

**Advanced Contracts (Sales and Leases)
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Sample Exam Questions Set #3 - Model Answers

11. In *Caudle v. Sherrard Motor Co.*, 525 S.W.2d 238 (Tex. Civ. App. 1975), the following facts were undisputed:

On February 10, 1972, plaintiff Sherrard Motor Company and defendant John Caudle entered into a contract for the purchase of a house trailer. It provided for a cash down payment of \$2,685 and a balance of \$4,005 in the form of a note payable to Sherrard. This contract was assigned with recourse to the Citizens National Bank of Denison, Texas, by Sherrard on the date executed. While Sherrard was making the trailer ready for the defendant, Caudle received a telephone call from his business office advising that he should return immediately to Dallas. Since the trailer was not ready, Caudle told Sherrard that he would return later to Denison and take possession of the trailer. Before Caudle returned and sometime between February 12 and 14, 1972, the house trailer was stolen from plaintiff's place of business. Upon learning of the theft, Caudle stopped payment on the check he had given Sherrard as down payment for the trailer. Sherrard then sued Caudle on the contract of sale for the contract price.

In support of the trial court's j.n.o.v. in its favor, Sherrard argued "it was acting as a bailee while the trailer remained on its premises and that by executing the contract, it had acknowledged the [Caudle]'s right to possession of the trailer. Plaintiff further argue[d] that because it did not agree to deliver the trailer to Caudle in Dallas, the trailer was to be delivered to Caudle 'without being moved.'" Sherrard also directed the appellate court's attention to the following provision in its contract with Caudle: "No transfer, renewal, extension or assignment of this agreement or any interest hereunder, and no loss, damage or destruction of said motor vehicle shall release buyer from his obligation hereunder."

Provide your own answers to each of the following questions posed by the court of civil appeals. Assume that Texas's version of § 2-509 in effect at the time the case was decided were identical to those set forth in your statutory supplement. Explain your answers.

A. Did the risk of loss pass to Caudle before the trailer was stolen because the trailer was held by a bailee, Sherrard, to be delivered without being moved pursuant to § 2-509(2)?

No. This is *Silver v. Wycombe, Meyer & Co.*, where the buyer ordered two rooms' worth of furniture, paid for goods in full and directed that some goods be delivered to buyer and others held by merchant seller until further instructions from buyer. The court there held that the fact that buyer had paid for the second room's worth of furniture and directed seller not to deliver it until further instructed did not turn seller into a "bailee" for purposes of § 2-509(2). The same result should pertain here. Also, § 2-509 cmt. 3, while not explicitly addressing Sherrard's "bailee" argument says "[w]here a contract involves delivery at the seller's place of business . . . , a merchant seller cannot transfer risk of loss and it remains upon him until actual receipt by the buyer, *even though full payment had been made and the buyer has been notified that the goods are at his disposal*" (emphasis added).

B. Did the contract provide that the risk of loss passed to Caudle when the contract was signed by the parties under § 2-509(4)?

No. While § 2-509(4) does permit the parties to alter the "default" risk of loss rules in § 2-509(1)-(3) by agreement, the quoted language is not sufficiently specific or obvious to do so. The "default" rule is that risk of loss does not pass until possession; therefore, in order for Caudle (Buyer) to have signed that right away, the relevant language must be clear and obvious. Additionally, Caudle could argue that the term was one of adhesion, as he did not have any real opportunity to negotiate it, and/or that it was substantively unconscionable, in that it was so one-sided as to be manifestly unfair, making Caudle bear the risk, *e.g.*, that one of Sherrard's employees would destroy the car prior to Caudle's taking delivery. In either case, the contractual provision would not bind Caudle.

C. Did the risk of loss remain with Sherrard, a merchant-seller, because the trailer was stolen before Caudle had taken actual physical possession of the goods pursuant to § 2-509(3)?

Yes. This contract is not a destination contract, shipment contract, or bailee contract; it's an "everything else" contract, and risk of loss under it is governed by § 2-509(3). Here the Sherrard (Seller) is clearly a merchant; therefore, risk of loss will not pass to the Caudle until he actually received – or, put another way, took actual possession of – the goods. See § 2-103(1)(c) (defining "receipt of goods" to mean "taking physical possession of" the goods). The trailer was stolen before Caudle had taken possession of the trailer from Sherrard. Therefore, the risk of loss remained on Sherrard, the seller.

12. 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. Seller, realizing its predicament, called Buyer on June 1st, explaining the situation and offering 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 for saplings 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 in writing 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 called Buyer requesting that Buyer remit the additional \$150.00. 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? To what remedy or remedies should the prevailing party be entitled? Please explain.

Contract formation. There is no contract prior to 6/1. B asked for performance, not promises; therefore, S's "agreement" – whether it is truly intended to be an acceptance – is irrelevant. The contract arises as a result of the 6/1 conversation, in which S orally offers to sell, and B orally agrees to buy, 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.

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."

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 writing(s), 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 writing(s), 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.

Contract terms. 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.

Seller's remedy(-ies). Because B has accepted the saplings and they are in B's possession, S does not have the option of selling the second batch of saplings to another purchaser and suing B for the difference between the contract price and the resale price under § 2-706, because doing so would not be commercially reasonable. Because B did not repudiate or refuse to accept conforming goods, S does not have the option of suing for the difference between the contract price and the market price at the time and place of tender under § 2-708(1). Because we don't have the information to ascertain what profit S expected to make on its contract with B or that S is a "lost volume" seller (indeed, the facts suggest just the opposite, at least due to the effects of inclement weather), S does not have the option of suing for its lost profits under § 2-708(2). That leaves the action for price. While we typically think of this remedy when the buyer refuses to pay at all, there is nothing in § 2-709 that says that the seller cannot use § 2-709 to recover when the buyer underpays.

So, S should be able to recover the difference between the price charged for the second batch of the trees (\$18 x 50) and the price B paid (\$15 x 50), plus any incidental damages S incurred trying to mitigate the effect of B's partial breach (\$0, as far as we know). In other words, S should get the \$150 it asked B to pay before filing suit.

Hopefully for S's sake, the law of the jurisdiction that governs this suit awards reasonable attorneys' fees to the prevailing party in a breach of contract suit. Otherwise, S will spend far more litigating this case than it can possibly recover.