

Contracts I
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Fall 2003

Sample Exam Question #11 - Model Answer

On March 1, Buyer, a commercial landscaper, called Seller and placed an order for 100 juniper saplings, with delivery to be made by Seller no later than June 15. Seller agreed to deliver 100 juniper saplings to Buyer no later than June 15th, with Buyer paying the reasonable costs of delivery. Neither party said anything about price. Shortly thereafter, Buyer, contracted with several clients who wanted juniper saplings included in their landscaping at prices ranging from \$10 to \$15 per tree. The prevailing market price for juniper saplings on March 1st was \$9.00 per sapling.

Bad weather struck leaving Seller unable to deliver 100 juniper saplings by June 15th. Realizing its predicament, Seller called Buyer on June 1st, explained the situation and offered to deliver 50 juniper saplings to Buyer no later than June 15th at a price of \$15.00 per sapling and another 50 saplings no later than August 1st. The prevailing market price for juniper saplings on June 1st was \$18.00 per sapling. Unaware of any substitute source on such short notice, and needing the saplings, Buyer orally agreed to Seller's new terms. Seller signed and faxed a letter to Buyer "confirming your agreement to a price of \$15.00 per sapling for those saplings to be delivered no later than June 15th and the then-prevailing market price for those additional saplings delivered no later than August 1st." Buyer did not respond to Seller's June 1st fax.

Seller delivered the first 50 saplings to Buyer on June 15th, along with an invoice in the amount of \$750.00 (\$15.00 x 50 saplings) plus \$50.00 delivery expenses. Buyer accepted the trees and wrote a check to Seller in the amount of \$800. On July 15th, Seller called Buyer to inform Buyer that Seller was ready to deliver the remaining 50 saplings. Buyer indicated he was ready to take delivery. Again, neither party discussed the price of the second batch of saplings. On July 16th, Seller delivered the remaining 50 saplings to Buyer, along with an invoice in the amount of \$900.00 (\$18.00 x 50 saplings) plus \$50.00 delivery expenses. The prevailing market price for juniper saplings on July 16th was \$20.00 per sapling. Buyer accepted the trees, crossed out the \$18.00 per unit language on the invoice and wrote in "\$15.00 per unit, per June 1st agreement," and wrote a check to Seller in the amount of \$800.

Seller requested that Buyer remit the additional \$100.00. Buyer refused. Seller then brought suit. In its Answer filed in response to Seller's suit, Buyer responded: "Buyer admits an agreement to buy 100 juniper saplings from Seller, but denies ever agreeing to pay more than \$15.00 per sapling, for a total contract price of \$1,500.00 or less."

Who should prevail in Seller's suit against Buyer and why?

This is the dreaded “kitchen sink” question. At a bare minimum, you should have “spotted” the following issues, and then followed up with as much discussion of them as your time permitted: governing law, merchant status, contract formation, open price term, statute of frauds, merchant’s confirmation exception, partial performance exception, judicial admission exception, and terms of the contract/battle of the forms. There were also some obvious “red herrings” – namely, firm offer, modification, and promissory estoppel.

1. Governing law: This agreement is governed by UCC Article 2 because it is a contract for the sale of goods. Nonetheless, we may look to common law, including but not limited to the *Restatement (Second)*, to define offer and acceptance and to fill the “gaps” left in the UCC.

2. Merchant status: Both parties are merchants within the contemplation of UCC § 2-104. This fact will affect the resolution of the issues of contract formation, statute of frauds, and contract terms.

3. Contract formation: There is no contract prior to 6/1. B asked for performance, not promises; therefore, S’s “acceptance” – whether it is truly and acceptance or a counteroffer (because it includes an additional term) – is irrelevant. The contract arises as a result of the 6/1 conversation, in which S offers to sell, and B orally agrees to buy, B 50 saplings at \$15 each by 6/15, and 50 more saplings by 8/1 at the then-prevailing market price. The 6/1 confirming fax is not, in and of itself, “the contract,” but evidences the contract to which the parties orally agreed earlier that day.

4. Firm offer: There is no written offer; and, even if the 6/1 fax were misconstrued to be one, it contains no language of irrevocability.

5. Open price term: The fact that the exact price of the second batch of trees is not certain at the time of contracting does not defeat the fact that B and S have agreed. § 2-305(1) permits a contract to be formed despite an “open” price term. Here, the parties have agreed that the 8/1 trees will be sold for the “then-prevailing market price.” In such a case, § 2-305(1)(c) provides that the price will be “a reasonable price at the time of delivery.”

6. Statute of frauds and exceptions: This is a contract for the sale of goods in the amount of \$500 or more; therefore, in order to satisfy § 2-201, there must be one or more writings, signed by the party against whom enforcement is sought, evidencing the contract. The 6/1 confirming fax evidences the contract, and would be valid against B, even though only S signed it, because B failed to object to the writing in writing within 10 days of receipt. § 2-201(2). However, § 2-201(1) requires that the writings, in order to satisfy the statute of frauds, state the quantity of goods to be sold. § 2-201 cmt. 1. There is no quantity term included in the 6/1 fax. The quantity requirement may be satisfied by adding to the 6/1 fax (1) the 6/15 invoice for 50 saplings at \$15/sapling plus delivery costs of \$50; (2) the check written by B on 6/15 for \$800 – the amount of that invoice; (3) the 7/16 invoice for 50 saplings at \$18/sapling plus delivery costs of \$50; (4) B’s notation on the 7/16 invoice accepting 50 trees at \$15 each “per June 1st agreement”; and (5) the check written by B on 7/16 for \$800 – \$15 per tree plus \$50 delivery fees.

Even if these writing taken together might not satisfy the statute of frauds, two other exceptions apply to this case – the partial performance exception, § 2-201(3)(c), and the judicial admission exception, § 2-201(3)(b). B accepted 100 trees. Therefore, § 2-201(3)(c) will permit S to enforce the contract against B as to those 100 trees. Moreover, B has admitted in its pleadings the existence of the contract, the fact that it was for 100 trees, and the fact that B owed S under the contract \$1,500. Therefore, § 2-201(3)(b) will permit S to enforce the contract against B up to 100 trees.

7. Terms of the contract/battle of the forms: The starting point is the 6/1 oral agreement – 50 saplings at \$15 each by 6/15, and 50 more saplings by 8/1. The 6/1 confirmation fax adds that the 8/1 “batch” will be at the “then-prevailing market price.” This is an “additional” term for purposes of UCC § 2-207.

§ 2-207(1) tells us that the presence of the additional term in the 6/1 confirmation does not prevent the confirmation being an “acceptance” (and, thus, giving rise to a contract between the parties) unless the confirmation was expressly conditional on B’s assent to the additional term. There is nothing in the language of the 6/1 confirmation that makes it expressly conditional on B’s assent to pay the “then-prevailing market price” for the 8/1 trees. The confirmation is silent on the issue. Therefore, it is an acceptance for purposes of § 2-207(1), and not a counteroffer.

Because both parties are merchants, § 2-207(2) tells us that any additional term contained in the 6/1 confirmation will be included in the contract between the parties unless (i) the offer expressly limited acceptance to the terms of the offer, (ii) the additional term materially altered the contract, or (iii) B notified S of B’s objection to the “then-prevailing market price” term within a reasonable time after B received notice of the term. None of these three conditions is satisfied. There was no indication from B that limited S’s ability to accept/confirm to the terms of the earlier oral agreement. The “then-prevailing market price” term cannot be said to materially alter the parties’ contract, given that, in the absence of the added term, § 2-305 would “fill the gap” left by the omission of a price term for the 8/1 shipment by substituting a “reasonable” price at the time of delivery. Query: What would be a “reasonable” price? Answer: The market price at the time of delivery (a.k.a. the “then-prevailing market price”). And, finally, B’s “objection” on the 7/16 invoice to the higher price for the “8/1” trees was not made within a “reasonable” time after B was notified of S’s terms.