore would never have been a possible item available for exchange. However, the mutual mistake rule falls apart because Betsy is the party seeking avoidance and she did assume the risk of the mistake by not having any of the items appraised before putting them on sale at a garage sale.

Thus it is likely that only the analysis for a unilateral mistake would apply to deem the contract voidable and not the rules for mutual mistake. Given the above rules and analysis, Betsy may still have a defense to formation through a unilateral mistake.

DEFENSES TO FORMATION CONCLUSION:

Given the above rules, facts, and analysis, it is likely that Betsy may be able to recover under a defense to formation of the contract. It is likely that she will have a valid defense under both intentional or unintentional misrepresentation along with the possibility of a unilateral mistake.

BREACH:

When a promisor is under an absolute duty to perform, and the duty has not been discharged, failure to perform according to the contract terms will constitute a breach of contract. The non-breaching party has to be able to show that they were still willing and able to perform despite the other party's breach.

When considering whether or not a breach has occurred, it is important to consider both express and implied conditions of the contract.

EXPRESS CONDITIONS:

Express conditions make an obligation to perform contingent on the occurrence of some specific event. Strict compliance is required to satisfy an express condition and failure to satisfy a condition will be considered a material breach and excuse the non-breaching party from performance.

Here, it can be argued that there was an express condition that stated Connie could, "select and keep any one item she wanted, provided that it had not already been sold." Although the floral bowl had not been sold by the end of the yard-sale, it can not be determined whether or not that express condition had truly been abided by because Connie hid the bowl behind other bowls hoping that it would go unnoticed at the sale and she could keep it for her own.

Within the rules of express conditions, there is an IMPLIED CONDITION RULE which states that courts will imply a condition of good faith and fair dealing in every contract. Thus if a party acts in bad faith, it will release any obligation or performance by the other party.

Here, it can be argued that Connie was acting in bad faith when she moved the floral bowl combined with the fact that Alice told her the bowl was "very special." If Connie wanted to act in good faith, she should have explained to Betsy the importance of the bowl and asked to keep it prior to the sale and/or moving it during the sale. The fact that she did not ask Betsy and/or disclose these facts implies that she knew of some higher monetary value of the bowl and felt she needed to act in bad faith in order to reap the benefits of the small floral bowl for herself.

Thus, it is likely that under the doctrine of express conditions and the implied condition of good faith and fair dealing, Betsy would be excused from performance and would be able to recover the bowl or its value from Connie.

BREACH CONCLUSION:

When evaluating whether a breach occurred, there are facts to indicate that Connie violated the contract through express and implied conditions which would constitute a breach. Betsy would then have to prove that she was still able to uphold her side of the bargain despite the breach, which she could easily do by allowing for Connie to keep any other unsold item from the garage sale in exchange for her work at the garage sale.

ADVICE TO BETSY:

Although Connie would likely argue that she only had the bowl appraised "on a whim," there is enough evidence to support an action based on defenses to formation as well as a breach of contract. The biggest asset that Betsy has to work with is that Connie withheld information about the bowl being "very special" to Alice alongside Connie hiding it behind other bowls at the garage sale in hopes that it would still be available after the sale which violated a clause of the contract. Connie exhibits bad faith throughout the course of this fact pattern which would likely allow for Betsy to either seek equitable relief under Specific Performance or through Monetary Damages for the monetary value of the bowl.

SPECIFIC PERFORMANCE:

If a legal remedy is inadequate, the non-breaching party may seek specific performance, which orders the breaching party to perform. Specific performance is always available for land sale contract or rare or unique goods, but is not available for a breach of services contract, even if the services are rare or unique.

Here, the facts indicate that Sotheby's Chinese art department identified the bowl as "a rare 15th century Chinese bowl from the Ming Dynasty." After they included it in an art auction, it sold for $721,800. This shows that the bowl was, in fact, a unique good and

therefore because breach can be established in the analysis supra, Betsy is entitled to recover under specific performance.

Thus, it is likely a court would grant an equitable remedy of Specific Performance in this case.

MONETARY DAMAGES:

The purpose of money damages is to compensate the non-breaching party by placing them in the same position where they would have been if there had been no breach.

Here, the facts do indicate that a breach has occurred under the theories supra. Combine with that analysis, it could be argued that Betsy has a case to recover the $721,800 that the bowl sold for from Connie.

Thus, it is likely a court could grant a remedy of monetary damages to Betsy as well. It is more likely that she would have to settle for the monetary damages because at the time she became aware of the bowl's value, it had already been sold at auction likely making Specific Performance no longer an available option.

CONCLUSION:

If Betsy presented this case to me, I would advise her that she likely has a case for Monetary Damages of $721,800 based on the fact that she has defenses to contract formation through theories of misrepresentation and unilateral mistake. And that even if the court ruled a contract had been formed, she would likely have a cause of action for breach based on Connie's actions in Bad Faith through violating both express and implied conditions.

END OF EXAM