Aspen Casebook Series

ANSWERS TO TEST YOURSELF QUESTIONS

F O R U S E W I T H

Contracts

A Modern Coursebook

(Second Edition)

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About this Document

This document is to be used in conjunction with *Contracts: A Modern Coursebook* (2019 2nd ed.) by Ben Templin. The documents contain answers to the *Test Yourself* questions found in the coursebook. You should first try to work through the problems on your own and then compare your answer to the ones found in this document. If you did not have the correct answer, go back and review the material.

Part I: Introduction and Contract Formation

Chapter 1. Introduction to Contracts

Answer to the Question on Page 10 (2nd ed.)

This problem is based on *Abrams v. Ill. College of Podiatric Medicine*, 395 N.E.2d 1061 (1979). The court held that the student evaluation provision in the handbook contains no promise.

The question asked you to analyze each of the three concepts (or elements) needed to establish that a promise was made.

1. Manifestation of Intention

The college clearly manifested an intention because it communicated its intention to others by publishing the statement in its student handbook and making that available to students.

2. To Act or Refrain from Acting

The statement contains language that identifies the following actions: (1) to periodically inform the student of his progress, and (2) to inform the student soon after midterm examinations of his standing with recommendations for improvement.

3. So Made as to Justify a Promisee in Understanding That a Commitment Has Been Made

The problem with this statement is that the student was not justified in understanding that a commitment was made. Each statement is qualified with words like "it is desirable" and "should." The objective meaning of these words indicates that the actions are things that ought to happen but do not establish a requirement that the school commits to performing those actions. Consequently, the "Evaluation of the Student" clause is merely a statement of intention, not a promise.

Note: It is common for first year law students to ask why a discussion of all three elements is needed if one of the elements can be shown not to exist. Even though you probably saw this issue is resolved on the third element, there is a useful educational purpose in asking you to discuss each element. First, it gives you practice in proving or disproving each element and makes you more familiar with the rule. Second, it creates discipline to make sure that you work through the facts methodically, always looking to apply every step of the rule. This thoroughness helps create the disciplined mind of an attorney.

Answer to the Question on Page 18 (2nd ed.)

Contract Formation

This part of the framework would cover the formation process where the two parties – through the use of the website – formed mutual assent to a bargain – i.e., the sale of a used casebook in exchange for a payment of $100.

Defenses and Excuses

The law student could rescind the agreement by pleading the defense of *misrepresentation* since the seller's statement about the marks and highlighting was clearly false. Such a statement would reasonably induce a conscientious student to purchase the book. Moreover, the statement was a material part of the bargain since the book is rendered virtually worthless by the marks and highlighting.

Consequently, one approach that the buyer could take is to rescind the agreement because of the misrepresentation. This would result in a return (restitution) of her money. However, the law student may have a better recovery by showing a breach of the agreement.

Contract Interpretation and Implication

Here, there is no apparent ambiguity in the representation that the seller made, so we need to go no further than the ordinary meaning of the language to establish that the seller had a duty to provide a used book with few marks or highlighting.

The implication material (Chapter 23) discusses warranties and allows us to also establish that the seller had certain duties under the Uniform Commercial Code Article 2 as to the sale of goods. Both an express warranty exists and – if the seller is deemed a merchant – the implied warranty of merchantability.

Breach, Conditions, and Anticipatory Repudiation

The seller delivered a book that did not conform to the representations made. Consequently, the seller breached the perfect tender rule under Uniform Commercial Code (UCC) Article 2. (Chapter 24). This gives the buyer the right to reject the goods.

Remedies

Under the UCC remedies, the buyer is entitled to her expectation interest. In other words, she should be put in the same position as if the contract had been performed.

At contract formation, the student's expectation was to receive a used book that was like new with few marks or highlighting for $100; therefore, we should award her money damages in an amount that puts her in that position.

Under the UCC remedies structure, the law student would first get her $100 (the price paid) upon returning the book.

Additionally, the student may be able to get an additional $50 in damages. This would represent the difference between the original contract price of $100 and the price at which she bought substitute goods of the same quality $150. Under the UCC, this sort of award is called *cover damages* and is available if the buyer made a purchase of substitute goods in good faith and in a reasonable time.

Under these facts (the purchase of a book of similar quality for the cheapest price available at the law school bookstore) it appears that the law student acted promptly and in good faith; therefore, she should receive cover damages of $50.

With this award, the student has the benefit of her original bargain. Although she had to purchase the book from the bookstore for $150, her cover damages of $50 from the online seller provides her with the benefit of the original bargain – a used copy of the book that is like new for only $100.

Chapter 2. Contact Formation: Consideration

Answers to the Questions on Page 36 (2nd ed.)

What was the consideration for the tutor's promise?

A bilateral contract exists between the student and the tutor because a promise was exchanged for a promise. Although the tutor does not explicitly ask for a return promise, both the context and the fact that the student gave a return promise demonstrate that the contract formed at the beginning of the semester when the promises were exchanged.

In the typical bilateral contract, neither party has performed any duty at contract formation; however, because the contract formed as a result of the exchange of promises, each party has an enforceable contractual duty. The tutor has a contractual duty to provide services, and the student has a contractual duty to pay for the services in one lump sum at the end of the semester.

To prove that there was consideration, we will apply the rule to these facts.

Consideration consists of: (1) a bargained for exchange between the parties, and (2) that which is bargained for must be of legal value.

Legal Value

Legal value is established if there is either: (1) a detriment to the promisee or (2) a benefit to the promisor. A detriment consists of a waiver of a legal right.

Here, a detriment to the promisee, the student, exists, because promising to pay money waives the legal right of title to his money. Additionally, there is a benefit to the promisor, the tutor, since he will receive a monetary gain—an increase in wealth—as a result of the promise to pay for his services.

Bargained for Exchange

A bargained for exchange exists if the promise induces the detriment and the detriment induces the promise.

Here, the promise of tutoring induced the student to take on the detriment of promising to pay the fee. We know this is his motive because the student is struggling academically.

In addition, the detriment of promising to pay the money induced the promise to provide tutoring. We know this is his motive because the facts state that he needs money.

Consequently, there was consideration for the tutor's promise.

Chapter 4. Adequacy and Other Characteristics of Consideration

Answer to the Questions on Page 67 (2nd ed.)

How might a trial court analyze this issue? What other issues does this problem suggest?

The contract cannot be rescinded based only on the *gross disparity* in consideration. The $5,000 was not *nominal consideration*, because this was not a case of a pretense of a bargain. There was no intent by the Korean immigrant to give a gift to the insurance company by releasing his claim for such an insignificant sum.

However, the immigrant is not without legal recourse. This problem is based on *Oh v. Wilson*, 112 Nev. 38 (1996), where a trial court granted summary judgment for the insurance company. The Nevada Supreme Court reversed. The court stated that "although inadequacy of consideration standing alone did not justify rescission of a contract or release," gross disparity in the things exchanged "may be relevant to issues of capacity, fraud and the like.…"

The court remanded the case for a determination of whether the immigrant Korean made a unilateral mistake—a defense which if proved would void out the $5,000 settlement and allow the injured party to recover the amount due.[1]

[1] See Chapter 19 for more on the defense of mistake.

Answers to the Questions on Pages 76-77 (2nd ed.)

This problem presented you with an analytic framework for "thinking through" a problem. The initial questions that are posed are meant to help you identify the facts you will need to draft the legal analysis.

Mia's promise: to pay a $3,000 bonus to Carla.

Carla's detriment: providing wedding planning services.

With those facts identified, we now move on to the legal analysis of whether there was a bargained for exchange.

1. In applying the *bargained for exchange* rule, we need go no further than the first step.

Did Mia's *promise* of a $3,000 bonus *induce the detriment* of Carla's promise to provide wedding planning services?

In other words, what was Carla's motive in promising to provide the wedding planning services? Was it Mia's promise of the $3,000 bonus that motivated Carla to plan the wedding?

The answer is clearly no. The reason Carla promised to provide services was that Mia agreed to pay the contract price of $20,000. Consider the timing of the promise that we are seeking to enforce. At the time that Carla promised to provide the services, Carla did not know that Mia would later promise her a $3,000 bonus.

2. Even though the first step disproves the consideration, let's take a look at the second half of the test.

Did Carla's *detriment* of promising to provide wedding planning services *induce* Mia's *promise* of the $3,000 bonus?

In other words, what was Mia's motive in promising the $3,000 bonus? Was it Carla's promise to provide wedding planning services?

It is true that Carla's detriment of doing a "good job" in wedding planning induced Mia to make the promise of the $3,000 bonus; however, the test here is made at contract formation. Again, there is a timing issue. Mia only made the promise for the bonus after Carla performed; therefore, the consideration is in the past.

Chapter 5. The Preexisting Legal Duty Rule

Answer to the Question on Page 100 (2nd ed.)

Under the common law of contracts, how would a court analyze this issue?

This problem is based on *Betterton v. First Interstate Bank*, 800 F.2d 732, 735 (1986).

Here, the bank had the contractual right to repossess the truck under the original contract. However, the modified contract—if supported by consideration—eliminated the bank's right to repossess and gave the trucker a second chance to make payment.

The issue is whether this was a one-sided modification. Was there consideration for the bank's promise to not repossess?

The law provides that a promise to modify a contract is supported by consideration if a party with a preexisting duty takes on some additional duty or there is a change in the type of consideration being given. Under Restatement (Second) of Contracts §73, the change in duty has to reflect more than a pretense of a bargain.

In the actual case, the trial court granted summary judgment for the bank on the ground that the officer's promise to let the plaintiff keep his truck was without consideration. The trial court reasoned that the trucker was making the same payment of $1,500 a month at the same time.

However, the appellate court reversed, noting that there was a change in the obligation of the trucker. Under the original contract, the trucker paid by check. Under the modified contract, the payments were deducted automatically from the plaintiff's paycheck. This automatic pay deduction constituted consideration since it was not part of the trucker's preexisting legal duty. Furthermore, the court held that the adequacy of the consideration was irrelevant under these facts absent a question of capacity, fraud, or duress.

Chapter 6. Promissory Estoppel

Answer to the Question on Page 123 (2nd ed.)

What legal claims could Claudia bring against Sal?

As we know from Chapter 3, Claudia's act of accompanying Sal around the block is not consideration for Sal's promise but is a condition to receive a gift.

However, in the absence of consideration we should consider whether Claudia could recover based on a promissory estoppel claim. If so, should the court enforce the entire promise, or limit it? Let's work through the analytic framework presented in Section B of Chapter 6

Promise

Sal makes a promise to purchase a bag of groceries for Claudia if she accompanies him around the block to the supermarket.

Action in Reliance

Claudia acts in reliance by walking around the block with Sal. But for the promise, Claudia would have likely remained where she was making money through panhandling.

Reasonably Foreseeable

It was reasonably foreseeable to Sal that his promise would induce Claudia to take this action, since she would be getting a bag of groceries that is likely worth more than she would earn as a panhandler. Additionally, Claudia's sign, “Will work for Food,” also suggests that food might be her primary objective rather than making money through panhandling.

Injustice

It seems unjust that the promise should not be enforced, since Claudia has acted to her detriment by giving up her panhandling. Claudia missed the rush hour when she would have probably made $10 to $20 an hour. The court may limit the remedy given that Claudia's detriment is the loss of revenue from panhandling, which is likely less than the cost of a bag of groceries.

Chapter 9. Offer

Answer to the Question on Pages 187-188 (2nd ed.)

Judge each communication as to whether it is an offer. Explain your reasoning. If it fails the test for offer, identify the element(s) not proven. If there is an offer, prove the facts for each element.

As a preliminary matter, you should note that this transaction is covered by the Uniform Commercial Code Article 2.

Choice of Law:

Since a car is a movable thing, it is covered by the UCC Article 2. The UCC is more liberally construed than the common law. UCC §2-204 recognizes that parties often enter into contracts without a formal bargaining process, however, the UCC still strictly requires that *the parties intend to enter into a bargain.* Since the UCC does not explicitly define an offer, we will use the common law definition.

Offer

An offer requires (1) a manifestation of intent to enter into a bargain, (2) with certain and definite terms, (3) which is communicated to an identified offeree, (4) reasonable for an offeree to understand that acceptance forms a contract.

In line 1, Bridget starts to manifest intent to enter a bargain by saying, “I really want to buy your car;” however, she hedges because of her worries about the maintenance issue. Moreover, there is no certainty as to the terms in her statement. Bridget does not suggest a price but asks for a price quote; therefore, there is no offer.

In line 2, Martin does not give a specific price quote, but hedges by saying, “about $5,000—maybe more.” Therefore, the terms are not certain. He also clearly does not manifest intent to enter a bargain because he uses the terms “think” and “might”. Using these terms suggests that he reserves to himself a choice even if Bridget did agree to pay $5,000. Even if this could be characterized as a definitive price quote, price quotes are generally not offers but are considered invitations to deal. There is no offer.

In line 3, Bridget is initially hedging by using the word “perhaps.” One interpretation is that this qualifying language suggests that she still wants to think about whether to enter the bargain. However, Bridget is using the word “perhaps” as to the worth rather than qualifying her intent to enter a bargain. The second part of her statement suggests that she is ready to enter a bargain and purchase the car if Martin includes a guarantee that the car will have no major repairs until it hits 300,000 miles. At this point, the terms are now certain and Martin is the identified offeree. Given the overall context with her previous statement that “I really want to buy your car,” there is a strong argument that Bridget continues to manifest intent to enter a bargain and that an offer has been made.

In line 4, Martin's statement shows unwillingness to agree to the guarantee term.[2] Martin's statement that he would consider $4,500 is also not an offer. The objective meaning of “would consider” also shows an unwillingness to enter a bargain—he is reserving the right to continue to negotiate if Bridget agrees to the $4,500 term.

Line 5 illustrates that conduct can be interpreted to show intent. Clearly, Bridget's leaving abruptly shows that she does not intend to enter into a bargain.

In line 6, Martin's statement could have been an offer since he manifests intent and provides certain terms by explicitly stating that he will take $4,000. The problem is that Bridget is nowhere to be seen. Since Martin has not communicated to an identified offeree, there is no offer.

In line 7, Martin is still hedging with the words “would probably” as to his intent to enter a bargain; the terms are not certain since a range in the price is given. Therefore, the email is not an offer.

Line 8 provides another offer from Bridget. The plain meaning of “I'll buy” shows that Bridget manifests intent to enter a bargain. The terms are certain since she identifies the subject matter (Martin's car “as is”), the price ($2,000), the payment terms (cash), and the time of the transaction (2 p.m. this afternoon). The identified offeree is Martin, who is justified in thinking that all he has to do to form the contract is accept those terms. Martin now has the power of acceptance.

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[2] We will learn in Chapter 10 that Martin's response is a rejection that terminates Bridget's offer.

In line 9, Martin merely says, “See you at 2 p.m.” We will study the requirements of acceptance in Chapter 10. Although Martin doesn't expressly accept Bridget's offer, given the context of the exchange and the liberal requirements of the UCC, his “See you at 2 p.m.” sounds like he has accepted her offer.

One last note: the final transaction here is conducted in email, thereby addressing an issue that we have not studied yet—the writing requirement of the statute of frauds.[3] Here, the electronic communication would satisfy the writing requirement of UCC §2-201 for the sale of a good of $500 or more.

Chapter 10. Acceptance and Other Responses to an Offer

Answer to the Questions on Page 206 (2nd ed.)

Has Nate's reply terminated his power of acceptance? If not, then why not?

This problem illustrates the issue of whether a response to an offer is a counteroffer or a mere inquiry.

In the exchange, Kaisha's offer is not terminated by Nate's response. Nate has made a mere inquiry in part because he explicitly reserves the right to keep the offer open by stating he would like to “keep the offer under advisement.” Additionally, Nate only asks about the possibility of different terms—i.e., a higher salary and a more generous vacation package—rather than rejecting the offer and proposing a new set of terms.

Therefore, Nate's reply has not terminated his power of acceptance as to Kaisha's offer.

Answers to the Questions on Page 211 (2nd ed.)

Next to each event, write the legal effect, if any, of the event.

This problem tests your ability to apply the mailbox rule to a situation where an offeror first mails an offer and then sends a revocation.

FACTS	WHAT IS THE LEGAL EFFECT?
October 1. Seller sends **offer** to Buyer by mail.	No effect. Offer is only effective on receipt.
October 2. Seller sends **revocation** to Buyer by mail.	No effect. Revocation is only effective on receipt.
October 3. Buyer receives **offer** from Seller.	Offer is effective on receipt, so Buyer now has the power of acceptance.

[3] See Chapter 13 Statute of Frauds, Section E. UCC Statute of Frauds.

October 4. Buyer sends **acceptance** to Seller.	Acceptance is effective on dispatch. The contract has been formed.
October 5. Buyer receives **revocation** from Seller.	No effect. The contract has already been formed. Offeror may not revoke after the offer has been accepted.
October 6. Seller receives **acceptance** from Buyer.	Seller now has notice that his offer has been accepted.

Although Seller had intended to revoke his offer before Buyer accepted, the revocation is not effective because Buyer did not learn of it until she received the revocation. Since the acceptance is effective on dispatch, the contract formed on October 4. Seller's attempted revocation came after acceptance and therefore has no effect.

Chapter 11. Irrevocable Offers

Answers to the Questions on Page 225 (2nd ed.)

Analyze the following two examples. What is the condition? What is the promise? What other issues do you recognize in these problems?

Example A.

The promise is to take the child to the beach.

The condition—i.e., the event that triggers the promise—is the absence of rain during the weekend. If there is no rain and the parent does not take the child to the beach, then he has broken his promise. However, if it rains during the weekend, then it is as if the promise was never made. There is no promise to be broken, because the condition never occurred.

Another issue is that this is a gratuitous promise. First, in the family context, there is a rebuttable presumption that a promise between family members is gratuitous; second, there is no explicit consideration requested.

Example B.

The promise by the boss is to give each of his employees a $1,000 bonus.

The condition—i.e., the event that triggers the promise—is the New York Mets baseball team winning the pennant. If the New York Mets do not win the pennant, then it is as if the boss had not promised anything. However, if the Mets do win the pennant, then the boss has made the promise.

Another issue is that the promise is gratuitous. Although this is the business context rather than the family situation as in the previous example, the promise is still gratuitous since there is no return consideration.

Answer to the Question on Page 238 (2nd ed.)

For each of the three scenarios, identify how long the offer is irrevocable. Does the power of acceptance also terminate when the irrevocability period ends?

This problem tests your understanding of the time provisions in the merchant's firm offer.

First, we should establish the extent to which UCC §2-205 applies.

Oscar qualifies as a merchant. Since he is a food distributor who primarily sells fruit and the offer is for watermelons, Oscar would be a "dealer" in goods of the type specified—i.e., watermelons.

The other elements of UCC §2-205 are also given. Oscar has made an offer to Wendy in a signed writing to sell 1,000 watermelons at a specified price and has committed to keeping the offer open.

The remaining issues have to do with how long the offer remains open and irrevocable.

In resolving the period of time that an offer is irrevocable, it pays to first calculate the three-month limit of the merchant's firm offer, and then apply the rule. Here, the offer was made on January 1, so the three-month limit is April 1.

Scenario A.

One common mistake is for students to assume the period of irrevocability for all merchant's firm offer problems is three months. That is incorrect. The period is for the time stated but no longer than three months. The correct answer here is February 15, since the time stated is within the three-month period.

Scenario B.

May 1 is four months after the date of the offer; therefore, the irrevocability period ends on April 1. Note that the offer is still effective from April 1 to May 1; however, the offeror may revoke after April 1.

Scenario C.

Again, a common mistake students make is to assume that that the irrevocability period lasts three months for any offer that meets the requirements of the UCC §2-205. Since there is no time stated, the correct answer to this question is that the irrevocability period is a *reasonable time* but not longer than three months.

A reasonable time is tested by all of the facts and circumstances, including the nature of the goods. One question you should ask is how long do watermelons last before going rotten? It would not be reasonable to expect Oscar to hold the offer open for so long that the watermelons can no longer be sold. We would need to consult the custom in the watermelon trade to determine how long is a reasonable time.

Chapter 13. Statue of Frauds

Answer to the Question on Page 274 (2nd ed.)

Has the writing requirement of the statute of frauds been satisfied as to Seller's obligation?

No. Although the writing contains all of the terms, Seller has not signed it. The party to be charged is the person who does not want to perform the contract—e.g., the defendant, if a lawsuit was filed. The only person who signed a writing was Buyer. Since there is no signed writing from the Seller, the statute of frauds is not satisfied.

Part II: Defenses and Excuses

Chapter 14. Incapacity

Answer to the Questions on Pages 313 (2nd ed.)

If Joe seeks to rescind the transactions with the casino using the defense of mental incompetence, which test for competency will likely put Joe in the best position to be successful?

The volitional test would be more appropriate than the cognitive test for Joe's circumstance since it recognizes that some individuals do not—by reason of mental illness—have the ability to act in a reasonable manner.

Under the cognitive test, a gambling addict would not likely be judged mentally incompetent. This is because the gambler normally understands the consequences of entering into a gambling contract—i.e., that there is usually a high probability that he will lose money that he cannot afford to lose.

However, under the volitional test, a gambling addict might prove that he cannot control his behavior because of a mental illness. Pathological gambling has been linked to serious mental disorders and is being treated by some physicians as a brain disease. This argument is supported by studies that show some gambling addicts are unable to control their impulses.[4]

In order to be successful, the gambler must also prove that the other party knew that the gambler was incapacitated.

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[4] See Brevers, Damien, and Xavier Noël. "Pathological Gambling and the Loss of Willpower: A Neurocognitive Perspective." Socioaffective Neuroscience & Psychology 3 (2013): 21592. PMC. Web. 27 June 2016, available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3960021/.

Chapter 15. Duress and Undue Influence

Answer to the Question on Page 328 (2nd ed.)

Has a contract formed? Are there any defenses?

Although there is a written agreement signed by the seller conveying the car to Rocko, the contract is void as a matter of public policy since it was formed because of physical duress.

Although Edgar's signature appears on the contract, he has clearly not manifested intent to enter a bargain, since Rocco physically forced Edgar to sign his name. The physical force exerted was improper, because it constitutes battery and therefore is a tort. Edgar had no reasonable alternatives, as he is feeble physically and Rocko is healthy and physically fit. The fact that there is gross disparity in consideration (the $3,000 purchase price represents only half the value of the car) is further proof that Edgar's intent was forced. Since the contract was formed by physical duress, the contract is void as a matter of policy; consequently, Edgar as the victim would not be able to ratify the contract later. When physical duress is involved, the assumption would be that any attempted ratification is just a further attempt to exert pressure on the victim.

Students might have suggested that mental incapacity was also a defense given that Edgar is old and physically feeble; however, the facts clearly state that Edgar's mental faculties are sharp. Mental incapacity therefore is not an issue.

This problem is a variation of Illustration 1 in the Restatement (Second) of Contracts §174.

Chapter 16. Misrepresentation and Fraud / Nondisclosure

Answers to the Questions on Pages 352-353 (2nd ed.)

Consider the following three questions, each of which is based on illustrations in the Restatement (Second) of Contracts §162. Can you distinguish between fraudulent misrepresentations and the two types of material misrepresentation?

Question 1 Answer

Sam's statement is a material misrepresentation—one that is likely to induce a reasonable person to assent, or one that its maker knows is likely to induce the recipient to assent. A reasonable person who is purchasing a racehorse would want one that is fast; consequently, a statement that the horse ran a 2 minute and 15 second mile would likely induce a reasonable person into buying the horse. The contract may be voided based upon this defense.

The misrepresentation is not fraudulent. Sam did not know his statement was not in accord with the facts. Sam was just honestly mistaken.

This problem is based on Illustration 3 in the Restatement (Second) of Contracts §162.

Question 2 Answer

Sam's misrepresentation is not fraudulent because he is honestly mistaken, but it is material. Although the Triple Star Stable is of better quality than the Double Zero Stable, it was material to Bill that the horse come from the Double Zero Stable, and Sam was aware of this fact. If the motivation of the party for entering the agreement is subjective, then the maker must know that the statement would likely induce the party. Since Sam was aware that Bill wanted a horse from Double Zero because the stable was founded by Bill's grandfather, the misrepresentation was material under the Restatement (Second) of Contracts; therefore, the contract can be rescinded as a mutual mistake.

This problem is based on Illustration 5 in the Restatement (Second) of Contracts §162.

Question 3 Answer

Sam's misrepresentation is neither fraudulent nor material to a reasonable person. A reasonable person would want a horse bred in the Triple Star Stable over the Double Zero Stable since the Triple Star Stable has a better reputation. Sam did not know Bill's wish that it be a horse from Double Zero Stable because his grandfather founded the stable; therefore, neither type of misrepresentation will rescind this agreement.

This problem is based on Illustration 4 in the Restatement (Second) of Contracts §162.

Chapter 18. Public Policy and Illegality

Answer to the Question on Page 397-398 (2nd ed.)

Will Harold be successful if he asserts a public policy defense?

Performance of the contract will likely result in the commission of the tort of defamation. The Restatement (Second) of Contracts §192 provides that "[a] promise to commit a tort or to induce the commission of a tort is unenforceable on grounds of public policy." Harold may rescind the agreement based on public policy.

Will Betty be able to recover the $5,000 she paid Harold? When both parties are at fault, as is the case here, courts apply the doctrine of in pari delicto and refuse to order restitution. None of the exceptions applies to Betty. She did not attempt to withdraw from the agreement and is equally at fault as Harold in the plan to defame Cathy.

This problem is based on Illustration 6 of the Restatement (Second) of Contracts §178.

Chapter 19. Mistake

Answers to the Questions on Page 421 (2nd ed.)

What is a basic assumption of the contract? Has there been a material effect on the value received by one of the parties? May Buyer rescind the contract based on mutual mistake?

Buyer should be able to rescind this agreement based on mutual mistake.

Seller made a misstatement of fact about who previously had worn the boots.

The basic assumption of this contract is that the boots were worn by John Wayne. We know it is a basic assumption, since Buyer is a collector of John Wayne memorabilia and the boots were listed as being John Wayne's boots.

Has there been a material effect? Normally, material effect is measured by an imbalance in the value—i.e., the worth—that is so severe that a party could not fairly be expected to carry it out. Here, the value for the two sets of boots is the same in terms of monetary worth. However, there is a material effect on the worth of the transaction to Buyer since he dislikes the character Bruce Wayne. The boots are—in essence—not worth the cost to Buyer. Since the Restatement urges the flexible concept of fairness, it is likely that a court would find that this mistake did have a material effect on the transaction even though the monetary value between the two sets of boots is the same.

Therefore, the contract is voidable by Buyer as a matter of mutual mistake.

Additionally, Buyer has not reasonably assumed the risk since he was relying on Seller to know her product. Seller had superior knowledge about the boots, given that she was a designer in the movie industry; therefore, given these circumstances it is reasonable for a court to allocate the risk to Seller.

Note: Buyer could also attempt to rescind the agreement under the defense of material misrepresentation.

Part III: Interpretation and Implied Terms

Chapter 21. Parol Evidence Rule

Answer to the Question on Page 481 (2nd ed.)

Can Buyer introduce evidence of the oral agreement as to the furniture and the one-year term to pay?

The correct answer is A.

If the contract is a partial integration, Buyer can likely introduce evidence of the oral agreement for the furniture but not for the one-year term to pay.

Keep the analytic framework in mind when answering this question. First, consider the level of integration. The problem tells you to assume that there is a partial integration.

Second, given the level of integration, what evidence can be admitted? There are two pieces of evidence to consider. Here, the writing states that payment will be made in six months; therefore, oral evidence that the payment is in one year is a contradictory term. Regardless of whether this is a partial or total integration, evidence of a contradictory term cannot come in.

The other evidence regarding the furniture is a consistent additional term. First, the contract is silent as to the furniture; therefore, the evidence is not contradictory. Additionally, including the furniture in the sale of a hotel is consistent with the sale of the business of a hotel since one needs the furniture to run the business. So long as the contract is a partial integration, the furniture term is likely to be admitted. If the contract was a total integration, the furniture term would not be admitted.

This problem is derived from Restatement (Second) of Contracts §209, illustration 3 and *Brown v. Oliver*, 123 Kan. 711 (1927).

Chapter 22. Interpreting Ambiguous Terms

Answers to the Questions on Pages 500-501 (2nd ed.)

In each of the three scenarios, determine the type of dispute. Is it an issue involving interpretation, parol evidence, or performance? Support your reasoning.

Contract 1

What type of issue is this?

This is a performance issue. Seller breached the contract by not sending the toys clearly spelled out in the contract.

This is not an issue of interpretation, conflicting terms, or supplementary terms. Seller is not asserting that the definition of "bears" includes "rabbits." Nor is Seller asserting that there was an oral agreement allowing substitution of rabbits if Seller were out of bears. The terms are clear, and Seller does dispute his duty.

Contract 2

What type of issue is this?

This is a parol evidence issue. Buyer is asserting that there is an oral consistent additional term. The term is not a contradictory term since the written agreement is silent on whether furniture is included.

This is not an interpretation issue. Buyer is not asserting that he and Seller agreed that the meaning of the term "hotel" would include the furniture. Note: If Buyer had asserted that he and Seller had agreed

that the term "hotel" meant the land, buildings, and furniture, then this would be an interpretation issue since it deals with the meaning of a term.

Contract 3

What type of issue is this?

This is a parol evidence issue involving conflicting terms.

Step 1 of the parol evidence analytic framework is to determine to what level the writing is integrated. Normally, an offer letter signed only by the offeror is not an integrated agreement since offer letters are often used during preliminary negotiations rather than used as final expressions of both parties. Some offer letters have a place for the offeree to sign, and a court would more likely consider such a letter to an integrated agreement if the offeree actually signs it. However, this letter asked the offeree John to call rather than sign the letter. Betty finished painting the house by April 15 instead of May 1 as stated in the offer letter. These facts lend some credibility to her argument that the parties renegotiated the terms over the phone. Consequently, a court would likely find that there was not an integrated agreement and allow evidence of the oral agreement to be admitted.

This is not an interpretation issue because the parties do not disagree on the meaning of a term.

Contract 4

What type of issue is this?

This is an interpretation issue because the parties disagree on the meaning of the term "old vines."

For details on the use of the term "old vines" in reference to wine, see Keith Beavers, Vinepair.com, What the heck is old vine wine? Here's everything you need to know (May 16, 2016).

Answer to the Question on Page 504 (2nd ed.)

Is the contract language reasonably susceptible to the meanings asserted by each professor?

The court in either a modern or classic jurisdiction hearing the case would likely find that the term "business attire" is *reasonably susceptible* to the meanings given by Professor A and Professor B since the term reasonably encompasses both formal and casual business dress. Some lawyers who do not go to court wear business casual dress. Consequently, an ambiguity exists between the definitions offered by Professors A and B.

However, the court would likely conclude that "business attire" is not reasonably susceptible to Professor C's interpretation since people in the legal profession generally do not wear Hawaiian shirts, shorts, and sandals to work—at least not in the Midwest. Consequently, the court would allow for the interpretation evidence of Professor A and Professor B to be admitted but not Professor C's evidence.

Answer to the Question on Page 508 (2nd ed.)

Could a contract for the sale of "pizza" in Chicago ever be reasonably interpreted as being the New York style pizza?

The purpose of this exercise was to illustrate how the context can influence the meaning of a term.

In New York, a pizza would have a thin crust; whereas, in Chicago pizza is often understood to be deep dish—i.e., with a thick crust.

An internet search would have revealed numerous sources supporting these statements as well as articles debating the merits of the two types of pizza.

Part IV: Nonperformance

Chapter 24. Breach of Contract

Answers to the Question on Pages 575 (2nd ed.)

The correct answer is C.

This question tests Seller's right to cure under the perfect tender rule. The call of the question asks for the "best" statement of the law.

Answer C is best answer. Although Seller normally has a right to cure if the time for performance has not arrived, Seller must give Buyer seasonable notice of the intent to cure under UCC §2-508. Here, Seller did not give notice that he intended to cure. As a result, Buyer has not duty to accept the goods even though Seller arrived with a conforming tender within the time for delivery.

Answer A is a poor statement because Buyer had a right to reject improperly tendered goods on Tuesday and the substantial performance doctrine is inapplicable here because of the perfect tender rule.

Answer B has the wrong legal conclusion. Normally, Buyer has to give Seller time to cure the breach if the time for delivery has passed. However, Seller must give notice of his intent to cure, which he did not. Therefore, Buyer did not breach the agreement by rejecting the goods.

Answer D is not the best answer because it misstates the right to cure under UCC §2-508(2). The right to cure is not extended beyond the time stated in the contract under these circumstances. The circumstances where a reasonable extension of time would be given under UCC §2-508(2) are that the seller must have "had reasonable grounds to believe [its nonconforming tender] would be acceptable with or without money allowance.…" If that is the case, then seller has "a further reasonable time to substitute a conforming tender." Nothing in the rules states that the buyer has to accept a non-conforming tender with a money allowance.

Chapter 25. Conditions to Performance

Test Yourself Answers to the Questions on Pages 593 (2nd ed.)

Which facts describe the promise?

Which facts describe the event that is the condition?

Is this a condition precedent or a condition subsequent?

1. The promise is for Buyer to purchase the property. There are two conditions. The first is that the zoning board must approve the rezoning of the property for commercial use. The second is that the Buyer must be able to get financing from a bank. Both of these are conditions precedent outside of the control of the parties. The decision on zoning is in the control of the zoning board, and the decision on financing is in the control of the bank. Buyer must make a good faith effort to obtain financing. To the extent that either party is involved in the rezoning effort (e.g., submitting documents or appearing before the zoning board), then those efforts must also be done in good faith.

2. The promise is to hire the teacher for a year. The condition is the teacher being arrested for a felony. This is a condition subsequent. The arrest for the felony is an event caused by the police—albeit based on the behavior of the teacher. The promise to hire the teacher for a year is terminated if the condition occurs; thus, it is a condition subsequent. Another way to understand this type of clause is to frame it as a conditional right, where the school's right to terminate becomes absolute upon certain conditions, such as the arrest for a felony.

3. Here, the promise is for a lease agreement. The condition is an event outside of the control of the parties where natural forces cause the electrical power to be down for more than four days. This is a condition subsequent since it terminates the duties under the lease contract.

4. The promise is for the landlord to renew the lease for one year. The condition (i.e., the event that must occur) is that the tenant gives at least one month's notice prior to the end of the lease of tenant's intent to renew. The event activates the duty to renew the lease; therefore, it is a condition precedent. The condition here is clearly within the control of Tenant, the promisee.

5. The promise is to increase the employee's salaries by a certain percentage. The condition (i.e., the event that must occur) is the rise in the consumer price index (CPI). If the CPI rises, then the Employer has a duty to increase Employee's salary by the same amount; therefore, this is a condition precedent. Here, the condition is outside of the control of both parties.

Chapter 26. Anticipatory Repudiation

Answers to the Questions on Pages 619 (2nd ed.)

Question 1

Did Seller repudiate the contract by mortgaging the property? Explain your reasoning.

Seller's action is a repudiation.

A repudiation requires a clear manifestation of intent to not perform a contract on the date set for performance. The intention must be a definite and unequivocal manifestation that the party will not render the promised performance when the time fixed for it in the contract arrives. Conduct, as well as words, can constitute a repudiation. Here, by mortgaging the property to a lender for a six-month term after contracting to sell it to Buyer free of any encumbrances in three weeks, Seller manifested his intent to not perform the land sale. A repudiation "is nullified, however, by a retraction…if notification of the retraction comes to the attention of the injured party before he materially changes his position in reliance on the repudiation or indicates to the other party that he considers the repudiation to be final."[5] These facts do not indicate that the repudiation has been retracted.

This example is derived from the Restatement (Second) of Contracts §250, Illustration 6.

Question 2

Has Employee repudiated the contract? Explain your reasoning.

Employee's action is a repudiation.

Yes, Employee's embarking on the voyage is a repudiation. Here, by leaving on a yearlong around-the-world voyage by ship when he contracted to start work on a six-month contract a week later, Employee has clearly manifested his intent to not perform his employment contract on the date for which performance was set in the contract. There is no indication in these facts that Employee's repudiation was retracted.

This example is derived from the Restatement (Second) of Contracts §250, Illustration 7.

Answers to the Question on Page 621

What would have been the earliest that Seller could have brought a breach of contract lawsuit?

The August 1 communication is a not an *unequivocal and definite statement* that Buyer will not purchase Blackacre on October 1, the date when performance is due. Merely requesting a modification does give rise to manifesting intent to not perform. However, on September 1 Buyer has clearly

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[5] Restatement (Second) of Contracts §256.

repudiated the agreement since he demands in no uncertain terms that he will not close unless Seller modifies the agreement by dropping the sale price $10,000.

Since Buyer anticipatorily repudiated the contract on September 1, Seller could have brought a breach of contract lawsuit on that date.

Part V: Remedies

Chapter 27. Introduction to Remedies and the Expectation Interest

Answers to the Questions on Pages 648-649 (2nd ed.)

1. Should Painter receive the $5,000 contract price?

Painter might argue that he is an innocent party, so he should receive the full $5,000 contract price. However, Painter would not prevail. Awarding the full $5,000 would overcompensate Painter, since he completed only half of the work. Additionally, Painter has not incurred all of the costs that he would have incurred had Owner not breached. If Owner had not breached, Painter would have expected a profit of $500 based on an estimate of costs of $4,500.

Here, Painter has incurred only $2,500 in costs; therefore, if we award Painter $5,000, then Painter has a profit of $2,500. Such an award overcompensates Painter.

2. What is Painter's expectation interest?

If the contract had been completed, then Painter would have received $5,000, which would cover his costs of $4,500 and yield a profit of $500. To put Painter in the same position as if the contract had been performed, he should cover his costs of $2,500 plus the expected profit of $500 for a total of $3,000 in expectation damages.

3. In the alternative, what is Painter's reliance interest?

Reliance damages only award out-of-pocket damages and not expected profit. The $2,500 in actual costs is the amount Painter spent in reliance on the contract and therefore represents Painter's reliance damages.

You may be asking why a court or a party would seek reliance damages instead of expectation if the amount is going to be less. Courts might use the reliance measure if the profit that Painter was going to make on the contract was speculative.

4. Instead of expectation or reliance, what is Painter's restitution interest?

Restitution measures the value of the benefit conferred. Owner hired Contractor to paint the other half of the house for $3,000. Contractor and Owner are of equal skill, and $3,000 represents the fair market value of half a paint job. Under a restitution theory, Painter conferred a benefit that is equal to $3,000. If we were awarding the restitution interest, then it would be unfair to let Owner keep that benefit without paying for it.

Although, the expectation and restitution interests are equal in this hypothetical, there is naturally some variation in the real world.

Answer to the Question on Page 660 (2nd ed.)

What are general damages, and what are consequential damages?

In the breach of a real estate contract, the measure for general damages is the difference between the contract price and the fair market value of the property at the time of the breach. Here, we will measure the breach at the time of repudiation. The contract price was $100,000, and the fair market value of the property at the time of the repudiation was $120,000, which results in general damages of $20,000.

In contrast, the lost profit of $30,000 from the delay in building the fast-food franchise is a consequential damage because it was lost profit on collateral contracts. The collateral contracts were those that would have occurred between Buyer's fast-food franchise and its customers. The damage was foreseeable since Seller was informed of Buyer's plans to open a fast-food business on the land at contract formation. The lost profits would also have to be established with reasonable certainty.

Answer to the Question on Pages 661-662 (2nd ed.)

Which of the four statements is correct?

The correct answer is B.

The measure of general damage for an employer breach of an employment contract is the salary due under the contract less any amount earned in other employment. Here, the contract was for one year at $200,000. Since employee was able to find a job for $150,000 for that year, he can recover general damages of the difference, which is $50,000.

Additionally, Employee can recover reasonable costs expended in mitigating the damage. Hiring the job coach helped employee mitigate by reducing the damages in getting another job. Since the $1,000 fee was the market rate, employee should be able to recover the cost even if the coach had been unsuccessful in helping Employee find a replacement job.

Chapter 29. Mitigation

Answers to the Questions on Page 696 (2nd ed.)

Address the questions in the following three fact patterns.

Scenario 1. Baker

How should Baker try to mitigate damages?

In the sale of goods, a non-breaching seller can try to mitigate the damages by reselling the goods to another buyer. The specific rules regarding resale under UCC 2-706 (including notice requirements) will be explored in Chapter 31.

However, we know enough from Chapter 23. Implied Terms that "Every contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance and enforcement." Additionally, UCC 2-103(1)(b) provides, "'Good faith' in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade."

The process that seller takes will depend on the facts and circumstances. Here, the resale of a wedding cake may be difficult since wedding cakes are typically customized and planned far in advance. It may be unlikely that Baker will find another purchaser.

Although it may be unlikely that Baker is successful in reselling the cake, Baker should still make reasonable efforts to find another purchaser, such as posting advertisements that are reasonable given the circumstances. So long as Baker makes reasonable efforts, his damages will not be reduced even if he is unsuccessful.

Scenario 2. Employee

How should Employee try to mitigate damages?

For the breach of an employment contract, the non-breaching employee should seek out other employment. The mitigation rule specifies that the injured party does not have to endure undue risk, burden, or humiliation. In the employment context, this would mean that the non-breaching employee does not have to take a job with lower status, among other factors. A more detailed discussion of the mitigation rules for employment contracts can be found in Chapter 30, Section C.

Scenario 3. Owner

Assuming Electrician is liable for the damage caused by the fire, will Owner's damages be reduced because Owner did not stay to put out the fire?

One basic principle of the mitigation rule is that the non-breaching party does not have to endure undue risk, burden, or humiliation. Staying in a burning house to put out a fire is clearly putting the Owner at risk. The fact that Owner did not put out the fire himself does not mean that he has not mitigated. In this context, Owner made reasonable efforts by calling the fire department.

If Owner had staying in the house to put out the fire and had sustained injuries as a result of his efforts, Electrician might be able to argue that he is not liable for Owner's injuries if it was unreasonable for Owner to actually stay in the house. In that situation, an unnecessary risk might be deemed unforeseeable.

Chapter 30. Real Estate, Employment, and Construction Contracts

Answers to the Questions on Pages 716-717 (2nd ed.)

In a land sale contract where the contract price is $100,000 and the fair market value is $80,000, what would be the damage award for Buyer if Seller breached?

$0. Buyer has not been harmed by the breach since the contract price is higher than the fair market value. Buyer should be delighted that Seller breached since he now is not obligated to purchase a property that is worth less than the contract price. Buyer can, of course, still seek specific performance if the price differential does not matter to him.

Same transaction as above, but what would be the damage award for Seller if Buyer breached?

$20,000. Here, Seller has been damaged since he had a contractual right to receive $100,000 for something worth only $80,000. A general damage award of $20,000 would give Seller his expectation interest.

In a land sale contract where the contract price is $80,000 and the fair market value is $100,000, what would be the damage award for Buyer if Seller breached?

$20,000. This is just the reverse of the previous two problems to illustrate that when the numbers change, so do the outcomes. Now, Buyer is damaged by Seller's breach since Buyer expected to receive something worth $100,000 for a purchase price of $80,000.

Same transaction as above, but what would be the damage award for Seller if Buyer breached?

$0. This is the reverse of the first problem. Seller has not been damaged since he is no longer obligated to sell something worth more than the contract price.

Answer to the Question on Page 719 (2nd ed.)

What damages may Owner recover, and why?

General Damages.

General damages in a land sale contract are measured by the difference between the contract price of $100,000 and the fair market value at time of breach. Here, the $90,000 sale price merely one week later

suggests that the fair market value is really $90,000; therefore, the difference is $10,000 in general damages.

Incidental Damages.

Owner spent an additional $100 in advertising costs in an attempt to mitigate the damage of the breach—i.e., selling the house to someone else. This is not a cost that Owner would have incurred but for the breach; therefore, the breach caused the damage. For incidental damages, Owner can receive $100 since it is an associated cost.

Answers to the Questions on Pages 730 (2nd ed.)

Assess what damages (if any) Teacher can get in a breach of contract case against School.

Scenario 1, Question 1

Here, Teacher will not fail to mitigate if he does not take the elementary school job. Teaching history to high school students is quite different from teaching math to elementary school students. The elementary school job may be considered inferior by a high school teacher, since it involved teaching younger students, even though the job pays more. Also Teacher is trained to teach history, and teaching math requires a different skill set that Teacher may not possess. Consequently, if Teacher does not take the math job, then he will likely recover the contract price of $50,000 as general damages. Teacher is also entitled to $100 in incidental damages since a fee to an employment website is an amount reasonably spent in an effort to mitigate by finding other employment.

Scenario 1, Question 2

Here, Teacher has decided to take the job even though he did not have to. That job pays more, so Teacher has no recovery since he is in a better position by earning an additional $10,000. Even though Teacher had to pay $100 in incidental damages, the higher salary of an extra $10,000 exceeds the $100 incidental damage. Therefore, the $100 is offset by the gain that the injured party had as a result of the breach.

Scenario 2, Question 1

As before, Teacher is entitled to $100 in incidental damages as reasonable costs spent to mitigate. For general damages, however, Teacher did not mitigate when he could have done so reasonably. Applying the mitigation rule, we reduce the expected salary of $50,000 by the $40,000 that Teacher would have earned if he had mitigated; consequently, Teacher receives $10,000 in general damages plus $100 in incidental damages.

Scenario 2, Question 2

Teacher did mitigate by taking the job. Applying the general damages rule for employer breach rule above, we reduce the expected salary of $50,000 by the amount that Teacher actually earned in other employment ($40,000) to get a recovery of $10,000 in general damages. Teacher is also entitled to $100 in incidental damages (as explained above).

Scenario 3

Normally, Teacher's damages would be the difference between the contract price of $50,000 and the salary he actually earned ($15,000) during the contract period. This would result in an award of $35,000.

However, Teacher did not mitigate since he did not look for another teaching job. If School can prove that through reasonable efforts Teacher could have gotten a similar job at the same salary, then damages can be reduced.

The problem is actually a hypothetical posed by Judge Posner in his opinion in *Cook v. City of Chicago*, 192 F.3d 693, 697-98 (7th Cir. 1999). Judge Posner wrote, " If a large corporation wrongfully terminated its CEO, to whom it had been paying $1 million in salary and bonus per year, he would not be performing his duty of mitigation if he took a full-time job as an adoption counselor in a no-kill cat shelter at a salary of $15,000 a year."

Answer to the Question on Pages 741 (2nd ed.)

How much can Contractor recover as general damages? Explain your reasoning.

This is a complicated problem that requires you to calculate general damages and then make adjustments for the prepayment and cost savings through mitigation.

In an owner repudiation of a construction contract, the measure of damages would be costs expended by contractor up until breach plus profit. This is reduced by prepayments and money saved in mitigation.

General Damages = Costs expended + Profit − Prepayment − Mitigation Savings

Costs

Here, the costs expended are stated as $11,000.

Profit

Profit = Contract Price – Costs

Calculating the profit brings up a certainty issue. The facts state that Contractor expected his total costs to be between $17,000 and $18,000; therefore, the profit is either $2,000 or $3,000. The Farmer would argue that the profit should be $2,000, since awarding the higher figure might result in overcompensating the Contractor.

However, courts only require reasonable certainty and will favor the non-breaching party in cases where the determination is not completely definite. Therefore, an answer that better aligns with the certainty rule would be to use the lower-cost figure, since that yields a higher profit favoring the non-breaching party.

Contract price ($20,000) − Costs ($17,000) = Profit ($3,000)

Prepayment

At contract formation, Farmer gave Contractor a prepayment of $5,000 toward the contract price; consequently, this amount should be deducted from the final award; otherwise, Contractor will be overcompensated.

Amount Saved by Mitigating

Contractor was able to mitigate his losses; therefore, the $2,000 he recouped by returning the irrigation supplies is deducted from general damages.

Final Calculation

General damages = Actual Costs ($11,000) + Profit ($3,000) − Prepayment ($5,000) − Mitigation Savings ($2,000) = $7,000

Chapter 31. UCC Remedies

Answer to the Question on Page 763 (2nd ed.)

Question 1

The correct answer is D.

This is a straightforward question about "cover damages." Cover damages are calculated as the difference between the cost of cover ($3 per screw) and the contract price ($1 per screw) for a recovery of $2 per screw for the 10,000 screws that Buyer replaced.

Answer A is incorrect since it suggests that notice is required to recover damages for cover. UCC §2-712 has no special notice provisions. Additionally, cover damages are a type of general damage and not a type of consequential damage; therefore, cover damages are inherently foreseeable and do not require special notice.

Answer B is incorrect because it only provides the buyer with a recovery for the price paid.

Answer C is incorrect because it provides only the cover remedy of the difference of the contract price of $1 per screw and the cost of purchasing screws at $3 each.

Answer D is correct because it articulates the rule that a buyer can recover any prepaid price plus cover.

Question 2

The correct answer is C.

Retailer is entitled to general damages of either cover or market damages plus consequential and incidental damages.

Here, the buyer made no attempt to cover; therefore, he is only entitled to market damages under UCC §2-713. Here, the market price would likely be considered the $110 per bike price that Retailer could have paid had he covered. Therefore, Retailer would be entitled to the difference between the market price of $110 and the contract price of $100 for total market damages of $10 for each of 50 bicycles—i.e., $500. Since Buyer is entitled to market damages, Answer C is the best answer.

Buyer is not entitled to consequential damages under §2-715(2)(a) because he made no attempt to cover. The $20,000 in lost profits is a consequential damage. Since Buyer is not entitled to consequential damages, Answers A and B are incorrect.

Answer D is incorrect since Buyer is entitled to market damages.

Chapter 34. Alternatives to Expectation: Reliance and Restitution

Answer to the Question on Pages 830-831 (2nd ed.)

What would be Entrepreneur's reliance damages? Distinguish between essential and incidental reliance.

Reliance Money Damages

If neither party proves with reasonable certainty what profit or loss Entrepreneur would have made if the contract had been performed, then can recover as reliance damages his out of pocket expenses.

Essential reliance: Here, essential reliance damage would be any payments already made to Hi Rise, Inc. under the lease agreement. Nothing in the facts indicates that Entrepreneur has essential reliance damages.

Incidental Reliance: Incidental reliance expenses are those costs incurred that are related to collateral contracts entered into in reasonable reliance on the contract that was breached. Entrepreneur incurred incidental reliance damages of $150,000 purchasing new espresso machines, furniture, and a supply of premium coffee beans and $5,000 to develop promotional material.

Foreseeability: All of these expenses would have been foreseeable to Hi Rise, Inc. given the nature of the business that Entrepreneur intended to start at the location. The expenses could be established with certainty because Entrepreneur would have receipts.

Mitigation: One issue is whether Entrepreneur reasonably mitigated in selling the machines, furniture, and coffee for only $40,000. There is a large price disparity between $150,000 in purchasing the items as new and how much Entrepreneur was able to get in reselling the goods. Hi Rise, Inc. should look into whether these sales were made at a fair market value rate.

If these were made at the fair market value, then Entrepreneur would be able to recover his $150,000 in expenses minus the cost he saved through mitigation of $40,000 for a recovery $110,000. Entrepreneur would be able to recover the $5,000 in marketing costs for a total recovery in reliance of $115,000.

Part VI: Third Party Rights

Chapter 35. Third Party Right

Answer to the Questions on Page 858 (2nd ed.)

What type of beneficiary is Food Bank?

Food Bank is an intended donee beneficiary.

Bernie's intent at the formation of the contract with grocery store was to donate to a charity—i.e., Food Bank. Food Bank will benefit from the transaction since it is receiving food at no cost that it can use to feed the homeless.

Nothing in the facts suggests that Bernie owed an obligation to Food Bank; therefore, the purchase of the groceries was not in satisfaction of a debt. The fact that Bernie has regularly donated money to Food Bank further underscores the fact that Bernie is in the habit of providing donations to the charity.

One possible counter-argument to this analysis would revolve around the issue of whether there is consideration for a charitable subscription. (See page 114 in Chapter 6.) If a court held there was consideration for a promise from Bernie to the Food Bank, then Bernie would owe a legal obligation to Food Bank. Furthermore, the contract between Bernie and Grocery Store would be in fulfillment of the legal obligation to Food Bank. Consequently, Food Bank would then be considered a creditor beneficiary.

Answer to the Question on Page 871 (2nd ed.)

What rationale would a court use to prohibit the assignment?

The assignment would be prohibited since it increases the risk for Insurance Company of having to make a payout. Insurance Company based the lower rate Athlete had to pay on his good health, thereby making an assumption that it would have to pay out fewer benefits given a lower likelihood of Athlete becoming ill. Aunt has poor health; therefore, the probability that Insurance Company will have to pay benefits under the contract will increase if the right is assigned to Aunt.

The problem illustrates the issue of increased risk. In practice, any insurance company would likely have included a term in the contract that makes any such assignment void.

Answers to the Question on Page 873 (2nd ed.)

Who is the obligor, obligee/assignor, assignee? Who can Zeke recover from if Xavier doesn't pay?

Xavier is the obligor since she owes an obligation of paying $100,000 to Yolanda. Yolanda is the obligee since she has the contractual right to receive the $100,000. Yolanda is also the assignor since she assigned the right to Zeke, who would be the assignee.

Zeke would normally only be able to sue Xavier if Xavier does not pay; however, Xavier has a valid defense of nondisclosure in not performing. Under these circumstances, Yolanda made a misrepresentation to Zeke when she said that Xavier did not have a valid dispute with Yolanda. Zeke can therefore sue Yolanda for the nonpayment of the $100,000.