

1)

Short Answer Question #1

The first thing that I would do as the lawyer for the Peevyhouse's is ask for the correct amount of damages! The lawyer for the Peevyhouse family did not ask for the correct amount of damages (the cost of fixing the land) and therefore indicated to the court that the money would not be used to fix the land at all. This was a big mistake on his part, since the Peevyhouse family did intend to fix their land and attached a huge sentimental and intrinsic sum to the land itself. The court then assumed that awarding such a huge sum of money (around \$25,000) when the land would only objectively be improved by about \$300, would create such economic waste that to do so would be wrong.

Secondly, I would have emphasized the subjective, intrinsic value that the Peevyhouse family placed on the land. The land had a far greater value to them than was reflected by the hard numbers. There was history and sentimental value that the Peevyhouse's contracted to preserve. The lawyer at trial did not emphasize this enough and since the family were one-shot players, they did not know how important it might be. They trusted that the coal mining company was honest and would keep their promise and this just wasn't so. Perhaps if the court had fully understood this intrinsic value to the family, they would have had an easier time awarding the cost of completion damages so the Peevyhouse could fix the land, rather than just the diminution in value since any more than that would be wasteful.

Lastly, I would focus on the importance of promise keeping. Mr. Peevyhouse is a very honest and charismatic man whom people can identify with. The fact that he was swindled by a big company and a bad lawyer is heart breaking. He put the condition that the coal mining company

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fix the land when they were done mining into the contract not to be wasteful, but because he valued the land. Without that stipulation, he never would have entered into the contract in the first place. He didn't make much money off of the contract, and wasn't really in it for the money anyways. This should have been emphasized in the court room.

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Question #1 Final Word Count = 382

Question #1 Final Character Count = 2149

Question #1 Final Character Count (No Spaces, No Returns) = 1755

2)

Short Answer Question #2

When parties do not specifically allocate the burden of mistake, Restatement §154 gives a few ideas as to how that mistake can be allocated by the court. First is the idea that at the time the contract was made, the party had only limited knowledge with respect to the facts to which the mistake related but he chose to treat his limited knowledge as sufficient. This makes sense to me, since the party had the opportunity to find out about the mistake and chose ignorance instead. Placing the burden of mistake on these parties will deter this kind of ignorant contracting and encourage people to educate themselves rather than blindly entering into agreements.

Second, the restatement says that risk can be allocated by the court to one party if it is reasonable to do so under the circumstances. A few reasons why it might be reasonable under the circumstances could be that the party who we allocate the risk to is a repeat player contracting with a one shot player, we allocate the risk to the party who drafted the contract, we allocate the risk to the party who is more capable of bearing the burden, or we allocate the risk to a party who should have had superior knowledge. I think that it is reasonable to allocate the risk to a repeat player instead of a one shot player because they have the advantage of being familiar with contract law, especially in whichever business it is that they choose to engage in. They are also often the architects of the contract itself. One shot players are often the average person with much less experience and typically with many fewer resources. Because the repeat player should know what they are getting themselves into, I think it is a matter of good policy to place the burden of mistake on them in order to protect the one shot player.

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 Question #2 Final Word Count = 322

Question #2 Final Character Count = 1820

Question #2 Final Character Count (No Spaces, No Returns) = 1491

**3)**

Short Answer Question #3

Since this is a contract for the sale of goods, one can rely on the UCC, §2-207 to resolve any disputes over the terms of the contract. One could also rely on the CISG if both countries (Italy

and US) were part of the convention.

First, the purchaser sent the seller an order for 100 computers at the price advertised, and with no mention of warranties. The seller sent back a confirmation that accepted the order and contained detailed terms, including that the company offered no warranties. Under the UCC:

§2-207 starts out by asking if there was a purported acceptance and/or a written confirmation.

The answer in this case is yes, so we will use §2-207(1) instead of 2-207(3).

2-207(1) then asks if the terms were conditional or not conditional. In this case, they were not conditional and therefore there is a contract. If the terms were conditional, then rather than a contract, we would have a counter-offer.

The next question we look at is whether the terms are additional or different. In this case, since the original purchase order made no mention of warranties, the terms are additional and not different. This brings us under 2-207(2).

Now we must ask if the seller is a merchant or a non-merchant. In this case, because the seller sells computers, they are a merchant. Because the seller is a merchant, the additional terms become part of the contract unless: (1) the offer limits acceptance to the terms of the offer, (2) the terms materially alter the contract, (3) the offeror objects.

In this case, the terms do materially alter the contract and the offeror would object. Therefore, they cannot become additional terms of the contract and it is likely that the new terms represent a counter-offer and not a modification.

Under the CISG:

The CISG follows the Mirror Image Rule, meaning that Article 19(1) says that any offer which purports to be an acceptance but contains additions, limitations, or modifications is a rejection of the offer and a counter-offer. Under Article 19(2), only modifications that materially alter the contract can be considered a rejection and counter-offer. Article 19(3) lists examples of material modifications and includes price, payment, quality, quantity, place and time of delivery, and extent of liability. Since disclaiming warranties in the acceptance would modify the extent of liability, it modifies the contract in a material way. Therefore no contract exists, since the modifications actually constitute a rejection and a counter-offer.

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Question #3 Final Word Count = 415

Question #3 Final Character Count = 2551

Question #3 Final Character Count (No Spaces, No Returns) = 2108

4)

Conceptual Essay Question

In *Consideration and Form*, Fuller argues that the stronger the substantive basis for enforcing a promise, the less need for formality there is. By his opinion, the court should always look for a substantive justification behind enforcement, since the contracts without formality usually have the strongest reason for enforcement.

According to Cohen in *Basis of Contract*, there are six substantive reasons why contracts should be enforced. These are the theory of injurious reliance, will theory, formalism, sanctity of promise, quid pro quo exchange, and risk allocation. Injurious reliance says that we should enforce promises because people rely on them, essentially the theory of promissory estoppel. However, we do not always rely on contracts to our detriment. Will theory is the illusive idea of a meeting of the minds, but not all things can be foreseen ahead of time, so this isn't always the best justification. Formalism is the idea that Fuller discusses in depth in his article. However, this has a weakness to in that not all contracts are made formally. Sanctity of promise is the idea that we want to encourage people to keep promises just on the nature of what a promise is. But, not all promises can be kept. Quid pro quo exchange is the idea that I gave you something and now you owe me something in return. But, not all contracts are exchanges. And the last substantive justification is for risk allocation, so that parties can control their destiny in the contract world. However, not all contracts involve risk.

Fuller discusses three functions of formality in *Consideration and Form*. They are the channel function, cautionary function, and evidentiary function. The channeling function shows others what you intended to do. The cautionary function makes people recognize the serious nature of contracting. The evidentiary function is proof that the parties intended to contract.

There are many cases where regardless of formality, promises should be upheld for other substantive reasons. One such case is that of *Webb v. McGowin* where even though no written document was ever drafted, there was a moral obligation for upholding the promise. In this case, a man saved the life of his employer and was paralyzed for the rest of his life as a result. In return, the employer offered to pay the man until he died so that he would not have to worry about providing for his family. However, the employer died first and his estate would not make the payments as promised by the employer. The court decided to enforce the promise, without the slightest bit of formalism involved. There are a few substantive theories that support this

court decision. First is the idea of quid pro quo. I saved your life, now you owe me something in return. There is also the idea of the sanctity of promise. I promised that I would support you financially for the rest of your life and I have a moral obligation to do so. Then there is also injurious reliance. In reliance on your promise I have not sought out another way to provide for my family. Through these substantive theories, enforcement should be upheld.

Just as often as there are informal contracts that should be upheld, there are formal contracts that should not be upheld. One such case is that of Mrs. Ortelere, a woman who was incompetent and signed a life insurance policy that was not favorable to her or her family. Though the contract was official, signed, and witnessed, thereby fulfilling the channeling, cautionary, and evidentiary functions of formalism, it should not be upheld and the court refused to enforce it. In this case, there was little substantive reason for enforcing the promise other than the fact that it was made in a formal matter. The school board would not be hurt by the breaking of the promise (no injurious reliance). There was no meeting of the minds, because Mrs. Ortelere was incompetent. The sanctity of promise was not honored in its true form because the promisor could not make promises effectively. There was no risk involved for the school board, as giving Mrs. Ortelere one policy instead of the next did not matter to them.

Therefore, as Fuller points out, the substantive reasoning behind contract enforcement is much stronger than is the formality in which the contract is born.

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Question #4 Final Word Count = 724

Question #4 Final Character Count = 4331

Question #4 Final Character Count (No Spaces, No Returns) = 3594

5)

Fact Pattern Essay #1

House could bring a claim against Badland Coal & Mining Company in a few different ways. First, he could claim that there is no contract because of a failure of mutual assent. While consideration does exist (bargain and legal benefit to the promisor/legal detriment to the promisee), there is a bit of confusion it seems between the parties as to the terms of the offer and the acceptance, which constitute mutual assent. Outside of the written document that he signed to sell his land, House also engaged in conversation with Jones, an agent for Badland in which he asked if there was anything else about the land that he should know about. He was assured by Jones that "if the land turns out to have gold on it", then Badland would sell it back to him. While Jones said that Badland would sell the land back if there was gold on it, House took this to mean that if there were any valuable natural resources on the land, it would be sold back to him for the same price. Depending on which test is used (Objective, Subjective, or Embry), the view of mutual assent comes out differently. Under the objective test, it appears that mutual assent did exist because both of the parties said that they agreed to the stipulation that if "gold" was found on the land it would be sold back. However, this was a bit slippery of Jones because what House was really thinking and what Jones probably knew House was thinking was that if there were "natural resources" on the land, it would be sold back to him. Therefore, under the subjective test, there is a failure of mutual assent. Under the Embry test, one must ask if a reasonable person would have taken what was said to constitute a contract. Then one must also ask if the promisee took what was said to constitute a contract. In this case, a reasonable person likely would have taken the statement to resell the land if there was gold on it to constitute a contract, but House did take the statement about gold to constitute a contract since he was thinking of natural resources in general. So, if the subjective test or the



Embry test is used, House can likely show that there was a failure of mutual assent. However, if the objective test is used, mutual assent will likely be found and a contract will be found to exist.

However, to even get evidence of this lack of mutual assent into court, House will need to be able to introduce parol evidence. Because the contract was in writing, he will have to use parol evidence to show that there were negotiations prior to the written contract that must also be considered here. Under the Four Corners Approach, used in *Thompson v. Libbey*, which will likely be argued by the defense, a written document is a fully integrated document and parol evidence may only be used for interpretation if the language of the writing is vague. In this case, the language is not vague, so parol evidence would not be admitted and House would not be able to show anything regarding the negotiations prior to the written contract. If the Corbin-Wigmore approach, used in *Brown v. Oliver* and later modified by *Pacific Gas*, is used here, then the court will use all evidence reasonably susceptible to the writing to determine whether or not the written contract is fully integrated. If the writing is fully integrated, then it is determined to be the final agreement between the parties. If it is intended to be the final agreement between the parties, House will not be able to introduce any evidence. However, since evidence from the negotiations contradicts the writing, it is not likely to be considered to be fully integrated. If the document is considered to be partially integrated, then House will only be able to introduce evidence consistent with the writing. However, if the writing is determined to be not integrated at all, then all evidence is considered. House will be able to use parol evidence of his negotiation that contradicts the written agreement only if the writing is determined not to be integrated. In this case however, because some specifics are included in the contract to which both parties agreed, it is likely that the document is partially integrated and only consistent parol evidence will be admitted, not evidence which contradicts the document.

House could claim that Badland breached an implied duty of good faith. The implied duty of good faith in contract dealing is an immutable rule and cannot be contracted around. It

provides that a party is required not to act in bad faith toward the other party. In this case, since Badland intentionally tried to trick House into selling his land for less than it was worth, knowledge which they had and knew that he did not have, one could argue that they acted in bad faith. Essentially, what they did is like stealing since they contracted to buy land, but knew that they were getting coal deposits with it and actively tried to prevent the seller from discovering that fact. Courts will not want to reward this kind of behavior and therefore could sanction Badland by refusing to enforce the contract since Badland breached the implied duty of good faith. House could equally claim that Badland breached the duty to disclose. While technically as shown in Laidlaw, there is no duty to disclose except in fiduciary relationships, when a promisee asks a direct question of a promisor, it amounts to bad faith if the promisor withholds information that could change the promisee's position. Additionally, Restatement §153 states that there are situations under which a contract is voidable if one party makes a mistake and the other party either had reason to know of the mistake or his fault caused the mistake. In this case, Badland certainly had reason to know of the mistake and caused the mistake by providing House with false information, such as the assurance that it was only willing to pay an additional \$10,000 because of the sentimental value it attached to the land, and when it used tricky language to deceive House into believing that there was nothing of value in the way of resources on the land. However, Badland will argue against both the implied duty of good faith and the possible duty to disclose by saying that it did not lie to House, which technically it did not. It gave an answer that was misleading, but is that enough to conclude that it acted in bad faith? Badland will also argue that it had no duty to disclose because contract law does not require that parties in competition act altruistically toward one another.

House could also claim that the contract is void on grounds of misrepresentation, duress, and/or undue influence. For misrepresentation, as employed in Vokes v. Arthur Murray, to be actionable misrepresentations must be of fact rather than opinion. In this case, Badland never

stated any facts that were blatantly incorrect. It showed House comparisons to other land in the area of similar size and told him that it valued the land for sentimental reasons, but it never directly lied about the land. However, there are exceptions to this rule for misrepresentation when there is a fiduciary relationship between the parties (there is not in this case), when some trick is employed by the representer, where the parties in general do not deal at arm's length (they do here), or where the representee does not have equal opportunity to become appraised of the truth or falsity of the fact represented (he could have had the land surveyed). In this case, it does seem that Badland employed a trick in order to get House to agree to sell his land. They used deceitful information, such as the representation of other land similar in size when they knew that the land in question was very different. Because they tricked House into selling his land, it is likely that they are guilty of misrepresentation and that he will be able to void the contract on these grounds.

In order to void a contract for duress of person, the party under duress must fear loss of life or dimemberment sufficient to deprive them of their free will in entering into a contract. In this case when one of the agents of Badland came to House's residence and pulled a pen out of his coat to get House to sign, House thought that he was carrying a knife and feared that the agents were going to harm him. Additionally, they had taken the phone from him when he tried to call a lawyer and said, "I wouldn't do that if I were you." These threatening comments, along with House's perception that there was a sharp metal object present could have been enough to make House fear that he would be harmed and could have deprived him of his free will in contracting. However, Badland will argue that no knife was present and that it did nothing to make House think that he was in danger. Since the burden of proof is rather high for duress, since House will have to show that he was forced into signing the contract, duress may be tough to prove in order to void the contract. Likely, Badland would have had to put a gun to his head in order for duress to void the contract.

In order to void a contract for undue influence, as was attempted in Odorizzi, there must be undue susceptibility in the weak-minded person and excessive pressure by the dominating person. In this case, Badlaw took House out drinking so that when arrived home he was hung over and disoriented. He was having trouble concentrating and making sense of the situation. This satisfies the undue susceptibility in the weak-minded person, since House's ability to judge the situation was severely impaired, and caused by the alcohol that Badland intentionally furnished to him. Badland then preyed upon House's weakness of mind by sending 20 representatives to his home to aggressively convince him to sign the contract. Over persuasion is typically evidenced by contracts being signed in weird places (Badland went to House's residence), at weird times (5am in this case), with the insistence on completion now (Badland would not give him more time to think), with emphasis on consequences of delay (Badland threatened to sue for breach of contract), with multiple persuaders (20 to 1 in this case), and with the absence of third party advisors (Badland would not allow House to call his lawyer). Therefore, in this case, House will likely be able to void the contract for undue influence.

House will not be able to void the contract in this case for violation of the Statute of Frauds. Statute of Frauds requires that contracts for the sale of land be made in writing, however there was a written contract in this case and therefore he cannot void on these terms.

It is possible that House could just breach the contract in this case and claim efficient breach. If he breaches, he will owe Badland what they think the land is worth, which is \$40,000 + \$10,000 for sentimental value. If he can sell it for what it is actually worth, which is \$500,000, then he will be able to pay off Badland and pocket \$450,000. However, in cases where land is sold, specific performance is almost always granted because the uniqueness of the land is presumed and monetary damages are not usually sufficient to compensate.

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Question #5 Final Word Count = 1945

Question #5 Final Character Count = 11178

Question #5 Final Character Count (No Spaces, No Returns) = 9212

6)

Fact Pattern Essay Question #2

There are two lawsuits that will likely develop out of this case. The first is James Hart (James) v. Bill Fences (Bill) for breach of contract. The second is Sarah v. James for breach of contract. James can also bring a counterclaim against Sarah for tortious interference.

### **James v. Bill**

A contract exists between James and Bill based on Bill's offer to pay \$1,000,000 to anyone who breaks Steve Weibe's world record. In order for a contract to exist, there must be an offer and acceptance (mutual assent), and consideration. In this case, Bill's statement does constitute an offer. An offer, according to Restatement §24, is a manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it. Bill's statement demonstrated his willingness to contract with anyone who could beat the score, and therefore justified James' understanding that he was invited to accept. Bill's claim to the general public is in many ways like an advertisement. According to Leonard v. Pepsico, an advertisement is an invitation to accept an offer. In order for an advertisement itself to constitute an offer (Lefkowitz), it must be clear, explicit, definite, and leave nothing open for negotiation. In this case, Bill's advertisement is

pretty clear: a person must break Steve Weibe's record, and they must do so on a classic, coin-operated Donkey Kong machine. Not much, if anything is left open for negotiation. Therefore, Bill's advertisement constitutes an offer.

In this case, Bill's offer sets up a unilateral contract, like that in Carbolic Smoke Ball. In contracts like these, the promisor is bargaining for the performance of the promisee and the promisee can accept by performance. Therefore, James accepted the contract when he beat Steve's world record. According to Restatement §54, unless otherwise stated, the promisee does not need to notify the promisor when they accept by performance, unless the promisor has no way to find out about the performance. In this case, James called Bill to collect his reward thereby notifying him of his acceptance of the offer. After acceptance, Bill can no longer revoke his offer, and must pay James if he has performed on the contract.

In order for the contract to be valid, there must also be either consideration. There is consideration because there is a bargain and a bargain based benefit/detriment to the promisor/promisee (Hamer v. Sidway). The bargain is that James beat the record and Bill will pay him \$1 million. Bill is bargaining for the performance of beating Steve's record. While there is really no legal benefit to Bill that is obvious in this case, the legal detriment to James is obvious. He has to give up hours of his time, his health, and his hygiene to beat Steve's record in order to satisfy his bargain with Bill.

Therefore, since there was an offer, acceptance, and consideration, a unilateral contract exists between Bill and James for the performance of beating Steve's record.

However, in this case there is also a condition precedent which must be fulfilled by the promisee. A condition precedent is a condition that must be satisfied by the promisee in order to trigger the duty of the promisor. Bill stipulated that James use a classic, coin-operated machine to beat the record. However, the machine that James used was not a "classic" machine because Sarah had altered it to slow down the mother board. Therefore, since James did not

use a "classic" machine, he did not fulfill the condition precedent and Bill does not have to pay him.

The word "classic" as Bill used it here in the contract is vague. This means that we cannot be certain what qualifies as classic and what does not. If the model for the machine was classic, which it was, is this enough? Or does it need to be unaltered as well? In order to make this determination, one could use the hierarchy of terms, as seen in Frigalment. First, the express terms in the contract are looked at, then the course of negotiation, course of performance, course of dealing, and usage of trade. The only tool that likely applies here is the usage of trade. Looking at what a classic machine means in the world of gaming, one that is altered to be made easier probably does not apply. Therefore, the altered motherboard probably makes the machine a non-classic one and James has not met the condition precedent by using this machine.

Promissory Estoppel also exists in this case. Promissory estoppel can be viewed as a substitute for consideration (Allegheny College) or as a cause of action by itself (Red Owl). Its elements are that a (1) a promise was made, (2), that the promise induced reliance, (3) that the promisee relied on the promise to his detriment, and (4) that the only way to avoid injustice is to enforce the promise. In this case, promissory estoppel will likely be used as its own cause of action. First, there was a promise made by Bill to pay anyone who broke the record using a classic machine. Second, the promise did induce reliance since James took it very seriously and even contracted with Sarah to pay her half of his winnings from Bill if he could use her machine. He invested in the promise, evidence of his reliance on it. Third, James relied on the promise to his detriment. In the process of trying to break the record, he was kicked out of law school, his health suffered, he lost a \$30,000 summer job, and had to spend three days in the hospital. Finally, the only way to avoid injustice is to enforce the promise. This element is a bit less clear. James did use a motherboard that was slowed down in order to beat the record,

however at the same time he took no part in slowing the motherboard down and had no idea that it was effected at all. It may be unjust to punish him, especially after everything he lost in reliance on the promise, when he took no part in invalidating his own success in beating the record and could not have been aware of the invalidation. If the court decides that the promise must be enforced to avoid injustice, James will be awarded reliance damages.

Reliance damages are those damages that put the promisee in the position that they would have been in had they never entered into the contract in the first place. In this case, James would be entitled to recover for being kicked out of law school, for losing his job, and for his stay in the hospital. However, in order for the damages to be awarded, they must meet the tests of foreseeability (Hadley v. Baxendale), certainty (Dempsey), and avoidability (Luten Bridge). Foreseeability says that the only damages that can be awarded are those that are fairly and reasonably considered to arise naturally, or those that are reasonably supposed to have been in the contemplation of both parties at the time that they made the contract. Certainty says that one must be able to establish the amount of damages with a reasonable degree of certainty. Avoidability says that damages are not recoverable for loss that the injured party could have avoided without undue risk or burden. In this case, damages will not likely be awarded to compensate James for being kicked out of law school. This damages does not have a value that can be ascertained within a reasonable degree of certainty. Other than the cost of tuition, we do not know what law school would have brought James in terms of earnings, and we do not know what difference it would have made to him financially. James will be able to recover the \$30,000 for the loss of his summer job. It is reasonable to suspect that with an offer of \$1 million, a person would abandon other obligations, such as those of work, in order to pursue the record in Donkey Kong. Also, the amount in controversy is a concrete number that can be determined with certainty. James could not have avoided this damage without also missing out on a chance to break the record, and so the cost to him of avoidance would have

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been too high to expect him to. However, we will not award damages for his hospital stay, since that is not a foreseeable damage from attempting to break a record on a video game. It can't be considered to have arisen naturally, and it was doubtfully in Bill's mind when he made the offer. Gaming to the point of physical illness is perhaps past the point of "reasonable". Therefore under promissory estoppel, James will likely be awarded \$30,000 in reliance damages.

### **Sarah v. James**

Sarah will likely sue James for breach of contract since she gave him her machine and never got paid the \$500,000 that he promised her. However, it is not likely that this promise will be enforceable because they did not enter into a valid contract. Since Sarah gave James her machine for free, and in return he promised to give her \$500,000 when he beat the record, there is a lack of consideration. There is no bargain here. Sarah gave James the machine for free. He promised her \$500,000 not to pay for the machine, but to share his winnings. This is a gratuitous promise. He asked for nothing in return and therefore there was no mutual exchange or bargain. There was no benefit to the promisor. Therefore there was no consideration and the contract will not be enforceable because no contract existed.

Additionally, there was no promissory estoppel because Sarah did not rely on the promise. She suffered no detriment because of it. The only thing that she lost in this entire situation was her Donkey Kong machine, but she gave that to James for free. Therefore, she cannot collect damages on promissory estoppel either.

James' promises to Sarah to give her \$500,000 and his promissory condition to beat

Steve's record are unenforceable and therefore she has no cause of action against him.

Perf. Interfer  
Implied Ws  
Interpretation  
Bar's end.

### James v. Sarah

James may be able to bring a claim against Sarah for tortious interference with contract. Sarah altered the motherboard of the Donkey Kong machine in order to make it easier for James to win. Because she did this, he was unable to break the record on a classic machine. This means that he was unable to perform on the condition of the contract, which made it impossible for Bill to perform on his end of the contract and pay James for beating the record. Because Sarah intentionally interfered with James' performance, and indirectly interfered with Bill's performance as a result, she caused the both of them not to perform. Restatement §766 provides that a person who intentionally interferes with the performance of a contract between another and a third person by causing the third person not to perform, is subject to liability to the other for the loss resulting from the failure of the third person to perform. Since Sarah caused Bill not to perform the contract by altering the motherboard and almost sabotaging James, she could be found to have interfered tortiously in the contract of another (James) and a third party (Bill).

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Question #6 Final Word Count = 1897

Question #6 Final Character Count = 11003

Question #6 Final Character Count (No Spaces, No Returns) = 9068

7)

## Fact Pattern Essay Question #3

## Consideration

Dave's attorney alleges that he cannot have a contract with Paula because in a contract both parties must give something of value and because in this case, Paula gave nothing in return. This is not entirely the truth. In order for a contract to be enforceable, there must be consideration, which means that there must be a bargain and a benefit/detriment to the promisor/promisee. In this case, it is entirely possible that Dave bargained for Paula not talking to the press and that in exchange he has agreed to pay \$4,000/month until her daughter graduates from college. This provides him with a legal benefit because he does not want to be portrayed as an adulterer in the media since he is a public figure. Additionally, consideration does not have to be adequate (U.S. v. Stump Home). The parties can contract for whatever they want. Therefore "value" as Dave's attorney discusses, is subjective and is determined by the parties themselves. Paula's silence could be very valuable to Dave, even if it is not objectively so.

Also, in some cases a moral obligation can be sufficient consideration for a promise to be enforced (Webb v. McGowin). If the promisor has no original duty or liability, but has previously received a material benefit (possibly still Paula's silence), a moral obligation is sufficient consideration to force him to pay. So in this case, if Paula's silence was the original material benefit that Dave received, he has a moral obligation to continue to pay her because she cannot support her daughter on her own and because it is the ethical thing to do. Just because he got what he wanted from her does not mean he can stop fulfilling his promise to her.

Additionally, Paula could claim promissory estoppel as a substitute for consideration if she cannot establish it any other way. Through promissory estoppel she will need to establish that

Dave made a promise to her, which he did in their phone conversations. She will need to establish that she relied on that promise, which she did financially. She will then need to show that she relied on the promise to her detriment. Perhaps her finances reflect the fact that she is now unstable because of the lost income from Dave's support? And last, she will need to show that justice requires Dave's promise to be enforced. In this case, she could try to show that perhaps her daughter will have to drop out of college if Dave stops paying, or some other reason why she would be harmed and that Dave should bear the burden here.

Since there is no written agreement in this case, parol evidence as to the negotiations between the parties, most of which is evidenced by the phone conversations will have to be used to determine what the parties wanted, what they were bargaining for, what they stipulated in their agreement, etc.

#### Mutual Assent

Dave's lawyer also claimed that Dave did not enter into an agreement with Paula at all. However, the theories of mutual assent would say otherwise. Under the objective test, his agreement to pay as taped in the their November 22, 2008 phone conversation would constitute an agreement. Additionally, the Emby test, which provides that a reasonable person would have understood what was said as a contract and the promisee understood it as a contract, shows that an agreement was made as well. A reasonable person would have likely assumed that Dave's comment that he would continue sending money was an agreement, and Paula did see it as an agreement. However, if the subjective test is used, then no agreement will be found. The subjective test looks at what the parties intended and Dave obviously did not intend to agree.

Since Dave made an offer, verbally, to make payments of \$4,000/month, he cannot revoke once Paula has accepted (Dickinson v. Dodds). If he is bargaining for Paula to refrain

from making a report to the media about their affair, then he is bargaining for performance.

Once Paula refrains from going to the media, which she has done, he cannot revoke the offer to pay. Unless Paula takes steps inconsistent with refraining from reporting to the media, under the Restatement, Dave cannot revoke his promise to pay.

### Statute of Frauds

Dave's lawyer claimed that the contract is voidable by the statute of frauds because contracts not to be performed within one year of being made are to be put in writing. This is meant to balance between the over and under enforcement of contracts. Without some sort of written memorandum, the contract cannot be enforced. However, there are exceptions to the statute of frauds, namely where there would be unjust enrichment, for speciall manufactured goods, or where there has been partial performance. Paula could argue that although her contract with Dave was not to be fully performed within a year, that making it void under the statute of frauds would fall under the exception for partial performance. Since she has remained silent and not gone to the media about their relationship and he has begun to pay her \$4,000/month but has not done so up until her daughter graduates from college, terminating the contract and refusing to enforce it would leave partial performance open, and therefore should fall under an exception to the statute of frauds.

### Remedy- Expectation Damages

In this case, Paula should be able to ask for expectation damages. Expectations damages would give her the \$4,000/month that Dave did not pay. From January-July, she is asking for \$44,000. She will not likely be able to recover this, since the amount of missed payments was only \$28,000. The court can also enforce that Dave continue to make payments until May 2015, when her daughter graduates from college.

Dave may also be able to argue that Paula has done nothing to mitigate the damages. The contract between them also stipulated that if Paula got a job, Dave could stop paying. Paula must use due diligence to find a job. If she has not done this, she may not be entitled to the full amount of damages. When she does find a job, Dave will not have to make monthly payments any longer.

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Question #7 Final Word Count = 1041

Question #7 Final Character Count = 6136

Question #7 Final Character Count (No Spaces, No Returns) = 5059

**END OF EXAM**