



# **California First-Year Law Students' Examination**

**Essay Questions  
and  
Selected Answers**

**June 2014**



The State Bar Of California  
Committee of Bar Examiners/Office of Admissions

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180 Howard Street • San Francisco, CA 94105-1639 • (415) 538-2300  
845 S. Figueroa Street • Los Angeles, CA 90017-2515 • (213) 765-1500

## **ESSAY QUESTIONS AND SELECTED ANSWERS**

**JUNE 2014**

### **CALIFORNIA FIRST-YEAR LAW STUDENTS' EXAMINATION**

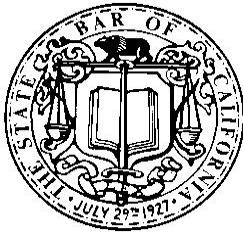
This publication contains the four essay questions from the June 2014 California First-Year Law Students' Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

<u>Question Number</u>	<u>Subject</u>
1.	Torts
2.	Criminal Law
3.	Torts
4.	Contracts

**June 2014**

## **ESSAY QUESTIONS**



# **California First-Year Law Students' Examination**

## **Answer all 4 questions**

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

You should answer according to legal theories and principles of general application.

## QUESTION 1

Twenty years ago, Flowers, Inc. (Flowers) built a large greenhouse facility in a rural area twenty miles outside of the city of Urbania at a cost of \$20 million. Flowers employs 20 workers. Because many of the plants grown in the greenhouse require more light than is naturally available, Flowers installed a system to provide needed light during normally dark periods. The light was extremely bright, casting a glow far beyond Flowers' property.

Flowers was successful in its business, but became concerned as the suburban area around Urbania expanded and as houses were built closer and closer to its greenhouse. Flowers decided to put up signs all around its property warning prospective residents of the light created by the business.

Harry saw Flowers' signs when he was thinking about buying one of the nearby residences, but figured that the light could not be that bad. He subsequently purchased and moved into an expensive new home, much like all the others in the area, on the street directly facing Flowers' greenhouse. After having lived there three months, Harry decided that he could not tolerate the light coming in his windows 24 hours a day. He has asked Flowers to turn off the lights, and Flowers has refused, arguing that its facility is completely up to industry standards, that there is no way to continue the business without the light, and that Harry knew about the issue when he bought the house.

1. What tort claims can Harry reasonably bring against Flowers? Discuss.
2. What remedies can Harry reasonably seek? Discuss.

## QUESTION 1: SELECTED ANSWER A

### Harry v. Flowers, Inc. (Flowers)

#### Private Nuisance

Nuisance is an unreasonable interference with the use and enjoyment of the land in possession of another.

Harry will assert a claim of nuisance against Flowers because the light shining into his home that lies directly across from the greenhouse that Flowers operates is an unreasonable interference with the use and enjoyment of his property. There is extremely bright light streaming into his home "24 hours a day" and he asserts that he can no longer tolerate it after enduring it for three months. He will claim that it is unreasonable because the neighborhood has become fairly residential and as a residential neighborhood it is not reasonable to have light shining at hours that are normally dark and that any reasonable person would be bothered by the intrusion.

Harry will argue that the extremely bright light interferes with the use and enjoyment of his property. The light streams in 24 hours a day and likely makes it difficult [to] use and enjoy his windows.

Flowers will assert that it is a successful business with no other means of operating its greenhouse. Flowers did everything in their power to maintain distance as they built their facility twenty miles outside of Urbana. The nuisance is not unreasonable, that the plaintiff came to the nuisance, and that there are measures that he can take to limit his damages such as heavy curtains or shutters. Flowers is a successful business at a cost of \$20 million dollars and is a benefit to the community.

Nuisance claims are judged on the benefit and utility to society versus the detriment that the plaintiff suffers. Flowers is a large business that built an expensive greenhouse to

grow plants. They likely employ many people and provide a valuable service to the community at large. Harry also knew via the signs that Flowers posted around the property that the light was part of the community standard and it is likely that the price that he paid for the home, although "expensive" was reflected in that.

Flowers will also argue that Harry "came to the nuisance" and was fully aware of the consequences of moving across the street. Coming to the nuisance is not a defense and is merely used by the court in weighing the damages. They will state that he consented to the light when he moved and was fully aware and assented to the intrusion.

Harry has a valid claim of nuisance against Flowers although it is likely that he will not prevail in obtaining injunctive relief.

### **Public Nuisance**

A nuisance that is a public detriment and usually violates an ordinance and as such affects the public at large. Proof must be offered that the Plaintiff suffered harm that was "different in kind" from the harm incurred by the general public.

Harry will assert a claim of public nuisance based on the theory that the light violates the peace and enjoyment of the entire neighborhood. Harry will argue that he has suffered harm different in kind from his neighbors because he is directly across the street from the nuisance, however he has other neighbors who are across the street and who suffer from the same issues. Harry will be unable to prove that he suffered harm that was different in kind from the other people in his neighborhood because the light shines all over.

Harry does not have a claim for public nuisance.

## **Trespass**

Trespass is the intentional interference with the property of another without consent.

Harry will claim that there is unnatural light streaming onto his property at all hours and that is a trespass. Flowers intentionally lights the area up 24 hours a day in order to grow the plants and it interferes with his property by causing him to endure light during periods that are normally and naturally dark. He will state that under Martin v. Reynolds the harm need not be fully physical in order to constitute a trespass. The case regarded pollutants that were airborne and were coming onto the land, he will argue that light particles are similar to the airborne pollutants and that the fact that they are coming onto his land and illuminating it at odd hours is a trespass.

Flowers will argue that the pollutant particles were a more physical invasion and that light is not causing the same level of harm because it is merely illuminating the area and not dusting it with particles.

Harry does not have a claim for trespass.

## **Intentional Infliction of Emotional Distress**

Extreme and outrageous conduct that is calculated to cause, and does cause extreme emotional distress.

Harry will argue that light streaming into his home at all hours causes him undue distress and is emotionally jarring. He will say that it is extreme and outrageous and that Flowers is intentionally causing him severe distress because they refuse to turn off the light. Flowers uses the light for its plants and does not calculate to cause his distress.

Harry does not have a claim for intentional infliction of emotional distress.

## **Remedies**

### **Injunction**

An injunction is a measure that prevents the defendant from continuing the action that the plaintiff seeks relief from.

Harry will seek injunctive relief for the light shining onto his property. He will claim that the light is an unreasonable nuisance and that Flowers should be prevented from shining it at all hours.

Harry will likely not be able to obtain injunctive relief from the light because, as discussed above, Flowers business is a benefit to Urbania.

### **General Damages**

Damages received for pain, loss, suffering or anxiety.

Harry will argue that having light streaming into his home at all hours causes him an unreasonable amount of stress and anxiety and that he should be awarded damages in light of that fact. Harry may be able to receive damages for the nuisance. He may also be able to receive damages for any measures undertaken to shut out the light.

Harry will receive damages.

### **Special Damages**

Monetary damages awarded for loss of income.



## **Punitive Damages**

Punitive damages are damages that punish a tortfeasor for malicious behavior.

There is no indication that Flowers acted in a malicious manner as they did everything in their power to warn prospective neighbors of the light issuing forth from their greenhouse.

Harry will not receive punitive damages.

## QUESTION 1: SELECTED ANSWER B

### 1) HARRY (P) V. FLOWERS (D)

#### Nuisance

Harry will sue Flowers based on nuisance. Nuisance is a type of harm where the D causes substantial interference with the P's quiet enjoyment of their real property. That property must be in the P's possession or immediate right to possession. At the time that P filed suit against Flowers he had been living in his home for three months and therefore did have possession of the property and a right to sue for nuisance.

#### Substantial interference

The substantial interference created by Flowers is the use of light that was "extremely bright, casting a glow far beyond Flowers' property". The quality of substantial is not measured by D's conduct, but by how great the impact would be on a reasonable, not hypersensitive person. Would a reasonable person find this to be highly objectionable? Harry will argue that not only are the lights extremely bright and disruptive to the enjoyment of the property when they are on, but he would point out that their light is "coming in his windows 24 hours a day"! There is no escaping the disruption that the lights cause. The interference is substantial.

#### Social utility v. harm

Courts will consider the circumstances of a nuisance in determining whether the harm should be allowed to continue. Factors that will be considered are the social utility to the community weighed against the harm. Flowers acknowledges the harm that the lights create, but will point out the social utility of keeping the business operational. Their business provides work to 20 workers and is successful. In a rural area, as such, that is an income to 20 people/families who live nearby which means employment for an area that will less likely have high employment opportunities such as a larger city. Those 20 jobs are important. The business cost \$20 million to initiate and is successful. The service they provide, growing plants, is valuable to the community; otherwise they

would not have found such success. Furthermore, although there is a harm in the constancy of the lights, Flowers will show that the lights are bright at the greenhouse, but only put out a glow beyond their property. D will make known that they conform to industry standards in their operation. P could always shut their curtains at night and avoid the light. There is a value to the community which will likely outweigh the harm.

### **Alternatives**

Although, there is a value to the community P will argue that perhaps the company can make modifications or adjustments that would allow the social utility, but help to eliminate the harm. P is requesting that the lights be turned off. D could also turn the lights another direction or create barriers between the greenhouse and the residential areas of the town to minimize the impact on the P. D should show reasonable efforts to minimize the harm in order to continue.

## **DEFENSES**

### **Coming to the harm**

Generally, D may argue that P came to the harm if the harm existed before P encountered it. This is a type of assumption of the risk analysis. Here, Flowers had built the greenhouse facility in an area appropriate for the factory. They built "in a rural area twenty miles outside of the city". As the town expanded and grew closer, Flowers then put up signs to warn "prospective residents" of the light created by the business. Given the efforts to build away from a town and the warning that Flowers put forth, then prospective residents, such as Harry who saw the signs, cannot say that he did not have knowledge and awareness of the harm. He was warned and chose to voluntarily encounter the interference anyway.

P will argue that although he saw the signs he did not fully understand the scope of the harm. He "figured the light could not be that bad". One who comes to the harm may still sue so long as their reason for coming to the harm is not to sue. P clearly did not

move to the area with a full appreciation of the interference of the lights and therefore may bring suit against Flowers and likely prevail.

## **2) REMEDIES FOR HARRY**

### **Injunction**

Harry will likely request an injunction. An injunction is an equitable remedy in which the court orders the D to stop doing something. In this case, P will request that the courts have D shut off the lights that are causing the substantial interference. D will again argue that the lights are pertinent to their operation. Many of the plants grown require more light than is naturally available and will not grow without it, which will impact the business. They meet industry standards and should not be required to shut down or suffer impacts to their operation.

D will likely prevail here.

Perhaps, alternatives may be sought as mentioned above in which D can help to remedy the situation by putting up lighting. In some cases, when one comes to the area and this forces a result on D, P can bear some of the cost of remedy.

### **Legal remedies**

P may seek damages for the harm caused or for dealing with the future harm of the interference. If P's have to move or get curtains, etc., P will seek to be compensated for this.

P will likely prevail here.

### **Note: Public Nuisance**

Private nuisance varies from public nuisance in that the substantial interference is to the health and safety of the community at large and the P would have to suffer a harm that is unique to the rest of the community. Here, P is suffering from the same burden of the

lights that affects the rest of the community and there is no apparent threat to health or safety; therefore private nuisance would not be applicable.

## QUESTION 2

Will asked Steve, a professional assassin, to kill Adam, a business rival, and Steve accepted. Before Steve was scheduled to kill Adam, Will heard that Adam's business was failing. Will told Steve that he had changed his mind and no longer wanted him to kill Adam, but Steve responded that he was going to kill Adam anyway.

Steve assaulted Adam late at night on a dark, deserted street. Adam resisted so vigorously as to put Steve's life at risk. Steve finally overcame Adam's resistance and succeeded in killing him.

1. What charges can reasonably be brought against Steve? Discuss.
2. What charges can reasonably be brought against Will? Discuss.

## QUESTION 2: SELECTED ANSWER A

### 1. CHARGES AGAINST STEVE (S)

#### CONSPIRACY TO COMMIT MURDER

Conspiracy is when two or more people agree together to do an unlawful act or to do a lawful act for an unlawful purpose, and in most jurisdictions, the conspiracy begins with the agreement and includes doing an overt act in furtherance of that conspiracy.

Here, S was asked to kill someone by W and he "accepted," so this is an agreement between them to commit the killing, which is an unlawful act. He did an overt act in furtherance of the conspiracy to kill by assaulting Adam late at night, showing that he sought Adam out with the intent to kill him. S may be charged with conspiracy.

#### PINKERTON RULE

provides that all co-conspirators are liable for all crimes committed in furtherance of the conspiracy, no matter which conspirator does the unlawful act.

Here, S does the act, so his co-conspirators will be liable for his crimes.

#### WHARTON'S RULE

provides that there must be at least one more person involved in the conspiracy than the number of people required to carry out the target unlawful act.

Here, it only takes one person to kill another, and there are two conspirators here, S and W, so this requirement is met for this conspiracy.

#### MERGER

provides that certain lesser included crimes may be merged into the larger crime, so that one may be charged with all but only may be convicted of the larger crime.

Here, S may be charged with both conspiracy and with murder as discussed below; however, conspiracy does not merge, so he will still be liable for both the conspiracy to commit murder and for the murder as discussed below.

#### ASSAULT

is the intentional placing of another in reasonable apprehension of the unlawful application of force that would result in harmful or offensive touching or physical injury.

Here, the facts tell us that S "assaulted" Adam so we can assume this is true, so he would be liable for that assault.

#### BATTERY

is the intentional and unlawful application of force that results in harmful or offensive touching or physical injury.

Here, the facts tell us that S "assaulted" Adam so we can assume this includes the crime of battery, so he would be liable for that battery as well.

#### MERGER

is discussed above.

Here, the assault and battery will merge into the larger crime of murder as discussed below, so S may not be convicted of assault and/or in addition to the murder.

#### MURDER

is the unlawful killing (homicide) of another person.

#### FIRST-DEGREE MURDER

is murder that is either a premeditated, deliberated killing of another person or a killing that occurs during the commission of an underlying, independent inherently dangerous felony.



## PREMEDITATED/DELIBERATED MURDER

is a homicide wherein the D intends to kill a person, has time to decide ahead of time to kill, and plans, premeditates doing the killing in a cool, calm manner.

Here, we are told that S is "a professional assassin," so he would be used to carrying out these killings in a planned, organized, and calm, cool manner. Here, he clearly accepts the solicitation to kill Adam, plans to do so and carries it out. S may be charged with first-degree, premeditated/deliberated murder of Adam.

## DEFENSES TO MURDER - SELF-DEFENSE

A person may use reasonable, necessary force to defend oneself against attack from another person, and may use deadly force if the attack reasonably appears to endanger life or threatens serious bodily harm.

Here, S will assert that because Adam "resisted...vigorously" he had to fight back and therefore was defending himself. However, this defense will not succeed because S was the aggressor and planned to kill Adam.

## FELONY MURDER

is a killing that occurs during the commission of an underlying, independent inherently dangerous felony.

Here, as discussed above, S has committed the felonies of assault and battery; however, because those charges will merge into the larger crime, they are not sufficient to support a felony murder charge because they are not independent of the murder felony.

## SECOND-DEGREE MURDER

is all other killing besides FIRST-DEGREE MURDER and may be done with INTENT TO KILL, INTENT TO INFLICT GREAT BODILY HARM OR A DEPRAVED HEART KILLING.

## INTENT TO KILL

is when the D subjectively desires to do the killing or knows with substantial certainty that death will result from his actions.

Here, if S is not convicted of FIRST-DEGREE MURDER, he may be charged with SECOND-DEGREE MURDER Intent to kill because he was a professional assassin, hired to do the killing and desired to kill Adam.

## INTENT TO INFLICT GREAT BODILY HARM

may be demonstrated by the use of a deadly weapon or by other conduct intended to and known to inflict serious bodily injury.

Here, S has accosted Adam late at night in a dark street to kill him, so we can assume he either used a deadly weapon or otherwise knew how to inflict serious bodily injury, especially since he is a professional assassin.

## DEPRAVED HEART KILLING

is one that is done with reckless disregard for a known risk to human life.

Here, again, because S is a professional, we can assume that he possessed this intent to kill with a depraved heart and reckless disregard for human life.

## DEFENSES

are discussed above and will apply here the same.

## VOLUNTARY MANSLAUGHTER

is when certain circumstances serve to mitigate a murder charge down to the lesser charge of voluntary manslaughter, either by adequate provocation or by an "imperfect self-defense."

### ADEQUATE PROVOCATION/LACK OF COOLING-OFF

is when a specific event occurs to provoke D into killing, such that a reasonable person would be adequately outraged and provoked by the event, and D actually IS PROVOKED by this event -- and a reasonable person in that circumstance would not have time to "cool off" and just does the killing, and the D actually does not have time to "cool off" and does not in fact cool off.

Here, there is no indication of an event that would be sufficiently provoking to allow this mitigation, such as one finding their spouse engaged in a sexual act with another or one being attacked with a substantial blow, etc. so this mitigation will not apply for S. The facts do not indicate any such circumstances here.

### IMPERFECT SELF-DEFENSE MITIGATION

is a second circumstance that may mitigate a murder down to voluntary manslaughter, wherein the D has the right to defend himself against an attack but overreacts or otherwise exceeds the scope and level of the defense allowed because he has misjudged the situation somehow by mistake.

Here, the facts do not indicate any circumstance whereby this mitigation will apply for S because he is a professional killer and has no right to the defense of self-defense because he was the aggressor and planned the killing, regardless of the victim's attempt to protect himself.

### INVOLUNTARY MANSLAUGHTER

is a killing of another person that is unintended and may be due to criminal negligence or may be a misdemeanor manslaughter.

### CRIMINAL NEGLIGENCE

is when a duty is owed to the victim but the D so grossly deviates from the standard of care owed that a killing/death results even though D had no intent to kill.

Here, there are no facts which suggest this applies and S will not be charged with involuntary manslaughter by criminal negligence but will still be charged with murder as discussed above.

#### MISDEAMEANOR MANSLAUGHTER

is a killing that occurs during the commission of an underlying, independent NON-inherently dangerous felony or a misdemeanor.

Here, there are no facts which suggest this applies and S will not be charged with involuntary misdemeanor manslaughter but will still be charged with murder as discussed above.

## **2. CHARGES AGAINST WILL (W)**

#### SOLICITATION FOR MURDER

is when one person asks or requests another person to do a killing of a person with the intent that the killing be done.

Here, the facts tell us that W asked S, a professional assassin, to kill Adam, a business rival. The solicitation was complete when W made the request to W, so he will be charged with solicitation.

#### ACCOMPLICE TO MURDER

An accomplice is one who aids, abets, or otherwise encourages a crime with the intent that the crime be committed. An accomplice may be charged with ALL CRIMES committed by the Principal [the one doing the unlawful act(s)], regardless of whether they were foreseeable or not or were in furtherance of the target crime or not.

Here, because W has solicited S to do the killing and encouraged him by the solicitation and giving him Adam's identity, he may be charged as an accomplice to the crimes committed by S.

## MERGER

is discussed above and will apply here for W as applied above for S; the crimes of SOLICITATION and ACCOMPLICE will merge with the murder charge that will also apply to W.

## CONSPIRACY TO COMMIT MURDER

is discussed above and will also apply here to W; W will be liable for all crimes committed in furtherance of the conspiracy to commit murder.

## DEFENSE – WITHDRAWAL

is when one party who has conspired to commit a crime decides to withdraw from the conspiracy and go no further to commit the target crime, so it may be a defense to a charge.

Here, W told S that he changed his mind and no longer wanted him to kill Adam. Communication to the other conspirators is required in order for a withdrawal to be effective and if so, then the party withdrawing may still be charged with the conspiracy but may escape the target crime charge. Had W told the police or otherwise tried to prevent the killing, some jurisdictions would have let him escape the conspiracy charge as well.

## QUESTION 2: SELECTED ANSWER B

Steve

Conspiracy

Conspiracy is when two or more parties agree to commit a crime. When Will asked Steve to kill Adam, "Steve accepted," strongly indicating an agreement between the two to commit the crime of murdering Adam. Modernly many jurisdictions also require an overt act in furtherance of the conspiracy. In this case, Steve's actual killing of Adam satisfies the element of an overt act. Conspiracy is also a specific intent crime, meaning that there must be the specific intent to carry out the crime in question. Here again, this element is strongly indicated by the fact that Steve did in fact kill Adam.

Steve is guilty of conspiracy. Conspiracy does not merge with any of the other crimes mentioned below.

Assault

An assault is an attempted battery or the threatening of another with an imminent battery. Here the fact pattern says that Steve assaulted Adam, though it is not clear if this means a legal assault or the more common meaning which is more akin to a battery. There was an attempt but because the killing/battery was actually successful Steve would be charged with the accomplished crimes rather than the attempts.

As there was a fight, it can logically be inferred that at some point before his death, Adam was placed in apprehension of an immediate battery by Steve. In this sense, he was assaulted.

## Battery

A battery is the unlawful application of force to the person of another. Steve killed Adam. This was an unlawful application of force to Adam. Steve is guilty of battery.

## Merger

If all the elements of one lesser crime are included in the elements of a greater crime, that crime merges with the greater. In this case, both assault and battery merge with murder which will be discussed below.

## Homicide

Homicide is the killing of a human being by another human being. Adam was a human being. He was killed by Steve, another human being. There was a homicide.

## Causation

In order to establish criminal liability it must be shown that the actions of the defendant were the actual and proximate cause of the victim's death. The facts only say that Steve...succeeded in killing him (Adam). This establishes actual and proximate causation.

## Murder Malice

Liability for murder requires the element of malice with one of four possible bases: intent to kill, intent to inflict serious bodily harm, wanton or reckless conduct, or the felony murder rule.

In Steve's case, he had the intent to kill Adam. First, he "accepted" Will's request that he kill Adam. Second, he "responded that he was going to kill Adam..." Thirdly, Steve

overcame Adam's substantial, even life threatening, resistance and killed Adam. This struggle indicates intent on the part of Steve. Finally, it says that Steve "succeeded" in killing Adam, indicating that he had that desire or goal going into the event. It was his intent to kill Adam. There is also the fact that Steve is a professional assassin. This means that he kills people for a living. He has done it before. He knows how to do it. He is probably good at it. He has probably developed the mental coolness to deliberate over, plan and carry out these killings.

The intent to inflict serious bodily injury is included in the intent to kill.

Wanton and reckless conduct. This element likewise is included. To assault someone, struggle with them and eventually kill them is certainly wanton, a disregard of a known risk to human life, but it is also included in the first element of intent to kill.

The felony murder rule does not apply here because Steve was not committing any other felony other than the murder. The killing itself cannot be the felony upon which murder malice is established, it must be a distinct felony which is causally related to the killing.

#### First-Degree and Second-Degree Murder

Having established murder malice, a modern law court will proceed to consider if this is first-degree murder or second-degree murder. First-degree murder requires the elements of deliberation, and premeditation, or that the murder was accomplished by certain methods such as poison, torture, a trap, explosives, etc. First-degree murder can also be established by the felony murder rule.

In Steve's case, again from his acceptance of Will's request to kill Adam, and from his confirmation that he would kill Adam in spite of the fact that Steve no longer wanted him to kill Adam, deliberation and premeditation are strongly indicated. All the facts, though brief, indicate that Steve considered the killing. He thought about it in advance. It was



a conscious decision on his part, not something that he rushed into or decided at the last moment. Steve would be found guilty of first-degree murder.

There is also mention of a "schedule" to kill Adam. This schedule also indicates planning and deliberation. It also further corroborates the conspiracy.

Second-degree murder is all murder which is not first degree.

Mitigation to voluntary manslaughter

Murder can be mitigated to voluntary manslaughter due to the heat of passion defense, mistaken justification or excuse, coercion or diminished capacity. These elements do not apply.

Defenses:

Self-Defense -- a person may use any reasonable force to protect themselves from imminent bodily harm.

The only possible defense that Steve would claim is self-defense. It is true that Adam resisted and put Steve's life at risk. However, because Steve was the initial aggressor and because his intent was to kill Adam, this defense would not be allowed. Rather it was Adam who would have had the defense of self-defense if he had killed Steve in an attempt to protect himself.

Will

Solicitation - - solicitation is requesting, counseling or inciting another to commit a crime. Solicitation is a specific intent crime which is complete upon the act of the request, etc. Will "asked" Steve to kill Adam. He is guilty of solicitation. Solicitation is complete upon the act of requesting.

## Accomplice liability

If a solicitation results in the other party attempting or committing the target crime, the solicitor is guilty as an accomplice. According to the rules of accomplice liability, the accomplice is liable for all the crimes of all the principals and all the accomplices which are carried out in furtherance of the target crime or are reasonably foreseeable results of the target crime.

An accomplice is required to have knowledge of the target crime. Here Will certainly had knowledge of Adam's murder because he requested Steve to do it. He also had to either solicit or assist in the target crime. Here Will solicited. He gave Steve the idea in the first place. Lastly, some courts require intent that the target crime be accomplished, indicated often by a corrupt stake in the venture. In this case, Will initially had the intent because he asked Steve to do it. Also he had a corrupt goal, to put a business competitor out of business. At least at the moment of solicitation, Will had the knowledge of the target crime and the intent that it would be accomplished.

Merger--solicitation merges with either the attempt, the commission of the target crime or with conspiracy. In this case, Will will be found to be an accomplice, thus liable for the target crime which was successfully accomplished. He will also likely be found liable for conspiracy (infra). So solicitation in his case merges.

Conspiracy--see definition supra--Will agreed with Steve that Steve would kill Adam. A modern court may look for some overt act in furtherance of the conspiracy. Again, Steve's actions to kill Adam supply the necessary overt acts.

Pinkerton's Rule -- the general rule of conspiracy liability states that a coconspirator will be liable for all the crimes of all the conspirators which are accomplished in furtherance of the conspiracy or are a foreseeable result of the conspiracy. The murder of Adam was the clear and unique goal of the conspiracy, therefore, Will will be found liable for the first-degree murder of Adam, unless he has some valid defense.

Defenses:

Withdrawal

Will would argue that he withdrew from the conspiracy before the actual target crime was attempted and accomplished. In order for a withdrawal to be valid and to excuse a coconspirator from the future crimes of the conspiracy, it is necessary that, one, the coconspirator notify the other conspirators of their withdrawal. In this case, Will notified Steve. He said that he had changed his mind and that he no longer wanted Steve to kill Adam. However, in addition most courts will require that the defendant have thwarted the success of the conspiracy in circumstances indicating a complete and voluntary withdrawal from the criminal purpose. In other words, Will would have had to either somehow stop Steve himself, or notify the legal authorities so that Steve would be stopped from killing Adam. Absent such thwarting, Will's withdrawal is ineffective, and he will be liable for the murder of Adam on the basis of accomplice liability and conspiracy liability.

### QUESTION 3

Jane, a babysitter, took three 6-year-old children—Abe, Betty, and Carl—to the playground.

Abe ran through flower beds bordering the playground. Gary, a groundskeeper, yelled at Abe, “Hey, get out of the flower beds!,” and threw a rock at him. Abe ducked, and the rock missed him.

Betty climbed the ladder at the back of a metal slide manufactured and sold by Slideco. The surface of the slide became very hot on typical summer days. That day was a typical summer day and the slide’s surface reached a temperature of 140 degrees. As she went down the slide, Betty sustained burns on her legs.

Carl began to kick a soccer ball. Jane was too occupied texting on her cell phone to notice that Carl had kicked the ball into the street and was running to retrieve it. A motorist, who was driving 40 miles per hour despite a posted limit of 25 miles per hour, struck Carl and injured him.

1. Under what theory or theories, if any, might Abe bring an action for damages against Gary? Discuss.
2. Under what theory or theories, if any, might Betty bring an action for damages against Slideco? Discuss.
3. Under what theory or theories, if any, might Carl bring an action for damages against Jane? Discuss.

### QUESTION 3: SELECTED ANSWER A

#### 1. Abe v. Gary

Assault - It's the intentional placement of apprehension of a harmful or offensive touching of the person of another without consent or justification.

Here, Gary, "yelled" at Abe. Gary said "Hey, get out of the flower beds!" Gary picked up a rock and "threw the rock at him." Thus, Gary is showing intent to place Abe in an immediate apprehension (Gary was yelling at him as he was throwing the rock at Abe) of an immediate harm. A rock thrown by an adult at a child may cause serious harm.

Abe, was aware Gary was yelling at him and he was also aware that Gary "threw a rock" because Abe "ducked" the rock. Abe did not consent, nor Gary seems to have a legal justification since the use of violence seems excessive force to be used to "protect" flowers.

Therefore, Gary will be liable for assault.

Defenses – Defense of property - Gary may argue he was protecting the flowers in the public park.

This defense will fail since this force was not reasonable to protect flowers in a public park.

#### Intentional Infliction of Emotional Distress

It's the intentional outrageous conduct that intends to inflict emotional distress and does cause severe emotional distress.

Here, Abe will argue that a 6 year old child is very sensitive to the conducts of adults. The yelling and throwing of a rock were intentional behaviors. Gary was trying to inflict

emotional distress on a child who was just playing in the park. A 6 year old child playing at the park on a summer day would not expect such an outrageous behavior from an adult. Abe did duck when Gary threw the rock. Gary will argue that his behavior did not cause Abe severe emotional distress.

The court would agree with Gary since the facts do not state Abe suffered severe emotional distress.

Therefore, Gary would not be liable for intentional infliction of emotional distress.

## 2. Betty v. Slideco

### Products Liability

#### Negligence

A defendant, like Slideco, would be held liable for negligence, if the plaintiff, Betty, can prove that there was a duty owed to her, that Slideco breached that duty, the breach of that duty was the actual and proximate cause of Betty's injuries.

Duty – Any manufacturer that places a product in the stream of commerce has the duty to do so safely, as any other manufacturer would under the same or similar circumstances.

Previously, duty was owed only within the privity of the two parties.

Modernly, privity is not necessary.

#### Defendant

Here, Slideco, is the manufacturer and seller of the metal slide; therefore it is the proper defendant.

### Plaintiff

A slide made and sold to a city park, is intended for the use and enjoyment of children. Betty, is a 6 year old girl, who frequents the park to play on the slide. Therefore, Betty is a proper plaintiff.

Slideco owed a duty to Betty, to have made and sold a safe slide.

Breach – It's the action that falls below the standard of care owed by defendant (Slideco) to defendant (Betty).

Design Defect – It's the defect that the manufacturer incurs when the product is manufactured according to the design but it is unsafe.

Here, the metal slide was manufactured according to design specifications. The metal slide, reached very high (140°) temperatures on "typical summer days." This is a design problem, since during "typical summer days" the slide was too dangerous for children to use.

Utility/risk test – Would a different design have solved this problem?

Maybe a different material like wood, would have been a better choice. Definitely, the risk of having children burned is too high for the utility of a slide, that is supposed to provide fun and enjoyment to children.

Warning Defect – Slideco could have warned children, parents, of the risks of burning if the summer days were so hot that created the slide unusable.

This warning may not be sufficient since many children that use a slide may not read a sign before sliding down, nor they may know how to read. Also, children may choose to ignore the sign since having fun is more important and they may not be able to appreciate the risks involved.

### Causation

Actual Cause – But for the metal slide reached 140° in a typical summer day, Betty would not have burned her legs.

Thus, Slideco's metal slide, is the actual cause of Betty's burns.

Proximate cause – It is foreseeable that a metal slide that reaches temperatures of 140° on summer days, would burn a child's legs while sliding down.

There are not intervening events.

Therefore, the metal slide is the proximate cause of Betty's injuries.

Damages – Betty suffered burns on her legs. This is a foreseeable kind of injuries for sliding down a hot metal slide. Also, pain and suffering, specials, medical bills, and out of pocket.

### Defenses

Industry Common Practice – Slideco may argue that metal is a reasonable material to use for slides, and that other companies also use metal to make slides.

This defense will fail since in this city on "typical summer days" the metal slide reaches unsafe temperatures.

### Contributory Negligence – Betty

Slideco may argue Betty contributed by going down the slide even though it was hot.

Defense will fail, since Betty is a 6 year old child, that may not know about the danger of a hot slide.



### Contributory Negligence - Jane

Slideco may argue that Jane, the babysitter, in locus parentis, was contributorily negligent since she did allow Betty to go down a hot slide.

Defense will fail since contributory negligence of Jane cannot be applied to Betty.

Therefore, Slideco will be held liable for Betty's injuries under this theory.

### Warranty –

#### Implied Merchantability

Every merchant that sells a product impliedly warrants the safe use of the product for the intended use. This warranty is that the product is of fair and average quality for the use intended.

Breach - Slideco, breached this warranty by placing a product unsafe for the intended use, and of less than fair and average quality. Defect discussed supra.

Causation – discussed supra

Damages – discussed supra.

Therefore, Slideco will be also liable under this theory.

### Strict liability in Torts

Any merchant/seller will be held liable as operation of law, for placing a defective product in the commerce.

Breach – Discussed supra

Causation – Discussed supra

Damages – Discussed supra.

Since Slideco manufactured and sold the design/warranty defective metal slide and placed it in the stream of commerce, Slideco will also be liable under this theory.

Defenses – According to the facts, there are not applicable defenses for Slideco.

### 3. Carl v. Jane

Negligence – Omission to act

As a general rule, one does not have a duty to act in benefit of another unless there is a special circumstance that would constitute an exception to this rule.

Special Relationships – One of the exceptions is when there is a special relationship between the plaintiff (Carl) and the defendant (Jane).

Locus Parentis – Here Jane was the babysitter of Carl. A babysitter is deemed to step up in place of a parent when the parent is not present, to take care of a child (Carl).

Therefore, Jane, had the duty to take care of Carl just like his parents would.

Per Contract – Jane, was also contracted and paid for, to take care of Carl.

Therefore, Jane owed a duty to care to watch and take care of him.

Breach - Did Jane breach her duty?

Here the facts stated that she was “too occupied texting on her cellphone to notice Carl.”

Jane needed to act as a reasonable babysitter would have under the same or similar circumstances.

Carl had a ball. Carl was 6 years old, and there was a street by the park. Jane should have been paying attention to what Carl was doing. She acted below the standard and reasonable way. Therefore, Jane breached her duty to Carl.

### Causation

Actual cause – “But for” Jane being distracted on her cell phone, she would have seen Carl kicking the ball and running to the street.

Therefore, Jane’s omission to act was the actual cause.

Proximate cause – It is foreseeable that if Jane is not watching what Carl, a 6 year old is doing, when he kicks the ball to the street and runs after it, he would get hit by a car.

Jane, will argue that the motorist driving 15 miles over the speed limit was an independent intervening event that should cut off her liability.

Carl, will argue that it is foreseeable for motorists to drive above the speed limit, and therefore, Jane should have been more careful in watching Carl as he played with ball by the street.

Therefore, Jane’s omission to act is the proximate cause of Carl’s injuries.

Damages – Carl was hit by a car so he will get generals, past, present and future pain and suffering, specials, hospital and doctor’s bills, and any other out of pocket.

Defenses – Contributory Negligence of Carl. Jane may argue Carl owed himself a duty to keep himself safe and he acted below the standard of care owed to himself.

Defense will fail since Carl is just a 6 year old child.

Negligence per se of motorist

Will fail since we cannot apply his negligence to Carl.

### **QUESTION 3: SELECTED ANSWER B**

**1) UNDER WHAT THEORIES MIGHT ABE BRING AN ACTION FOR DAMAGES AGAINST GARY?**

**ABE V. GARY**

#### **ASSAULT**

An assault is a voluntary act with intent to cause apprehension of an immediate harmful or offensive touching that does cause reasonable apprehension resulting in damages.

Here G threw a rock at A after yelling "Hey, get out of the flower beds!". The act of his bodily movement to throw the rock satisfies the first element because it was completely voluntary.

G threw the rock in the direction of A to get him to leave the flower beds. G would argue he did not intend for A to be placed in fear of being struck by the rock when he threw but to merely get his attention. This is a weak argument because G would have been substantially certain that after getting a six year old child's attention by yelling at him and throwing a rock in his direction the child would be placed in apprehension of the rock hitting him which satisfies the intent element.

Here reasonable apprehension is present because A ducked after the rock was thrown specifically to avoid it hitting him; therefore it is shown he was in fear of being struck by the rock.

The damages present in this case is the fear the child felt from being hit by the rock.

#### **DEFENSES**

**DEFENSE OF PROPERTY**

Defense of property allows the reasonable use of force to defend one's property. Deadly force is never authorized.

Here G would state defense of property was valid because A was walking in the flower beds which would destroy and damage them. G was the groundskeeper in charge of maintaining the park and as such had control of the property. This is a weak argument because there were no signs or any indication stating for A to not enter them and it would have been reasonable for G to have stopped at only yelling at A to get out of the flowers because there was no indication he would not do so after being told making the further use of force unreasonable.

## **CONCLUSION**

The court would most likely find G liable for assault.

## **2) UNDER WHAT THEORIES MIGHT BETTY BRING AN ACTION FOR DAMAGES AGAINST SLIDECO?**

### **BETTY V. SLIDECO**

#### **STRICT PRODUCTS LIABILITY**

Strict products liability is present when a product is placed in commerce that was defective in some way from the manufacturer and that product causes harm to a foreseeable plaintiff.

#### **PROPER PLAINTIFF**

A proper plaintiff is any foreseeable consumer, user, or bystander of the product. Privity is not required between the parties.

Here B would be a foreseeable user of the product because the slide was manufactured to be used in playgrounds where children like her play and therefore she would be a proper plaintiff. S would argue the owner of the playground was the buyer and that S

did not have privity with them but this is invalid because privity is not required but only that she was a foreseeable user.

### **PROPER DEFENDANT**

A proper defendant for SPL is any member of the regular chain of commerce from manufacturer to the retailer who sells the product.

Here S is the manufacturer of the metal slide at the playground and as such they would be a proper defendant for strict products liability.

### **TYPE OF DEFECT**

The following types of defect are actionable under strict products liability: manufacturer defect, design defect, and failure to warn defect.

### **MANUFACTURER DEFECT**

A manufacturer defect is present when the product is in a different state than similar products made at the same time by the manufacturer. This is also stated as it was not manufactured as intended.

Here there are no facts which indicate that the slide was not made as it was intended to be and as such there is no manufacturer defect present.

### **DESIGN DEFECT**

A design defect is present when the product was made as it was intended to be but there is still a defect present.

Here B would state there was a design defect because the slide was made out of a metal that would become extremely hot when placed in the sun.

## RISK V. UTILITY TEST

The risk v. utility test compares the risk of the harm suffered by the defect and the utility of the product as designed in order to determine if there is a design defect.

Here S would state the utility of using metal for the slide was high because it is a durable material that would hold up to the elements and prolonged use and abuse from children over a long period of time. They would state those who purchase the product would not want to have to continuously replace it because it was not made from a very durable material and as such there is a significant utility for the use of metal.

B would counter this by stating the risk of a child being burned by the metal when using the slide is extremely high because traditionally more people go to parks and use the slide during times when the weather is warmer, creating a large probability that they would encounter the slide when it was very hot from prolonged sun exposure. S could counter stating the slide could be placed in an area that is shaded to avoid this but this is a weak argument because it is foreseeable that the slide would be placed in direct sunlight.

## CONSUMER EXPECTATION TEST

The consumer expectation test used the standard of what the average ordinary consumer would expect of the product in order to determine if there was design defect.

Here S would argue a reasonable consumer would expect the slide to be durable to last and afford the children the opportunity to use it at a play area which is met by the current design. B would counter stating the reasonable consumer would expect that children would be able to use the slide safely without fear of being burned to include the peak times of use when the slide would be extremely hot due to sun exposure and as such the current design would fail to meet the consumer expectation test.



## REASONABLE ALTERNATIVE DESIGN

This test examines if there is a reasonable alternative design that could have been used by the manufacturer in order to avoid the defect that is claimed.

Here B would state there was a defect because a different material could have been reasonably used to make the slide that would not have been subject to becoming so hot as to cause burns from merely sliding down it. S would counter stating the reasonableness of an alternative material is not known because no facts state if there would be increased costs or change the time of manufacture. B would counteroffer manufacturers produce slides made of plastic material which does not become as hot and as such provide a reasonable alternative.

## STATE OF THE ART

This test determines if there is any technological advances in the field the defendant should have been aware of in determining a design defect.

No facts are present to determine that there was any state of the art technology and as such this test is not effective in this case.

## FAILURE TO WARN

Failure to warn defect is present when there is an inadequate warning of a danger related to the product that would not be considered to be common knowledge to the public.

Here B would state there was a failure to warn because there was no warning present on the metal slide that it would become severely hot and cause burns when exposed to direct heat and sunlight for a long period. S would counter stating this would be general knowledge and as such should not require the warning. B would counter stating it would not be reasonable to believe a 6 year old would understand the danger and a warning was required.

## **CAUSATION**

Causation is required to show the design was the cause of the harm suffered. This requires the elements of actual cause and proximate cause.

### **ACTUAL CAUSE**

Actual cause is found by using the "but for" test or by determining if it was a substantial factor in causing the harm.

Here B would state the defect was the actual cause of her harm because but for the use of the metal or lack of a warning she would not have been burned when sliding down the slide.

### **PROXIMATE CAUSE**

Proximate cause is present when the harm suffered is a foreseeable consequence of the defect with no intervening acts breaking the chain of causation.

B would argue the defect was the proximate cause of her harm because it is foreseeable a child would burn themselves sliding down a slide in the direct sun that was made of metal and with no warning of the danger of it being that hot.

## **DAMAGES**

Damages in strict products liability must be foreseeable to the situation and must be more than merely economic.

Here B suffered burns from sliding down a hot metal slide which would be foreseeable; therefore they qualify as damages.

## **DEFENSES**

### **ASSUMPTION OF RISK**

Assumption of risk is a complete bar to recovery that requires the plaintiff: 1) knew of the risk, 2) voluntarily encountered the risk, and 3) appreciated the scope of the risk.

Here S would argue that it would be common knowledge for anyone to know of the risk of using a metal slide in the direct sun and that B voluntarily encountered the slide at the playground. B would counter saying as a six year old child she did not truly appreciate the scope of the risk and as such would not have assumed the risk.

### **CONCLUSION**

The court would most likely find S liable for strict products liability due to design defect and failure to warn.

### **NEGLIGENCE**

Negligence is an unintentional tort in which a party is harmed due to the defendant's failure to exercise the reasonable standard of care under the circumstances and requires the elements of duty, breach, causation, and damages.

### **DUTY**

Duty is the reasonable standard of care under the circumstances and is often stated as what the defendant could have done to prevent the harm. Under the Cardozo view a duty is only owed to those in the zone of danger who were foreseeably harmed. Under the Andrews view a duty is owed to everyone.

Here B would state S owed her a duty to make a slide that was safe for her to use because she was a foreseeable user of their product. B would argue there was a high enough degree risk of her being injured by the slide if it was not made safely that this duty should be present. S would claim there was no privity between the parties which would cause no duty. This is an invalid argument because as a foreseeable user of the slide B would be properly owed a duty.

## **BREACH**

A breach is present when the defendant fails to uphold the reasonable standard of care under the circumstances. This is typically stated as what a reasonable person would have done.

## **LEARNED HAND DOCTRINE**

This doctrine compares the probability of harm and the burden placed on the defendant to act differently in order to determine if there was a breach.

Here B would argue the probability that a child using the slide would be burned by it being too hot is so high in comparison to the burden that would be placed on S to manufacture the slide out of a different material that a reasonable person in their position would have done so. S would counter stating the economic burden would be high to invest in the material and research and that this would be an undue burden. B would counter stating this would be a one time cost and it would be offset by the decrease in harm caused to children.

## **CAUSATION**

See supra

## **ACTUAL CAUSE**

See supra

B would argue the breach was the actual cause of her harm because but for the slide being made the way it was she would not have been harmed. S would argue the placing of the slide in direct sunlight was the actual cause of her harm and not the metal. This is a weak argument because the slide being made of metal was a substantial factor in causing her injuries and as such would qualify as the actual cause.

## **PROXIMATE CAUSE**

See supra

B would argue the breach was the proximate cause of her harm because it is foreseeable a child would be burned sliding down the slide when it is highly susceptible to heat.

## **DAMAGES**

See supra

Here B suffered burns from sliding down the slide which are foreseeable to the circumstances.

## **DEFENSES**

### **CONTRIBUTORY NEGLIGENCE**

A complete bar to recovery if the plaintiff is found to have contributed to their harm no matter how slight.

S would argue B contributed to her harm because she did not check the slide to see if it was too hot to slide down prior to using the slide and that by doing so she had the last clear chance to avoid the harm. B would counter stating it would not be reasonable to hold a six year old to this standard.

### **COMPARATIVE NEGLIGENCE.**

Comparative negligence states a plaintiff may still recover the percentage of the defendant's negligence. Pure comparative negligence states they may recover whatever the defendant's percentage is. The other form states so long as they were not more negligent than the defendant they will still be able to recover the defendant's percentage.

S would make the same arguments as discussed supra in contributory negligence with the same counter arguments made.

## **ASSUMPTION OF RISK**

See supra

Here S would argue that it would be common knowledge for anyone to know of the risk of using a metal slide in the direct sun and that B voluntarily encountered the slide at the playground. B would counter saying as a six year old child she did not truly appreciate the scope of the risk and as such would not have assumed the risk.

## **CONCLUSION**

The court would most likely find S liable for negligence and award under the appropriate contributory or comparative negligence doctrine.

## **IMPLIED WARRANTY OF MERCHANTABILITY**

An implied warranty of merchantability states the product is fit for its normal use.

Here B would argue the implied warranty was breached when she was burned because the normal use of a slide would be for a child to play on it safely. Therefore it being made of a material which caused her to be easily burned was a breach of this warranty because it was foreseeable she would use the slide during a hot day.

## **DEFENSES**

### **ASSUMPTION OF RISK**

See supra

Here S would argue that it would be common knowledge for anyone to know of the risk of using a metal slide in the direct sun and that B voluntarily encountered the slide at the playground. B would counter saying as a six year old child she did not truly appreciate the scope of the risk and as such would not have assumed the risk.

## **CONCLUSION**

The court would most likely find S liable for breach of implied warranty of merchantability.

## **3) UNDER WHAT THEORY MIGHT CARL BRING AN ACTION FOR DAMAGES AGAINST JANE?**

### **CARL V. JANE**

#### **NEGLIGENCE**

See supra

#### **DUTY**

See supra

Here C would state J owed him a duty to properly supervise him at the park.

#### **SPECIAL DUTY: SPECIAL RELATIONSHIP**

Typically there is no requirement to supervise another unless a special relationship is present.

Here J was the babysitter who voluntarily assumed the care of C and took him to the park. This would create a duty present for J to provide proper supervision and care of C as a six year old child entrusted in her care.

#### **BREACH**

See supra

#### **LEARNED HAND DOCTRINE**

See supra

Here C would argue the risk of harm to a six year old child not being properly supervised at a park that borders a street is so high compared to the burden of the caregiver to pay proper attention to them that a reasonable person would avoid allowing themselves to be distracted by texting.

## **CAUSATION**

See supra

### ACTUAL CAUSE

See supra

Here C would argue J's breach was the actual cause of her harm because but for her texting and not paying attention he would not have been injured in the accident. J would argue the actual cause was the driver speeding. This is a weak argument because her not paying attention was a substantial factor in causing the harm and qualifies as actual cause.

### PROXIMATE CAUSE

See supra

C would argue the breach was the proximate cause of his harm because it is foreseeable a child would be injured running off at a park when not properly supervised.

## **DAMAGES**

See supra

C suffered physical injury from an accident due to not being supervised properly which is foreseeable.



## **DEFENSES**

### **CONTRIBUTORY NEGLIGENCE**

See supra

J would argue C contributed to his harm by running in the street without looking and as such contributed to his harm. C would counter that it would be unreasonable to expect this of a normal 6 year old child chasing a ball.

### **COMPARATIVE NEGLIGENCE**

See supra

J would make the same arguments as discussed supra with the same counter argument.

### **ASSUMPTION OF RISK**

See supra

J would argue C knew of the risk of running into the street and did so voluntarily. C would counter by stating a six year old child could not be held to appreciate the scope of the risk present and as such would not have assumed the risk.

## **CONCLUSION**

The court would most likely find J liable for negligence.

## QUESTION 4

On February 1, Wholesaler called Manufacturer and ordered 100,000 widgets at \$5 apiece for delivery on February 8. Manufacturer, who knew that Wholesaler was buying the widgets in order to resell them to retailers, said, "It's a deal." Wholesaler immediately entered into contracts to resell them for \$15 apiece.

On February 2, Wholesaler sent Manufacturer a signed formal memorandum confirming the agreement and setting forth all its terms. In listing the terms, Wholesaler misstated the price as \$6 apiece and added an additional term—that any dispute was subject to binding arbitration.

On February 3, Manufacturer received and read the memorandum. Manufacturer was surprised by the arbitration term, which was rare in the industry. Manufacturer did not respond to the memorandum.

On February 8, Manufacturer discovered that the market price of widgets had climbed to \$25 apiece and refused to deliver them to Wholesaler. Although substitute widgets were available for \$25 apiece, Wholesaler did not have the cash or credit to buy them.

On February 28, Wholesaler sued Manufacturer for breach of contract.

1. Is Wholesaler likely to prevail in its suit? Discuss.
2. What remedies, if any, may Wholesaler reasonably seek? Discuss.

## **QUESTION 4: SELECTED ANSWER A**

### **Applicable Law**

The Uniform Commercial Code (UCC) applies to the sale of goods, which are tangible, movable personal property identified to the contract at the time of formation.

The transaction here pertains to the purchase and sale of 100,000 widgets, which are tangible and movable goods that had been named in the contract at formation.

Therefore, the UCC will apply to this transaction.

### **Merchants**

A merchant is a person in the business or profession to which the goods or contract pertains, and those who hold themselves out as having expertise in such goods. Merchants are held to a higher standard of good faith and fair dealing, and certain sections of the UCC apply only to merchants.

Here, both Wholesaler and Manufacturer are in the widget business. Manufacturer actually makes the widgets and sells them, while Wholesaler resells them to retailers.

Therefore, both Wholesaler and Manufacturer

### **WHOLESALE (W) V. MANUFACTURER (M)**

### **Contract formation**

Contract formation requires a valid offer, a valid acceptance, consideration, and no valid defenses.

## **Offer**

An offer is the manifestation of present contractual intent, using definite and certain terms, communicated to the offeree.

When W called M and ordered 100,000 widgets on February 1, he specified all the material terms and would be sufficient to make a valid offer as follows:

Quantity - 100,000

Time of performance - Delivery on February 8

Identity of parties - W and M

Price - \$5 each, or \$500,000 in total

Subject matter - purchase of widgets

The UCC only requires that the quantity term be specified, although the terms of W's offer include much more detail. Because W communicated these specific terms to M, there was a valid offer.

## **Acceptance**

An acceptance under the UCC is any reasonable expression of acceptance (under common law it would be the unequivocal assent to the terms of an offer).

When M said "it's a deal" they expressed and communicated their assent to W's offer.

Therefore, there was a valid acceptance.

## **Consideration**

Consideration is a bargained for exchange of legal benefits and detriments.

The consideration here was the promise of 100,000 widgets for the promise to pay \$500,000.

Therefore, there was valid consideration. Note that when W immediately entered into contracts to the widgets for \$15 apiece, when M "knew that" W was buying them for resale, this would be foreseeable detrimental reliance. However, foreseeable detrimental reliance is relevant at the offer stage only when consideration is lacking, which is not the case here.

### **Terms of Agreement - Section 2-207 - Additional Terms**

Under UCC Section 2-207, additional terms that are included in an acceptance between merchants become part of the contract so long as the offer was not limited to the terms of the offer, the terms are not material, and the offeror does not timely object.

On February 2, when W sent M a signed formal memorandum confirming the agreement and setting forth all its terms, W included an additional term that any dispute was subject to binding arbitration. This was an additional term because such a term was not discussed prior to this memo. As noted supra, both W and M are merchants. There was nothing in the offer precluding the new term or otherwise limiting the terms to those stated in the offer, and M did not object to the new term even though he was surprised by it and thus aware of it. However, since such an arbitration clause term was "rare in the industry", and terms that dictate how and when a claim for breach must be settled, it is likely a material term. As such, it will be excluded from the contract.

W might argue that M had a chance to respond to it but failed to do so, and therefore should be barred from later raising the issue. But M may have presumed the term to be excluded because it was material. A court would have to decide if M's knowledge and lack of response was in essence a "waiver" of their ability to exclude the term.

### **Defense to Formation - Statute of Frauds**

A contract for the sale of goods of \$500 or more must be in writing to be enforceable.

The contract here was for \$500,000, and therefore must be in writing to be enforceable. There are, however, various exceptions under the UCC that will take the contract "outside" the statute of frauds, such as a merchant confirmatory memo.

### **Merchant Confirmatory Memo Exception**

When a merchant receives a written and signed confirmatory memo regarding a prior oral agreement, they must respond to the memo within 10 days or be barred from raising the statute of frauds as a defense.

Here, when W sent M a signed formal memorandum confirming the agreement and setting forth all its terms, this satisfied the statute of frauds because M did not reply to it.

Therefore, the statute of frauds is satisfied.

### **Defense to Formation - Mistake / Scrivener's Error**

A mistake in contract formation may allow a party to avoid contractual obligations when the error goes to the essence of the contract.

Here, there was a scrivener's error in that W misstated the price as \$6 apiece rather than the \$5 apiece as was agreed to in the phone call earlier. This is a minor error and can be corrected via reformation, and does not go to the essence of the contract. See *infra*. for discussion of the error and parole evidence.

Therefore, this mistake will not bar contract formation nor make the contract voidable.

## **Conditions**

A condition is an act or state of affairs that must be met before a party's performance obligation matures.

W must show that it met all of its performance obligations in order to due M, so that M's performance obligations were actually due. W's only obligation appears to be to "stand ready" to perform its obligation of paying the money it will owe for the widgets. Normally deliver of goods is required before payment. Therefore, as long as W was able to "tender" the payment, and stood ready to do so, they fulfilled their conditions.

Therefore, W met its conditions.

## **Breach / Anticipatory Breach**

Breach occurs when a party fails to meet their contractual obligation. An anticipatory breach occurs when a party to a contract states in unequivocal terms that they will not meet their contractual obligation, prior to the time performance is due. This allows the other party to no longer stand ready to fulfill their own obligations, and to sue for breach either immediately or when performance becomes due.

On February 8, when M discovered the market price of widgets had climbed to \$25 apiece and "refused to deliver them" to the W, it was a breach. Because performance was actually due on February 8, it was not an anticipatory breach but just a typical breach. Therefore, unless M has some excuse for not fulfilling their contractual obligations, they will be in breach of contract.

M will try to raise the following to excuse their breach, but will fail.

### **Impossibility**

A party will be excused from performance if their performance obligations become objectively impossible.

M may claim that because the price of widgets rose so dramatically, they could not perform. This will fail because they had the widgets and merely wanted to make a larger profit. There was nothing impossible about delivering them.

Therefore, the defense of impossibility will fail.

### **Impracticability**

A party may be excused from performance when the performance obligation becomes commercially impracticable.

M may claim that because the price of widgets rose so dramatically, their delivery of them to W was not practical. Again, this defense will fail because they had the widgets and merely wanted to make a larger profit. They are in the business of widgets and aware that prices fluctuate, and thus are acting in bad faith by not delivering them as agreed to in the contract.

Therefore, the defense of impracticability will fail.

### **Frustration of Purpose**

A party may avoid contractual obligations if the purpose of the contract becomes frustrated in a manner foreseeable by both parties at contract formation.

This defense would fail for the same reasons noted supra.



## **Breach / Anticipatory Breach**

Breach occurs when a party fails to meet their contractual obligation. An anticipatory breach occurs when a party to a contract states in unequivocal terms that they will not meet their contractual obligation, prior to the time performance is due. This allows the other party to no longer stand ready to fulfill their own obligations, and to sue for breach either immediately or when performance becomes due.

On February 8, when M discovered the market price of widgets had climbed to \$25 apiece and "refused to deliver them" to the W, it was a breach. Because performance was actually due on February 8, it was not an anticipatory breach but just a typical breach. Therefore, unless M had some excuse for not fulfilling their contractual obligations, which as noted supra they did not, they will be in breach of contract.

Therefore, M is in breach of contract.

## **REMEDIES AVAILABLE TO WHOLESALER**

### **General Damages / Expectation Damages**

W will seek the expectation damages represented by the difference between the market value of the widgets at the time of breach, which was \$25, and the contract price of \$5.

### **Parol Evidence**

Under the parol evidence rule, evidence of a prior oral or written agreement, or contemporaneous oral agreement, will be excluded if it adds to, varies or contradicts the terms of a fully integrated contract.

M may argue the actual price as written in the confirmatory memo is \$6, not \$5, and that remedy (if any) should be based on this amount. W will note this was just a scrivener's

error. Generally, a court will allow the parol evidence to show that a basic terms was written down incorrectly, especially because the UCC is liberally construed.

Therefore, W will likely be allowed to bring in the earlier phone call and agreement that set the price at \$5 apiece.

### **Special Damages / Consequential Damages / Hadley v. Baxendale**

Special damages that are foreseeable (as under Hadley v. Baxendale) at the time of formation by both parties may be collected as a remedy as well. Here, M knew that W was buying for resale, although they may not have known they would be reselling them for \$15 apiece.

W will be better off with the differential in market price (\$25) and the contract price (\$5), and will thus successfully sue for that amount.

### **Cover**

Cover under the UCC is when the buyer goes to market to replace the goods that were not delivered due to breach. Here, W cannot afford the widgets at the new price and cover is not an option for them. However, they will be able to get the differential between the market value at time of breach and the contract price as noted above.

### **Incidental Damages**

W may also recover incidental damages.

## **Specific Performance**

Specific performance may be allowed for unique goods when the remedy at law is insufficient. The widgets are available elsewhere and are therefore not unique. Therefore, specific performance will not be allowed.

## QUESTION 4: SELECTED ANSWER B

Wholesaler v. Manufacturer

The rights and remedies of the parties will depend on whether there was an enforceable contract in place. A contract is a promise or set of promises that the law will recognize as a duty and for whose breach the law will provide a remedy. To be enforceable a contract must have a valid offer which is accepted and supported by consideration, a bargained for exchange.

UCC

Under contract law, Article 2 of the Uniform Commercial Code governs the sale of goods. A good is a movable, tangible object at the time of identification to the contract.

Here, the contract is for goods because the wholesaler is purchasing widgets which are movable and tangible.

Therefore, the UCC will govern here.

MERCHANTS

Under the UCC, merchants are held to a higher standard of good faith and fair dealing and may have special requirements. A merchant is someone who regularly trades in the goods of the contract or otherwise holds himself out as knowledgeable in the goods of the contract.

Here, the seller is a merchant because they are a manufacturer of widgets. The buyer is also a merchant because [he] is a wholesaler that regularly sales widgets.

Therefore, both parties are merchants and will be held to the standard for merchants in this transaction.

## WRITING REQUIREMENT

When the contract is for the sale of goods at a value greater than \$500, a writing is required signed by the party to be enforced. If the parties are merchants, a written sales contract by one party will bind both parties.

Here, the contract is for goods greater than \$500 because it is for 100,000 widgets at \$5 per piece. The written memorandum by one party will suffice, because both parties are merchants.

Therefore, a writing is required and this requirement has been met by the Feb 2 memorandum.

## OFFER

An offer is a manifestation of present intent to enter into a bargain which is specific enough that a reasonable observer would assume that assent would form a bargain. Under the UCC, [it] will be sufficiently detailed if the quantity is provided. Other terms can be completed via Gap Fillers.

Here, the communication on Feb 1 contained the required detail for an offer because it contained the quantity 100,000 widgets. In addition, other terms were provided such as the parties, the price and time for performance.

Therefore a valid offer was made in the telephone call of February 1.

## ACCEPTANCE

An acceptance is an unequivocal communication that the parties have present intent to be bound to the bargain. Under the UCC, if not specifically required in the offer, an acceptance can be made in any reasonable manner including the shipment of goods and within a reasonable time.

Here, the manufacturer verbally communicated his acceptance because he said "It's a deal". The terms of the contract would be those stated on the phone call and agreed to by both parties.

#### ADDITIONAL TERMS

Under the UCC, when both parties are merchants a contract can be modified without additional consideration. Additional terms will become part of the contract unless the receiving party objects within a reasonable time of notification and the terms do not materially change the agreement.

Here, the written memorandum on Feb 2, contained two additional terms. The first was related to the misquoted price of \$6 as compared to \$5, which was agreed to by the parties, and the addition of an arbitration clause. As both of these would materially change the terms of the agreement, they would not become part of the contract unless accepted by the manufacturer. As it relates to the use of arbitration, the court may view industry standards in determining what was agreed to.

The written formal memorandum if intended to be a full integration of the agreement will be the only evidence allowed under the PAROL EVIDENCE RULE. The parties may request that evidence as to the price be considered during their breach of contract claim. Since the use of \$6 versus the agreed to price of \$5 was a misstatement by Wholesaler, the court would likely make an exception to the Parol Evidence Rule based on mistake.

#### BREACH

A breach of contract occurs when a party fails to perform a duty that has become due under the contract.

Here, the manufacturer had a duty to deliver 100,000 widgets on February 8. On February 8, they breached that duty because they refused to deliver the widgets to the wholesaler.

Therefore, Manufacturer has a material breach of contract, because they have failed to provide the benefit of the bargain to Wholesaler.

#### DEFENSES - UNCONSCIONABILITY

The manufacturer may try to argue that the contract is unconscionable because the contract price is significantly below the market price. However, this defense is likely to fail because the price was reasonable at the time the contract was created and both parties assume a risk that market conditions will change and be unfavorable to them.

#### WHO PREVAILS

The Wholesaler is likely to prevail in a breach of contract claim because there was a valid contract in place and Manufacturer materially breached that contract.

#### REMEDIES

Under contract law, a non-breaching party has rights to expectation damages, reliance damages, and legal restitution. Expectation damages are designed to make the non-breaching party whole and legal restitution is available to prevent unjust enrichment.

Here, Wholesaler will seek damages associated with lost profits. Relying on the contract, he entered into contracts to resell the widgets for \$15 dollars apiece after purchasing them for \$5 per piece. He will seek to get the \$10 per piece difference that he expected in profit. He will also try to recover the difference between contract cost and what he will have to pay to obtain at current market price. In this case, \$25 market versus the \$5 contract price.

He may also seek to recover the incidental damages, which are the costs he incurred against the contract. This could include such items as processing the orders with resellers, rented warehouse in preparation of the order and the like.

The wholesaler may also request specific performance under legal restitution which would require the manufacturer to provide the widgets as contracted. This would

prevent the manufacturer from being unjustly enriched by reselling the widgets at \$25 versus the \$5 he is currently obligated to sell them for.