

### EXAMINERS' ANALYSIS OF QUESTION NO. 13

1. The issue is whether the contract modification is valid when there was no consideration. Before an analysis can be provided, it must be determined whether the UCC or common law applies. The UCC applies to the sale of goods. Goods are defined as all things which are movable at the time of the contract. MCL 440.2105. Here the contract pertains to the sale of shovels. Shovels are moveable and therefore considered goods. Therefore, Article 2 of the UCC applies.

Under Article 2, contract modifications made in good faith are binding without consideration. However, if a modification is effectuated from the other party in bad faith, it is unenforceable. MCL 440.2209.<sup>1</sup> Consideration is defined "as a bargained exchange involving a benefit on one side, or a detriment suffered, or service done on the other." *Prentis Family Foundation v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 58 (2005) quoting *Gen Motors Corp v Dep't of Treasury*, 466 Mich 231, 238-239, 644 (2002) (internal quotes omitted). Here, the facts indicate that the cost of materials

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<sup>1</sup> MCL 440.2209 (Note 2) states that modifications must be made in good faith.

Subsection (1) provides that an agreement modifying a sales contract needs no consideration to be binding. However, modifications made thereunder must meet the test of good faith imposed by this Act. The effective use of bad faith to escape performance on the original contract terms is barred, and the extortion of a "modification" without legitimate commercial reason is ineffective as a violation of the duty of good faith. Nor can a mere technical consideration support a modification made in bad faith.

The test of "good faith" between merchants or as against merchants includes "observance of reasonable commercial standards of fair dealing in the trade" (Section 2-103) and may in some situations require an objectively demonstrable reason for seeking a modification. But such matters as a market shift which makes performance come to involve a loss may provide such a reason even though there is no such unforeseen difficulty as would make out a legal excuse from performance under Sections 2-615 and 2-616.

Good faith is defined by MCL 440.1201(19) as "honesty in fact in the conduct or transaction concerned."

increased and that Sampson Shovel, Inc. asked Bailey Landscape Supply to agree to an increased sale price of \$12.00 per shovel for the remaining deliveries and Ms. Bailey, an agent for Bailey Landscape Supply, agreed to the new term. Sampson Shovel Inc.'s obligations under the contract have not changed at all. The company is simply doing what it was already legally obligated to do. But since no new consideration is required, Bailey Landscape Supply cannot avoid the contract modification for lack of consideration.

However, in order to effectuate the modification, Sampson Shovel Supply must have been acting in good faith. Here, the facts simply indicate that the material costs increased. There is no indication from the facts that Mr. Sampson extorted this modification in bad faith. Therefore, the contract modification is valid.

2. The next issue is whether the Statute of Frauds applies when the contract as modified falls within its provisions. The rule is that contracts for the sale of goods at a price of \$1,000 or more are not enforceable unless there is some writing made that is signed by the party to be charged or such party's agent. A writing is not insufficient because it omits or incorrectly states a term agreed upon, but the contract is not enforceable beyond the quantity of goods shown in the writing. See MCL 440.2201(1) and MCL 440.2209(3).

Here, the original contract was for \$15,000 and thus had to be in writing in order to comply with the State of Frauds. The modification of the contract increased the contract price by \$2,250. Therefore, the contract as modified still remained within requirements of the Statute of Frauds and must be written and signed by Ms. Bailey, the agent for Bailey Landscape Supply, the party to be charged. The facts indicate that Mr. Sampson telephoned Ms. Bailey and asked if she would agree to pay an increased cost per shovel. The modification was not reduced to a written form and Ms. Bailey did not sign any documentation assenting to the change. Therefore, strictly speaking, the modification of the contract is not in compliance with the Statute of Frauds.

Some examinees may argue that if the term modified is not a term required to be in writing, then the modification does not need to be in writing. Here, the term modified was price. Price is not a term required to be in writing. Therefore, under this reasoning, the modification does not fail per the Statute of Frauds. MCL 440.2204, MCL 440.2305. Should an examinee so argue, credit is to be awarded.

3. The last issue is whether Ms. Bailey's assent to the new price term operates as a waiver of her right to enforce the contract as written when Sampson Shovel, Inc. has not materially changed its position in reliance on her oral assent to the price change. "A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver." MCL 440.2209(5).

Here the facts indicate the increased cost in materials would in no way affect Sampson's ability to perform under the original terms of the contract. The facts further indicate that although Ms. Bailey orally agreed to the price change, Sampson Shovel Inc. has not done anything to materially change its position in reliance on the waiver. Thus, the retraction would not be unjust. Ms. Bailey needs to retract the waiver by notifying Mr. Sampson that strict performance under the original terms of the contract will be required. The next delivery date was three weeks away. If she notifies Mr. Sampson promptly, the notification would be considered reasonable provided that Sampson Shovel, Inc. does not materially alter its position before the notification. Therefore, Bailey Landscape Supply will not be held to the modified price terms of the oral agreement.

In conclusion, Bailey Landscape Supply can avoid the oral modification to the original contract provided she promptly notifies Sampson Shovel, Inc. of her retraction.

Although this question is designed to elicit an answer on waiver, if an examinee stated that an enforceable contract modification is not retractable and gave enough reasoning to support the answer, full credit was awarded on this issue.