

A breeder bought a two-month-old registered boar at auction from a seller for \$800. No express warranty was made. Fifteen months later, tests by experts proved conclusively that the boar had been born incurably sterile. If this had been known at the time of the sale, the boar would have been worth no more than \$100. In an action by the breeder against the seller to avoid the contract and recover the price paid, the parties stipulate that, as both were and had been aware, the minimum age at which the fertility of a boar can be determined is about 12 months.

Which of the following will the court probably decide?

- A. The breeder wins, because the parties were mutually mistaken as to the boar's fertility when they made the agreement.
- B. The breeder wins, because the seller impliedly warranted that the boar was fit for breeding.
- C. The seller wins, because any mistake involved was unilateral, not mutual.
- D. The seller wins, because the breeder assumed the risk of the boar's sterility.

## Explanation:

### When party assumes risk of mistake

<b>Express</b>	Contract allocates risk to party
<b>Conscious ignorance</b>	Party enters contract despite conscious ignorance of facts related to mistake
<b>Adjudication</b>	Court allocates risk to party because reasonable under circumstances

**Mutual mistake** occurs when both parties enter into a contract based on the same mistake. In such cases, the contract may be **voidable** by the **adversely affected party** if:

- the mistake relates to a **basic assumption** of the contract
- the mistake **materially affects** the agreed-upon **exchange of performances** (ie, the adversely affected party cannot fairly be required to carry it out) *and*
- the adversely affected party **did not assume** the **risk of the mistake**.

One way a party assumes the risk of a mistake is by proceeding with **conscious ignorance** (ie, **awareness of his/her limited knowledge**) of the facts related to the mistake.

Here, both the breeder and the seller likely entered the contract based on an erroneous belief that the boar would be fertile—a basic assumption of the contract—as evidenced by the \$800 sales price (**Choice C**). That mutual mistake materially affected the agreed-upon exchange since the boar's actual worth was no more than \$100. However, the breeder assumed the risk that the boar would turn out to be sterile because the breeder was *aware* that the boar's fertility could not be known at the time of the sale (**Choice A**). As a result, the seller probably wins.

**(Choice B)** Under the UCC, a seller **impliedly warrants** that goods are fit for a particular purpose if the seller knows or should know that the buyer requires the goods for a particular purpose (eg, to breed) AND is relying upon the seller's expertise to provide suitable goods (eg, had the breeder lacked knowledge of fertility).

### Educational objective:

Mutual mistake renders a contract voidable by the adversely affected party when (1) the mistake relates to a basic assumption of the contract, (2) the mistake materially affects the agreed-upon exchange of performances, and (3) the adversely affected party did not assume the risk of the mistake.

**UCC** = Uniform Commercial Code

**References**

- Restatement (Second) of Contracts § 152 (Am. Law Inst. 1981) (when mutual mistake makes a contract voidable).
- Restatement (Second) of Contracts § 154 (Am. Law Inst. 1981) (when a party bears the risk of a mistake).

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