

Scott Pearce's
Master Essay Method

Contracts

CONTRACTS APPROACH

Minimalist Approach

- I. Formation
- II. Defenses to Formation
- III. Breach
- IV. Defenses to Breach
- V. Remedies
 - A. Damages
 - B. Restitution
 - C. Contracts Remedies: Reformation and Rescission
 - D. Equity (Specific Performance)
- VI. Defenses to Remedies

Elaborate Approach

A thoughtful applicant needs to make two decisions about any contracts question before doing the analysis:

1. Does the common law or the Uniform Commercial Code apply?
2. Which party is aggrieved? (Who is the "good guy" and who is "bad")

Once you have decided these threshold issues, proceed to make a careful examination of the facts through the following intellectual framework:

- I. Formation: Is there a contract?
 - A. Offer
 - 1. Intent of the offeror to be bound
 - 2. Content of the offer
 - a. Parties
 - b. Subject Matter
 - c. Quantity
 - d. Price
 - 3. Communication of offer to offeree
 - B. Acceptance
 - C. Consideration: a bargained-for exchange

- II. Defenses to Formation
 - A. Incapacity
 - B. Infancy
 - C. Fraud / Duress
 - D. Statute of Frauds
 - E. Mistake

- III. Terms of the Contract
 - A. Express Terms
 - B. Implied Terms
 - 1. Prior Dealings
 - 2. Custom and Usage
 - C. Oral Contracts: Parol Evidence Rule

IV. Rights of Non Contracting Parties

- A. Third Party Beneficiaries (vesting rules)
- B. Assignment of Rights may create third party beneficiaries.
- C. Delegation of Duties always creates third party beneficiaries.

V. Conditions

- A. Satisfaction of Conditions
- B. Discharge of Conditions
- C. Excuse of Conditions

VI. Breach

A. Minor Breach

- 1. Substantial performance of the contract by the breaching party
- 2. Remedy: Contract price minus damages

B. Material Breach

- 1. Some performance, but less than substantial performance
- 2. Remedy: Damages or the right to cure, but no right to terminate the agreement.

C. Total Breach - Two Caveats:

- 1. Divisibility
- 2. Rescission

VII. Defenses to Breach - The most frequently tested are:

- A. Impossibility
- B. Impracticability
- C. Frustration of Purpose
- D. Modification / Novation

VIII. Remedies

- A. Damages: contract price minus part performance
- B. Restitution: payment for the benefit conferred
- C. Reformation: fix the contract
 - 1. Mistake - either mutual or unilateral
 - 2. Misrepresentation - innocent or fraudulent
 - 3. Defenses to Reformation
 - a. Laches
 - b. Sale to B.F.P.
 - c. Parol Evidence Rule
- D. Rescission: cancel the contract
 - 1. Mistake that goes to the heart of the agreement
 - 2. Fraud or misrepresentation
- E. Equity: Specific Performance
 - 1. Inadequate Legal Remedy
 - 2. Definite and Certain Contract
 - 3. Feasibility
 - 4. Mutuality (no longer required in many jurisdictions)
 - 5. Defenses

IX. Defenses to Remedies

- A. Damages are Speculative
- B. Damages are Not Foreseeable
- C. Failure to Mitigate Damages
- D. Laches
- E. Unclean Hands

Contracts / Remedies

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In 2001, Lou was the managing partner of Law Firm in State X and Chris was his paralegal. Realizing that Chris intended to go to law school, Lou invited Chris and his father to dinner to discuss Chris's legal career. Aware of Chris's naive understanding of such matters, Lou, with the authority of Law Firm, made the following written offer, which Chris accepted orally:

- 1) After graduation from law school and admission to the Bar, Law Firm will reimburse Chris for his law school expenses;
- 2) Chris will work exclusively for Law Firm for four years at his paralegal rate of pay, commencing immediately upon his graduation and admission to the Bar;
- 3) Chris will be offered a junior partnership at the end of his fourth year if his performance reviews are superior.

In 2005, Chris graduated from law school and was admitted to the Bar, at which time Law Firm reimbursed him \$120,000 for his law school expenses. Chris and his father invited Lou to dinner to thank him and Law Firm for their support. During dinner, however, Chris advised Lou that it was his decision to accept employment with a nonprofit victims' rights advocacy center. Lou responded that, although Law Firm would miss his contributions, he and Law Firm would nonetheless support his choice of employment, stating that such a choice reflected well on his integrity and social consciousness. Nothing was said about Law Firm's payment of \$120,000 for Chris's law school expenses.

In 2008, Chris's father died. Chris then completed his third year of employment at the advocacy center. Not long thereafter, Law Firm filed a breach-of-contract action against Chris seeking specific performance of the agreement or, alternatively, recovery of the \$120,000. In State X, the statute of limitations for breach-of-contract actions is five years from breach of the contract in question.

What legal and equitable defenses can Chris reasonably present to defeat the relief sought by Law Firm, and are they likely to prevail? Discuss.

Contracts / Remedies – Outline of Issues
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- I. Defenses to Formation
 - A. Chris's "naive understanding"
 - B. Statute of Frauds
 - C. Conclusion

- II. Defenses to Breach by Anticipatory Repudiation
 - A. Waiver
 - B. Acceptance of Alternate Performance
 - C. Conclusion

- III. Defenses to Remedies
 - A. Statute of Limitations
 - B. Laches / Waiver
 - C. Service Contracts are not specifically enforceable.
 - D. Conclusion

Contracts / Remedies – Answer
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Law Firm filed a breach of contract action against Chris for specific performance or damages. This dispute will be governed by the common law, since it involves services. A defendant in a contracts action can present defenses at several stages of the plaintiff's case. Although both parties to the instant case have valid arguments, in the end Chris is likely to prevail.

I. Defenses to Formation

The contract between Chris and Law Firm was formed in 2001. A valid contract requires an offer, acceptance and consideration. Lou, Law Firm's managing partner, offered to reimburse Chris for his law school expenses after graduation, in return for four years of lawyer work at paralegal pay, and a potential junior partnership. Chris accepted this offer orally.

Although Chris does have defenses to the formation of this contract, they are unlikely to prevail.

A. Chris's "naive understanding"

Lou made his offer to Chris, knowing that Chris had only a "naive understanding of such matters." Although the law protects naive people from being defrauded, no facts are present to suggest that Lou was acting with anything other than the best intentions toward his young paralegal.

Chris appears to have been old enough to make a contract. He was smart enough to make it through law school and to pass the bar exam. Chris will not be able to use his own personal qualities to escape possible liability for breach of contract.

B. Statute of Frauds

Contracts that cannot be performed in a year are subject to the statute of frauds, which requires them to be in writing. The problem for Chris is that Law Firm reimbursed him \$120,000 for his law school expenses. Part performance is good enough to satisfy the statute.

C. Conclusion

The contract between Chris and Law Firm was valid. Chris's defenses to formation will fail.

II. Defenses to Breach by Anticipatory Repudiation

When Chris and his father took Lou out to dinner – after Law Firm had paid the \$120,000 – Chris advised Lou that he had decided to accept employment with a nonprofit victims' rights advocacy center. This is an apparent repudiation of the earlier agreement between Chris and Law Firm, since a key element of the contract from Firm's perspective was obtaining Chris's services as a lawyer at a discount for four years.

Despite his apparent total breach, Chris has a credible defense to Law Firm's central claim.

A. Waiver

When one party repudiates a contract, the other party has options. The non-breaching party can sue immediately, can wait until performance is due and sue, or can seek further assurances. In this case, Chris apparently repudiated the agreement in 2005, to the face of Lou, the person he made the deal with in the first place four years earlier.

At the moment of this alleged repudiation, Lou responded that, although Law Firm would miss his contributions, he and Law Firm would support his choice of employment, stating that choosing to work for a nonprofit victim's group reflected well on his integrity and social consciousness. Chris will argue, persuasively, that Lou's statements constitute a clear waiver of the employment provisions of the original agreement. Furthermore, although Law Firm gave up Chris's services at a reduced rate for four years, Chris also gave up something, namely his chance for a junior partnership at the end of his fourth year of work.

Lou's statements to Chris bind Firm, and they constitute a waiver of Chris's repudiation of the agreement. This is Chris's strongest argument against liability, and it is likely to prevail.

B. Acceptance of Alternate Performance

Implicit in Lou's favorable judgment of Chris's integrity and social consciousness is the fact that Law Firm is pleased to have contributed to the education of a socially conscious young lawyer. Chris worked for three years at this nonprofit agency before Law Firm filed its suit. It is possible that, at least indirectly, Law Firm has benefited from possible public knowledge of its contribution to Chris's education. It isn't as if Chris cynically accepted Law Firm's payment for his legal education and then accepted highly lucrative employment with a larger firm or another company.

C. Conclusion

Lou waived Law Firm's claims against Chris at dinner in 2005. Law Firm's breach-of-contract action will fail.

III. Defenses to Remedies

Although Chris is likely to defeat Law Firm on the merits of the contract action, the facts also give Chris strong defenses to the enforcement of the contract.

A. Statute of Limitations

The State X statute of limitations for contracts cases is five years from the breach. Chris repudiated the contract in 2005. Law Firm filed suit in 2008. Thus, Law Firm's action appears to be timely. The statute of limitations does not offer a defense to Chris.

B. Laches / Waiver

Although Law Firm's action is not rendered untimely by the statute of limitations, it is possible that the circumstances as a whole make it seem unfair for Firm to obtain remedies. Even if a trier of fact does not interpret Lou's conduct at the 2005 dinner to constitute a complete waiver to all of Law Firm's claims, it is quite possible that Lou's conduct plus the passage of more than three years render the contract unenforceable. The fact that Law Firm waited until after Chris's father died before filing this action does not make the plaintiff's claim seem any more equitable or persuasive.

As mentioned above, Chris has not acted cynically. Perhaps his idealism is naive, but Law Firm's failure to raise even the slightest objection to Chris's conduct for several years before filing a lawsuit is unreasonable.

C. Service Contracts are not specifically enforceable.

Law Firm seeks specific performance of the 2001 contract. This would require the court to force Chris to work for Law Firm for four years, and perhaps then to judge whether or not Chris's performance was good enough to require Law Firm to extend a junior partnership offer to him.

Forced servitude is forbidden by the Constitution. This fact, combined with the obvious problems with supervision, render Law Firm's prayer for specific performance impossible for any court to award. Of course, Law Firm would be free to seek a damages award of the \$120,000 it paid Chris.

D. Conclusion

Chris is likely to prevail. Lou waived Law Firm's right to performance in 2005. In the unlikely event that Law Firm were to prevail, its remedies would be limited to damages.

Contracts

Copyright February, 2009 – State Bar of California

Developer had an option to purchase a five-acre parcel named The Highlands in City from Owner, and was planning to build a residential development there. Developer could not proceed with the project until City approved the extension of utilities to The Highlands parcel. In order to encourage development, City had a well-known and longstanding policy of reimbursing developers for the cost of installing utilities in new areas.

Developer signed a contract with Builder for the construction of ten single-family homes on The Highlands parcel. The contract provided in section 14(d), “All obligations under this agreement are conditioned on approval by City of all necessary utility extensions.” During precontract negotiations, Developer specifically informed Builder that he could not proceed with the project unless City followed its usual policy of reimbursing the developer for the installation of utilities, and Builder acknowledged that he understood such a condition to be implicit in section 14(d). The contract also provided, “This written contract is a complete and final statement of the agreement between the parties hereto.”

In a change of policy, City approved “necessary utility extensions to The Highlands parcel,” but only on condition that Developer bear the entire cost, which was substantial, without reimbursement by City. Because this additional cost made the project unprofitable, Developer abandoned plans for the development and did not exercise his option to purchase The Highlands parcel from Owner.

Builder, claiming breach of contract, sued Developer for the \$700,000 profit he would have made on the project. In the meantime, Architect purchased The Highlands parcel from Owner and contracted with Builder to construct a business park there. Builder’s expected profit under this new contract with Architect is \$500,000.

What arguments can Developer make, and what is the likely outcome, on each of the following points:

1. Developer did not breach the contract with Builder.
2. Developer’s performance was excused.
3. In any event, Builder did not suffer \$700,000 in damages.

Contracts – Outline of Issues
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- I. Developer's arguments that Developer did not breach the contract with Builder.
 - A. Contract formation: offer, acceptance and consideration are present
 - B. Contract terms: Interpretation of Section 14(d)
 - 1. Plain language of Section 14(d)
 - 2. Parol Evidence Rule: "complete and final agreement" provision
 - 3. Builder acknowledged that the reimbursement provision was implicit in 14(d)
 - C. Conclusion: Developer did not breach the contract with Builder.

- II. Developer's argument that Developer's performance was excused
 - A. Frustration of Purpose / Commercial Impracticability
 - B. Conclusion: Developer's performance was excused.

- III. Developer's argument that Builder did not suffer \$700,000 in damages
 - A. Builder is going to help Architect develop The Highlands parcel and profit \$500,000
 - B. Conclusion: Builder did not suffer \$700,000 in damages.

Contracts

Copyright July, 2006 – State Bar of California

On Monday, Resi-Clean (RC) advertised its house cleaning services by hanging paper handbills on doorknobs in residential areas. The handbills listed the services available, gave RC's address and phone number, and contained a coupon that stated, "This coupon is worth \$20 off the price if you call within 24 hours and order a top-to-bottom house-cleaning for \$500.

Maria, a homeowner, responded to the handbill, phoned RC on the same day, spoke to a manager, and said she wanted top-to-bottom house cleaning as described in the handbill. Maria said, "I assume that means \$480 because of your \$20-off coupon, right?" The RC manager said, "That's right. We can be at your house on Friday." Maria said, "Great! Just give me a call before your crew comes so I can be sure to have someone let you in."

Within minutes after the phone conversation ended, the RC manager deposited in the mail a "Confirmation of Order" form to Maria. The form stated, "We hereby confirm your top-to-bottom house cleaning for \$500. Our crew will arrive at your house before noon on Friday. You agree to give at least 48 hours advance notice of any cancellation. If you fail to give 48 hours notice, you agree to pay the full contract price of \$500."

About an hour later, maria sent RC an email, which RC received, stating, "I just want to explain that it's important for your cleaning crew to do a good job because my house is up for sale and I want it to look exceptionally good."

On Thursday evening before RC's cleaning crew was to show up, Maria accepted an offer for the sale of her house. The next morning, Friday, at 10:00 a.m., Maria sent RC another email stating, "No need to send your crew. I sold my house last night, and I no longer need your services." By that time, however, RC's crew was en route to Maria's house.

At 10:30 a.m. on Friday, Maria received RC's Confirmation of Order form in the mail. At 11:00 a.m., RC's crew arrived, prepared to clean Maria's house. Maria explained that she no longer needed to have the house cleaned and sent the crew away.

RC's loss of profit was \$100, but RC billed Maria for \$500.

Maria refused to pay.

Has Maria breached a contract with RC, and, if so, how much, if anything, does Maria owe RC? Discuss.

Contracts – Outline of Issues
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- I. Has Maria breached a contract with RC?
 - A. Formation
 - 1. Offer and Acceptance
 - 2. Consideration
 - 3. RC's "Conformation of Order"
 - 4. Maria's Email Message
 - 5. Conclusion
 - B. Breach - Maria's repudiation
 - C. Maria's Defense to Breach - Frustration of Purpose
 - D. Conclusion - Maria is liable for breach.

- II. How much, if anything, does Maria owe RC?
 - A. RC billed Maria \$500
 - B. RC's lost profit was \$100
 - C. Conclusion

CONTRACTS / REAL PROPERTY
Copyright July, 2005 – State Bar of California

Developer acquired a large tract of undeveloped land, subdivided the tract into ten lots, and advertised the lots for sale as “Secure, Gated Luxury Home Sites.” Developer then entered into a ten-year, written contract with Ace Security, Inc. (“ASI”) to provide security for the subdivision in return for an annual fee of \$6,000.

Developer sold the first lot to Cora and quickly sold the remaining nine. Developer had inserted the following clause in each deed:

Purchaser(s) hereby covenant and agree on their own behalf and on behalf of their heirs, successors, and assigns to pay an annual fee of \$600 for 10 years to Ace Security, Inc. for the maintenance of security within the subdivision.

Developer promptly and properly recorded all ten deeds.

One year later, ASI assigned all its rights and obligations under the security contract with Developer to Modern Protection, Inc. (“MPI”), another security service. About the same time, Cora’s next-door neighbor, Seller, sold the property to Buyer. Seller’s deed to Buyer did not contain the above-quoted clause. Buyer steadfastly refuses to pay any fee to MPI.

MPI threatens to suspend its security services to the entire subdivision unless it receives assurance that it will be paid the full \$6,000 each year for the balance of the contract. Cora wants to ensure that she will not be required to pay more than \$600 a year.

On what theories might Cora reasonably sue Buyer for his refusal to pay the annual \$600 fee to MPI, what defenses might Buyer reasonably assert, and what is the likely outcome on each of Cora’s theories and Buyer’s defenses? Discuss.

Contracts / Real Property – Outline of Issues
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- I. Cora v. Buyer
 - A. Real Property Theories
 - 1. Breach of Covenant
 - a. Intent
 - b. Touch and Concern
 - c. Notice
 - d. Privity
 - 2. Equitable Servitude
 - 3. Implied Reciprocal Servitude
 - 4. Defenses
 - 5. Conclusion
 - B. Contract Theory - Intended Third Party Beneficiary
- II. Conclusion

Contracts

Copyright February, 2005 – State Bar of California

PC manufactures computers. Mart operates electronics stores.

On August 1, after some preliminary discussions, PC sent a fax on PC letterhead to Mart stating:

We agree to fill any orders during the next six months for our Model X computer (maximum of 4000 units) at \$1,500 each.

On August 10, Mart responded with a fax stating:

We're pleased to accept your proposal. Our stores will conduct an advertising campaign to introduce the Model X computer to our customers.

On September 10, Mart mailed an order to PC for 1,000 Model X computers. PC subsequently delivered them. Mart arranged with local newspapers for advertisements touting the Model X. The advertising was effective, and the 1,000 units were sold by the end of October.

On November 2, Mart mailed a letter to PC stating:

Business is excellent. Pursuant to our agreement, we order 2,000 more units.

On November 3, before receiving Mart's November 2 letter, PC sent the following fax to Mart:

We have named wholesaler as our exclusive distributor. All orders must now be negotiated through Wholesaler.

After Mart received the fax from PC, it contacted Wholesaler to determine the status of its order. Wholesaler responded that it would supply Mart with all the Model X computers that Mart wanted, but at a price of \$1,700 each.

On November 15, Mart sent a fax to PC stating:

We insist on delivery of our November 2 order for 2000 units of Model X at the contract price of \$1,500 each. We also hereby exercise our right to purchase the remaining 1,000 units at that contract price.

PC continues to insist that all orders must be negotiated through Wholesaler, which still refuses to sell the Model X computers for less than \$1,700 each.

1. If Mart buys the 2,000 Model X computers ordered on November 2 from Wholesaler for \$1,700 each, can it recover the \$200 per unit difference from PC? Discuss.
2. Is Mart entitled to buy the 1,000 Model X computers ordered on November 15 for \$1,500 each? Discuss.

Contracts – Outline of Issues
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- I. Mart v. PC
 - A. Formation and Performance
 - 1. Offer
 - 2. Acceptance
 - B. Breach - or lawful Revocation of Merchant's Firm Offer?
 - C. Remedies
 - 1. Damages
 - a. November 2 order
 - b. November 15 order
 - 2. Restitution
 - 3. Specific Performance
- II. Conclusions
 - A. A binding contract was formed on September 10
 - B. Mart can recover the \$200 per unit difference from PC on the Nov. 2 order
 - C. Mart is entitled to buy the 1,000 Model X computers ordered Nov. 15 for \$1,500 each

CONTRACTS - REMEDIES
Copyright July 2002 State Bar of California

Travelco ran a promotional advertisement which included a contest, promising to fly the contest winner to Scotland for a one-week vacation. Travelco's advertisement stated: "The winner's name will be picked at random from the telephone book for this trip to 'Golfer's Heaven.' If you're in the book, you will be eligible for this dream vacation!"

After reading Travelco's advertisement, Polly had the telephone company change her unlisted number to a listed one just in time for it to appear in the telephone book that Travelco used to select the winner. Luckily for Polly, her name was picked, and Travelco notified her. That night Polly celebrated her good fortune by buying and drinking an expensive bottle of champagne.

The next day Polly bought new luggage and costly new golfing clothes for the trip. When her boss refused to give her a week's unpaid leave so she could take the trip, she quit, thinking that she could look for a new job when she returned from Scotland. After it was too late for Polly to retract her job resignation, Travelco advised her that it was no longer financially able to award the free trip that it had promised.

Polly sues for breach of contract and seeks to recover damages for the following: (1) cost of listing her telephone number; (2) the champagne; (3) the luggage and clothing; (4) loss of her job; and (5) the value of the trip to Scotland.

1. What defenses should Travelco assert on the merits of Polly's breach of contract claim, and what is the likely outcome? Discuss.
2. Which items of damages, if any, is Polly likely to recover? Discuss.

CONTRACTS - REMEDIES
Copyright July 2002 - Scott F. Pearce, Esq.
Outline

- I. Travelco's Defenses to Polly's Breach of Contract Claim
 - A. Defenses to Formation
 - 1. The promotional advertisement was not an offer.
 - 2. The 'agreement' between Travelco and Polly lacked Consideration.
 - 3. The Scotland trip was a gift, nothing more - no bargained for exchange.
 - 4. Polly's 'reliance' did not create a contract.
 - B. Defense to Breach: Travelco's promise to make a gift was freely revocable.
 - C. Defense to Damages: Discussed in Part II below.
 - D. Conclusion: Travelco is not liable to Polly for breach of contract.

- II. Travelco's Defenses to Damages
 - A. Rule: Compensatory and Foreseeable Consequential Damages are Available.
 - B. Polly's Damages Claims
 - 1. The cost to list her phone number: not foreseeable in any event.
 - 2. The champagne: Polly presumably enjoyed it, which is benefit enough.
 - 3. Luggage and Clothes: foreseeable, but she has a duty to mitigate by returning them.
 - 4. Lost Job: not foreseeable in any event.
 - 5. Value of the Trip: probably not recoverable; better to pursue specific performance (outside the scope of the question).
 - C. Conclusion: Travelco did not breach a binding contract and is not liable for damages.

CONTRACTS / REMEDIES
Copyright February 2002 - State Bar of California

Berelli Co., the largest single buyer of tomatoes in the area, manufactures several varieties of tomato-based pasta sauces. Berelli entered into a written contract with Grower to supply Berelli its requirements of the Tabor, the only type of tomato Berelli uses in its pasta sauces. The Tabor tomato is known for its distinctive flavor and color, and it is particularly desirable for making sauces. The parties agreed to a price of \$100 per ton.

The contract, which was on Berelli's standard form, specified that Grower was to deliver to Berelli at the end of the growing season in August all Tabor tomatoes that Berelli might require. The contract also prohibited Grower from selling any excess Tabor tomatoes to a third party without Berelli's consent. At the time the contract was executed, Grower objected to that provision. A Berelli representative assured him that although the provision was standard in Berelli's contracts with its growers, Berelli had never attempted to enforce the provision. In fact, however, Berelli routinely sought to prevent growers from selling their surplus crop to third parties. The contract also stated that Berelli could reject Grower's tomatoes for any reason, even if they conformed to the contract.

On August 1, Berelli told Grower that it would need 40 tons of Tabor tomatoes at the end of August. Grower anticipated that he would harvest 65 tons of Tabor tomatoes commencing on August 30. Because of the generally poor growing season, Tabor tomatoes were in short supply. Another manufacturer, Tosca Co., offered Grower \$250 per ton for his entire crop of Tabor tomatoes. On August 15, Grower accepted the Tosca offer and informed Berelli that he was repudiating the Berelli/Grower contract.

After Grower's repudiation, Berelli was able to contract for only 10 tons of Tabor tomatoes on the spot market at \$200 per ton, but has been unable to procure any more. Other varieties of tomatoes are readily available at prices of \$100 per ton or less on the open market, but Berelli is reluctant to switch to these other varieties. Berelli believes that Tabor tomatoes give its sauces a unique color, texture and flavor. It is now August 20. Berelli demands that Grower fulfill their contract in all respects.

1. What remedies are available to Berelli to enforce the terms of its contract with Grower, what defenses might Grower reasonably assert, and what is the likely outcome on each remedy sought by Berelli? Discuss.
2. If Berelli elects to forgo enforcement of the contract and elects instead to sue for damages, what defenses might Grower reasonably assert, and what damages, if any, is Berelli likely to recover? Discuss.

CONTRACTS / REMEDIES
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Outline

- I. Remedies available to Berelli to enforce the contract with Grower
 - A. Berelli's theory of liability: Breach of Contract
 - 1. Formation: UCC Contract
 - 2. Defenses to Formation
 - 3. Breach: Grower's August 15 Repudiation
 - 4. Defenses to Breach
 - 5. Conclusion: Berelli will not be entitled to remedies.
 - B. Berelli's Remedies
 - 1. Replevin
 - 2. Specific Performance
 - a. Inadequacy of Legal Remedy
 - b. Definite and Certain Contract
 - c. Feasibility
 - d. Mutuality
 - e. Defenses - Discussed below
 - 3. Defenses to Remedies
 - a. Unclean Hands [misrepresentation]
 - b. Estoppel [re excess tomatoes]
 - c. Unconscionability
 - C. Conclusion

- II. Grower's Defenses and Berelli's Damages
 - A. Fraud
 - B. Failure of Consideration
 - C. Unconscionability
 - D. Damages
 - 1. Standard Measure UCC Damages
 - 2. Consequential Damages
 - 3. Punitive Damages
 - E. Conclusion

CONTRACTS / REMEDIES

Copyright February 2001 - State Bar of California

Owens, a homeowner, approached Carter, a licensed contractor, to discuss construction of a new garage attached to Owens' home. After several meetings, Owens and Carter signed the following contract.

Carter will build a two-car garage, with overall dimensions of 30' (width) by 25' (depth). Included within the overall dimensions will be a storage area at the rear. Storage area to be 30' by 4', and divided from the remainder of the garage by a wall containing a door. Wooden siding, paint, and roof will be matched to Owens' home. Carter will commence work on March 15 and will complete job no later than April 30. Owens agrees to pay \$8,500 upon completion. The time for performance of these obligations shall be of the essence.

The contract was signed on January 15, and Carter arrived on the job site on March 15 to begin work. Several weeks later, Carter learned that roofing shingles of the exact type and color used on Owen's home were difficult to obtain. Therefore, he used shingles made of other material which were of even higher quality than those originally planned but which, although very close, did not precisely match those on the roof of Owens' home.

Carter completed the garage on May 10 and presented Owens with a bill in the amount of \$8,500. Later on the same evening, Owens placed his car in the garage only to learn that the length of his car did not permit the garage door to close. Upon closer inspection he discovered that the storeroom in the back of the garage was 30' by 6', two feet deeper than planned. As a result, the garage parking area was only 19' in depth. While this would be sufficient for most automobiles, it was several inches too short to accommodate Owens' large car.

The cost of removing and relocating the dividing wall would be \$800. The cost of removing and replacing the shingles with others matching Owen's home would be \$2,200. Owens has refused to pay any part of Carter's bill, citing as reasons Carter's failure to (1) complete the job by April 30; (2) use matching shingles; and (3) build a garage and storeroom of the dimensions called for by the contract.

What are Carter's rights and liabilities? Discuss.

CONTRACTS / REMEDIES
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Outline

- I. Carter's Rights: Contract Theory of Liability
 - A. Formation: No Problems
 - B. Breach by Owens: Refusal to Pay
 - C. Owens' Defense to Breach: Carter's Breaches
 - 1. The storage area was the wrong size.
 - 2. The project was finished 10 days late.
 - 3. The shingles do not match perfectly.
 - D. Carter's Defenses to Breach
 - 1. Matching shingles were difficult to obtain.
 - 2. The substitute shingles were higher quality.
 - 3. The delay may have been caused by the unanticipated shingle problem.
 - 4. Carter has no defense to his storage area size mistake.
 - E. Conclusion: Both parties are in breach.
- II. Carter's Remedies - Restitution
 - A. The Contract Price: \$8,500
 - B. Carter's recovery reduced by the cost to relocate the storage wall: \$800
 - C. Carter's recovery may be reduced by the cost to replace the shingles: \$2,200
 - D. Carter's recovery may be reduced by some amount for the late completion.
 - E. Conclusion: Carter gets at least \$5,500 - less any damages for the delay.

CONTRACTS

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In January, in response to an inquiry, Seller sent Buyer a letter offering to sell 10,000 tires, assorted sizes to be selected by Seller and delivered at the rate of 1,000 each month for ten months. This letter stated the price for each size and specified that payment was due on delivery of each shipment. Buyer sent a letter agreeing to purchase 10,000 tires, assortment to be specified by Buyer. Buyer's letter contained its standard provision that any disputes arising under the agreement were to be resolved by commercial arbitration. The letter also contained Buyer's specification of the size assortment for the first month's shipment of tires.

On February 1, Seller's driver arrived with the first installment, which consisted of the assortment specified in Buyer's letter. The driver left the tires without asking for payment. Four days later Buyer sent Seller a check for the first installment and a letter specifying the assortment for the second installment. On March 1, Seller's driver arrived with the second installment, again containing the assortment specified in Buyer's letter. Again, the driver left the tires without getting payment.

Three days later, Buyer sent a check for the second installment and specifications for the third installment. On April 1, Seller's driver arrived, but the assortment was not exactly what Buyer had specified. Buyer accepted the tires anyway and seven days later sent a check for third installment, along with specifications for the fourth installment.

On May 1, Seller's driver arrived, again with an assortment that was not exactly what Buyer had specified. Buyer agreed to take delivery, but Seller's driver insisted on payment. When Buyer was unable to pay, Seller's driver refused to leave the tires and took them back to Seller's warehouse.

Buyer called Seller to complain about the driver's refusal to leave the tires and insisted upon immediate redelivery. Buyer said he would pay "as usual, a few days after delivery." Seller refused and told Buyer, "If you don't like it, why don't you take me to arbitration?" Buyer replied, "Look, I have no intention of arbitrating this dispute. But I'm not accepting that last shipment unless it meets my specifications precisely and unless you allow me the same leeway for payment as with past shipments."

Seller sued Buyer for breach of contract. Buyer immediately filed a counterclaim against seller and moved the court for an order staying the suit and compelling arbitration. Seller opposed the motion.

1. How should the court rule on the motion for an order staying the suit and compelling arbitration? Discuss.
2. What are the rights and obligations of Seller and Buyer, and who should prevail on the merits of the litigation? Discuss.

CONTRACTS

Outline

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- I. The court should grant Buyer's motion to stay the suit and compel arbitration.
 - A. This is a U.C.C. contract between merchants.
 - B. Offer and Acceptance
 - C. U.C.C. 2-207
 - D. Conclusion

- II. The rights and obligations of Seller and Buyer
 - A. Formation
 - B. Breach
 - 1. Seller's Claim: Buyer must make immediate payment.
 - 2. Buyer's Claims:
 - a. Seller should give Buyer leeway for payment.
 - b. Seller should supply Buyer with the goods Buyer specifies.
 - C. Remedies
 - D. Conclusion

CONTRACTS - TORTS
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In February 1997, Carrier, a trucking company, and Maker, a manufacturer, negotiated an agreement under which Carrier promised to provide for two years all the transportation services required by Maker in exchange for monthly payments based on the number of packages transported. In response to Carrier's concerns over proposed legislation that would restrict its ability to use more efficient "triple-trailer" trucks, the parties agreed that Carrier could terminate the contract if such legislation were enacted. No such law was ever passed.

Carrier drafted a document embodying the agreed terms and, on March 1, 1997, sent two signed copies to Maker with a request that Maker sign and return one copy. Although Maker did not sign the document, the parties immediately began doing business according to its terms. During the next six months, Maker paid all of Carrier's monthly invoices on time. During the same period, Carrier declined two potentially lucrative offers from other manufacturers because performance of the agreement with Maker required most of Carrier's capacity.

In September 1997, Maker began to have concerns about the cost of Carrier's services. Maker sent a letter to Transport, one of Carrier's competitors, describing Maker's needs, Maker's agreement with Carrier, and the amount charged by Carrier. Transport offered to provide comparable transportation services at a lower cost. On September 20, Maker sent a fax to Carrier stating that Maker would no longer use Carrier's services as of November 1. Carrier responded with a fax to Maker which stated that Maker had no right to terminate the contract. On September 21, Maker suspended all business with Carrier and began doing business with Transport. Maker also refused to pay an invoice submitted by Carrier for transportation services rendered in September.

What, if any, rights and remedies does Carrier have against:

1. Maker? Discuss
2. Transport? Discuss

CONTRACTS - TORTS
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Outline

I. Carrier v. Maker: Breach of Common Law Contract

- A. Formation: Requirements Contract
- B. Defenses to Formation
 1. Statute of Frauds
 2. Vagueness as to Quantity and Price
 3. Illusory Promise
 4. Conclusion: The Contract is Valid
- C. Breach by Anticipatory Repudiation
- D. Defenses to Breach
- E. Remedies
 1. Damages
 - a. Expectation Damages
 - b. Consequential Damages
 - c. Punitive Damages
 2. Restitution
 3. Equity: Specific Performance
- F. Conclusion

II Carrier v. Transport

- A. Tortious Interference
 1. Transport knew about the contract between Carrier and Maker.
 2. Transport intentionally interfered with the Carrier - Maker contract.
 3. Damages
- B. Defense: Business Privilege
- C. Remedies
 1. Damages (actual and punitive)
 2. Restitution
 3. Equity: Injunctive Relief
- D. Conclusion

CONTRACTS

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On June 1, 1994, Owner signed a contract with Ace Painting to paint the exterior of Owner's house by September 1, 1994 for a contract price of \$4,700. On July 1, Owner called Ace by telephone and told Ace that it was particularly important that the house be painted by September 1 because his employer had transferred him and he was putting the house up for sale.

The weather was unusually rainy, and Ace fell behind on all of its painting jobs. Ace could have hired additional painters or subcontracted some of its jobs to stay on schedule, but Ace would have lost money on several jobs. Ace did not finish painting Owner's house until September 20. As a consequence, Owner did not list the house for sale until September 21.

The house stood empty, and Owner made no effort to rent or otherwise make use of it, until it was finally sold in May 1995. Most realtors in the area agree, and would testify, that the "selling season" in the area runs from May 1 to October 1 and that Owner's house would have been more likely to be sold in 1994 if it had been painted and ready to show by September 1.

Owner has refused to pay Ace for the work. Ace has sued Owner for \$4,700. Owner denies liability and counterclaims against Ace for \$6,000, asserting that the delay in Ace's completion was the cause of his missing the "selling season." The interest payments on the mortgage on Owner's house from October 1994 to May 1995 totaled \$6,000.

What claims and defenses may Owner and Ace reasonably assert against one another, and what is the likelihood of success of each? Discuss.

CONTRACTS
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Outline

- I. Owner v. Ace
 - A. Owner's Claim: Contract Theory
 - 1. Breach of Contract
 - 2. Consequential Damages
 - B. Ace's Defenses
 - 1. Defenses to Formation
 - 2. Defenses to the Modification
 - 3. Defenses to Breach
 - a. Impossibility
 - b. Commercial Impracticability / Frustration of Purpose
 - 4. Defenses to Remedies
 - a. Foreseeability
 - b. Failure to Mitigate
 - C. Conclusion
- II. Ace v. Owner
 - A. Ace's Claims: Breach, Restitution
 - B. Owner's Defenses
 - C. Conclusion

CONTRACTS

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Neptune is an upscale seafood restaurant that opened in a convenient downtown location six months ago. It has become well known for the quality of its food and service. It has several dishes featuring salmon that are particularly popular with patrons.

Neptune entered into a valid written contract with Seafood Uptown Providers (SUP) under which SUP agreed to supply Neptune with 250 pounds per week of fresh Pacific salmon at \$4.00 per pound for the next year.

Three months after the making of the contract, a large widely publicized oil spill occurred in Pacific coast waters. The spill greatly reduced the catch of salmon. Salmon began selling on the open market for at least \$5.00 per pound. SUP then told Neptune that it would supply salmon only at a price of \$6.00 per pound. Neptune refused to pay more than the contract price. In fact, SUP has found a new customer willing to pay \$6.00 per pound, and it is selling its entire supply (about 450 pounds of salmon per week) to that customer.

Neptune, faced with the prospect of having to obtain salmon for its daily restaurant menu and also for special events that it caters, found a supplier willing to meet about one-half of Neptune's weekly requirement for salmon at \$5.00 per pound. With further effort, Neptune might have filled a portion of the remaining weekly requirement for salmon at \$6.00 per pound, but it was uncertain to what extent salmon would continue to be obtainable and how high the price might go. Neptune decided instead to reduce its menu offerings of salmon and to cancel several catering contracts.

Within a month after reducing its menu offerings of salmon, Neptune experienced a 25% decline in its restaurant business from the previous month. It also had a 75% decline in new bookings for catering jobs.

Neptune still has the immediate and long-term problem of how to obtain a reliable source of salmon, and wants to sue SUP.

What rights and remedies does Neptune have against SUP, what damages, if any, might Neptune recover, and what defenses, if any, should SUP assert? Discuss.

CONTRACTS
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Outline

- I. Neptune's Rights: Contract
 - A. The contract was valid.
 - B. The UCC applies to these merchants.
 - C. SUP breached the contract.

- II. Neptune's Remedies
 - A. Expectation Damages
 - B. Consequential Damages
 - 1. 25% decline in restaurant business
 - 2. 75% decline in new bookings for catering jobs
 - C. Neptune's Duty to Mitigate
 - D. Specific Performance

- III. SUP's Defenses
 - A. Defenses to Breach
 - 1. Impossibility
 - 2. Impracticability
 - B. Defenses to Specific Performance

CONTRACTS

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Technical University (Tech) solicited an offer from Data Equipment Company (Data), headquartered in State A, for the supply, installation and testing of air-quality monitoring equipment for Tech's floating Ocean Research Station in the mid-Pacific Ocean. Identical equipment, uninstalled, was available for \$20,000 from several of Data's competitors, but only Data had the means to install and test the equipment in the mid-Pacific Ocean.

At a meeting on April 3, 1990, Data's president, Dan, offered to do the job for \$28,000 by July 30, 1991, and Tech accepted. On April 4, 1990, Tech sent Data a letter confirming their April 3 discussions.

One month later, Tech called Data to ask if the work could be completed by May 1, 1991, so that Tech could participate in a U.S. Navy experiment. Dan said that the work would be completed by May 1, 1991, at no additional charge.

On May 15, 1990, Data signed a lucrative contract with a major oil company and wanted to have all installation personnel available for work on that contract. Then, on June 1, 1990, Dan informed Tech by telephone that Data would not be able to install the air-quality monitoring equipment at all.

On June 15, 1990, after having searched unsuccessfully for a substitute to supply, install and test the equipment, Tech sued Data in State A court for specific performance, demanding that Data be required to supply, install and test the equipment by May 1, 1991.

What legal arguments could Data raise as defenses, and how should the court rule on each of them? Discuss.

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Outline

- I. Data's Defense to Formation: The Statute of Frauds
 - A. The one year rule requires a writing.
 - B. Data did not sign the confirming letter.

- II. Data's Defenses to the Modification
 - A. The modification lacked consideration.
 - B. The modification was not in writing.

- III. Data's Defense to Breach: Tech's Suit is Premature.

- IV. Data's Defenses to Specific Performance
 - A. Legal remedies are adequate.
 - B. The court lacks jurisdiction to order performance.
 - C. The contract is for personal services.
 - D. Conclusion

CONTRACTS

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Without seeking bids from other contractors, Owen entered into a written contract on March 2 with Cobb, a contractor, whereby Cobb was to remodel Owen's house for \$20,000. The remodeling was such that Owen could continue to live in his home while Cobb worked on it.

Owen paid Cobb \$2,000 when the contract was signed. The contract calls for payment of the \$18,000 balance upon completion of the work and for completion by November 1 of the same year. The contract also provides that in the event of delay in completion, the amount due Cobb from Owen would be reduced by \$500 for each month, or part thereof, of delay.

When Cobb had completed 50% of the work, he informed Owen that he would not finish the remodeling at the contract price. He told Owen that he had underestimated labor costs by \$4,000 as a result of a mathematical error made by his bookkeeper. Owen refused to pay a higher amount, and Cobb refused to proceed with the remodeling.

Owen promptly obtained bids from two other contractors for completion of the work. He accepted the lower of the two bids - \$15,000. Included in this bid was \$1,500 to remove and replace paneling Cobb had installed in the family room. Cobb had installed a much lighter weight paneling than called for by the contract. The substitute contractor completed the remodeling, including the replacement of the paneling, on December 1.

Cobb sued Owen to recover the value of work he did up to the time he stopped performance. Owen counterclaimed for damages stemming from Cobb's refusal to fulfill the contract and for \$500 based on late completion of the work.

After receiving evidence of the above facts, the trial judge, sitting without a jury, ruled:

1. Cobb had breached the contract but could recover \$8,000 on his claim.
2. Cobb's recovery would be offset by \$5,000, as damages owing to Owen based on Cobb's breach of the contract.
3. Owen could not recover any amount based on the liquidated damages clause.

Were the rulings of the trial judge correct? Discuss.

CONTRACTS
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Outline

- I. Review of the Contract Claims
 - A. Formation
 - B. Defense to Formation: Cobb's Unilateral Mistake
 - C. Breach
 - 1. Owen paid Cobb.
 - 2. Cobb refused to finish the job.
 - D. Defense to Breach: Severe Impracticability
- II. Remedies
 - A. Ruling #1
 - 1. Cobb had breached the contract.
 - 2. Cobb could recover \$8,000 on his claim.
 - B. Ruling #2: \$5,000 damages to Owen
 - 1. Owen sought substitute performance.
 - 2. Owen is entitled to expectation damages.
 - C. Ruling #3: Owen could not recover liquidated damages.
 - 1. Delay damages are difficult to calculate.
 - 2. The clause appears to be a reasonable estimate.
 - D. Conclusion