
Defenses to Enforceability

1. In a restitutionary action, can the administratrix of the 84-year-old man's estate, a surviving sister, recover on behalf of the estate either all or part of the $20,000 paid to the geriatric company on September 25?

On August 1, a geriatric company operating a "lifetime care" home for the elderly admitted an 84-year-old man for a trial period of two months. On September 25, the 84-year-old man and the geriatric company entered into a written lifetime care contract with an effective commencement date of October 1. The full contract price was $20,000, which, as required by the terms of the contract, the 84-year-old man prepaid to the geriatric company on September 25. The 84-year-old man died of a heart attack on October 2.

- Yes, because the geriatric company would otherwise be unjustly enriched at the 84-year-old man's expense
- Yes, under the doctrine of frustration of purpose
- **No, because the 84-year-old man's life span and the duration of the geriatric company's commitment to him was a risk assumed by both parties**
- No, because the geriatric company can show that between September 25 and the 84-year-old man's death it rejected, because of its commitment to the 84-year-old man, an application for lifetime care from another elderly person

Note:
C is correct. Restitution generally is not available to recover a benefit conferred pursuant to a valid and binding contract. When determining whether a contract may be unenforceable on grounds of unconscionability, the fairness of the exchange is determined as of the time that the contract was entered into. Although the price of $20,000 may seem unfair as of October 2, the risk that the 84-year-old man would die within a short period was one that he assumed when he entered into the contract on September 25.

A is incorrect. The benefit was conferred pursuant to a binding contract. Restitution is generally used to prevent unjust enrichment in a case where a non-breaching party partly performs before the other party breaches the contract. Restitution is generally not available in a fact pattern like this one where this is a valid binding contract.

B is incorrect. There was no frustration of purpose. Courts will generally look to the allocation of risk in order to decide if the doctrine of frustration applies. This is the concept that the more foreseeable the event is, the more likely the court will be to conclude that the risk was implicitly allocated to the party who, according to the structure of the contract, would lose most or all of the benefit of the bargain. In this fact pattern, the man was given care for the remainder of his life.

D is incorrect because the company may enforce the contract at law and does not need to show detrimental reliance.

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2. As between the retailer and the wholesaler, which of the following is an accurate statement?

On June 9, a valid federal statute making the interstate sale of assault rifles punishable as a crime had become effective, but neither the retailer nor the wholesaler was aware until June 15 that the statute was already in effect. On June 10, the wholesaler sold and delivered the same rifles to another merchant for $300 each. Unaware of that transaction, the retailer on the morning of June 11 mailed the wholesaler a letter rejecting the latter's offer, but, changing his mind an hour later, retrieved from his local post office the letter of rejection and immediately dispatched to the wholesaler a letter of acceptance, which the wholesaler received on June 14. A retailer of guns in a state received on June 1 the following signed letter from a gun-wholesaler in another state: "We have just obtained 100 of the assault rifles you inquired about and can supply them for $250 each. We can guarantee shipment no later than August 1."

- No contract was formed, because of wholesaler's June 10 sale of the rifles to another merchant revoked the offer to the retailer
- **If a contract was formed, it is voidable because of mutual mistake**
- **If a contract was formed, it is unenforceable because of supervening impracticability**
- No contract was formed, because the retailer's June 11 rejection was effective on dispatch

Note:
A mutual mistake is when the contract is based upon a mistake made by both parties. There are three requirements that must be satisfied before the adversely-affected party may avoid the contract on the account of a mutual mistake: (i) the mistake must concern a basic assumption on which the contract was made; (ii) the mistake must have a material effect on the agreed exchange of performances; and (iii) the party seeking avoidance did not assume the risk of the mistake.

The test for whether the mutual mistake relates to a basic assumption on which the contract is founded is if one party will get an unexpected, unbargained-for gain, and the other party will suffer an unexpected loss. Market conditions and financial ability are not considered assumptions that are basic to the contract, and a mutual mistake on those terms will NOT void the contract. As to the second element, the person seeking to avoid the contract for mutual mistake must show that the mistake has a material effect on the agreed exchange of performances. This party must also show that the resulting imbalance in the agreed exchange is so severe that he cannot fairly be required to carry it out. If the party seeking to avoid enforcement of the contract on the basis of mutual mistake is the one who originally took on the risk that there might be a mistake, he will not be able to raise a mutual mistake defense. This commonly occurs where one party is in a better position to know the risks than the other party (e.g., contractor vs. homeowner) or where the parties knew their assumption was doubtful (i.e., the parties were consciously aware of their ignorance). In other words, to be a defense, it must truly be a mistake, not uncertainty.

The occurrence of an unanticipated or extraordinary event may make contractual duties impossible or impracticable to perform or may frustrate the purpose of the contract. Where the non-occurrence of the event was a basic assumption of the parties in making the contract and neither party expressly or impliedly assumed the risk of the event occurring, the bar exam will use the term "impracticability" to encompass both impossibility and impracticability.

Remember: The promisor's duty to perform serves as a condition precedent to the other party's duty to perform. In other words, if these duties are excused by impossibility, impracticability, or frustration, the other party's contractual duties will also be discharged.

Modern courts will discharge contractual duties where performance has become impracticable. The test for impracticability is that the party who is supposed to perform has encountered: (i) extreme and unreasonable difficulty and/or expense; and (ii) its non-occurrence was a basic assumption of the parties when they entered into the contract. In effect, courts allow a party to avoid performance where subjective impossibility is found.

Article 2 generally follows these rules, which means if the sale of goods has become impossible or commercially impracticable, the seller will be discharged to the extent of the impossibility or impracticability. UCC §2-615. Generally, the seller assumes the risk of the possibility that unforeseen events may occur. However, where it is fair to say that the parties would not have placed the risk of such an extraordinary occurrence on the seller, he will be discharged.

The power of acceptance created by an offer ends when the offer is terminated. The mutual assent requirement obviously cannot be met where the termination occurs before acceptance is effective. One type of offer termination is revocation, which is the retraction of an offer by the offeror. A revocation terminates the offeree's power of acceptance if it is communicated to her before she accepts. Revocation directly communicated to the offeree by the offeror terminates the offer. A revocation is generally effective when received by the offeree.

An express rejection is a statement by the offeree that she does not intend to accept the offer. Such a rejection will terminate the offer.

EXAM TIP: Although rare, on a few occasions the NCBE has released two correct answers for one question. For this question, when it was scored, either answer B or C was accepted as correct and given credit. However, moving forward, examinees should still approach each question as if only one answer is correct.

B is correct. This answer choice poses a hypothetical: IF a valid contract was formed, THEN it is voidable on the ground of mutual mistake. This is a true statement because the elements of mutual mistake are satisfied here. First, the mistake related to a basic assumption of the contract - that it was legal for the wholesaler to sell the rifles to the retailer. Second, the mistake had a material effect on the exchange because if it was illegal to sell the rifles, then the entire contract is unenforceable. Finally, the party seeking discharge (the wholesaler) did not originally bear the risk of the mistake (nor did the retailer) because there was no reason to believe that such a federal statute would be enacted. Because all of the elements of mutual mistake are satisfied, IF there was a valid contract, then it is voidable on this basis.

C is also correct. This answer choice also poses a hypothetical: IF a valid contract was formed, it is unenforceable because of supervening impracticability. As stated above, a party's obligation under a contract may be discharged on grounds of supervening impracticability if the impracticability is due to an extraordinary event, the non-occurrence of which is a basic assumption of the contract, without the fault of either party and where the party seeking discharge did not bear the risk of the event. Here, because the federal statute criminalizes the performance required under the contract (the interstate sale of assault rifles), it renders performance impracticable for both the retailer and the wholesaler, and neither party bore the risk of the event happening.

A is incorrect. This is incorrect because, in order for the revocation to be effective, a notice of it must be received by the offeree. As such, the wholesaler's June 10 sale of the rifles to the other merchant would have had to have been communicated to the retailer for it to be a valid revocation.

D is incorrect. This answer choice applies the mailbox rule, a doctrine that only applies to acceptance. A rejection is only effective when the offeror receives notice of it. Thus, the retailer's mailing of the rejection alone was not enough to constitute a rejection absent notice to the wholesaler.

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3. In an action by the family friend against the father to recover $1,000 plus interest, which of the following statements would summarize the father's best defense?

A father and his adult daughter encountered an old family friend on the street. The daughter said to the family friend, "How about lending me $1,000 to buy a used car? I'll pay you back with interest one year from today." The father added, "And if she doesn't pay it back as promised, I will." The family friend thereupon wrote out and handed to the daughter his personal check, payable to her, for $1,000, and the daughter subsequently used the funds to buy a used car. When the debt became due, both the daughter and the father refused to repay it, or any part of it.

- He received no consideration for his conditional promise to the family friend
- His conditional promise to the family friend was not to be performed in less than a year from the time it was made
- **<u>His conditional promise to the family friend was not made for the primary purpose of benefiting himself (the father)</u>**
- The loan by the family friend was made without any agreement concerning the applicable interest rate

Note:
C is correct. Generally, a promise to guarantee a debt to a third person falls under the Statute of Frauds and therefore must be in writing and signed by the party to be charged in order to be enforceable. Restatement (Second) of Contracts § 110 (1981). However, the promise will not fall under the Statute where the principal purpose of making the guarantee was to benefit the promisor himself and not the third-party debtor. Restatement (Second) of Contracts § 116 (1981). Here, if the father's promise was made for the primary purpose of benefiting his daughter and not himself, then his promise to guarantee his daughter's debt falls within the Statute of Frauds and a writing is required for his promise to be enforceable. Thus, the father's best defense is that the promise was not to benefit himself, which means the contract did not satisfy the Statute of Frauds because the father never signed a writing acknowledging he would pay the family friend $1000 if the daughter defaulted.

A is incorrect. This answer choice incorrectly applies the facts because consideration was given to the daughter. Valid consideration requires the contract to be a bargained-for exchange in which there is a legal detriment to the promisee or a benefit to the promisor. Restatement (Second) of Contracts § 71 (1981). Although the father is not directly benefiting from the $1000 loan, he did request the friend to give the daughter $1000, which would be considered a legal detriment to the promisee. Thus, this is not the father's best defense.

B is incorrect. Contracts that cannot be performed within one year require a signed writing by the party to be charged to be enforceable. Restatement (Second) of Contracts § 110 (1981). Here, the daughter explicitly stated she would pay the family friend back within one year. Thus, this is not the father's best defense because the contract would have been performed within a year and the Statute of Frauds would not apply.

D is incorrect. Restatement (Second) of Contracts § 33 (1981) requires the terms of a contract to be reasonably certain; a contract is not enforceable if one or more of the essential terms are left open. Here, the daughter's promise is sufficiently definite to be enforced notwithstanding the failure to specify an interest rate because the loan amount and payment due date are both mentions; the interest rate term may be implied and determined based on the market.

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4. Which of the following, if proved, would best support the wallpaper hanger's defense?

Three other competing hangers sent the general contractor similar bids in the respective amounts of $18,000, $19,000, and $20,000. The general contractor used the wallpaper hanger's $14,000 figure in preparing and submitting her own sealed bid on Doctors' Building. Before the bids were opened, the wallpaper hanger truthfully advised the general contractor that the former's telegraphic sub-bid had been based on a $4,000 computational error and was therefore revoked. Shortly thereafter, the general contractor was awarded the Doctors' Building construction contract and subsequently contracted with another paperhanger for a price of $18,000. The general contractor now sues the wallpaper hanger to recover $4,000. /s/ the wallpaper hanger Will do all paperhanging on new Doctors' Building, per owner's specs, for $14,000 if you accept within reasonable time after main contract awarded. A wallpaper hanger sent a general contractor, this telegram:

- The general contractor gave the wallpaper hanger no consideration for an irrevocable sub-bid
- The wallpaper hanger's sub-bid expressly requested the general contractor's acceptance after awarding of the main contract
- Even after paying $18,000 for the paperhanging, the general contractor would make a net profit of $100,000 on the Doctors' Building contract
- **Before submitting her own bid, the general contractor had reason to suspect that the wallpaper hanger had made a computational mistake in figuring his sub-bid**

Note:
D is correct. A contract may be rescinded on grounds of unilateral mistake if the mistake relates to a fundamental assumption of the contract that has a material effect on the exchange, if the party asserting mistake should not bear the risk of the mistake and if either (i) the non-mistaken party has reason to know of the mistake; or (ii) the effect of the mistake would make enforcement of the contract unconscionable. The wallpaper hanger may argue that the sub-contract should be rescinded on grounds of the $4,000 mistake that he made in computing his sub-bid. If the general contractor had reason to know of the computational error, this would greatly support the wallpaper hanger's argument.

A is incorrect. The bid may be found to be irrevocable on a reliance theory even in the absence of an option promise supported by consideration.

B is incorrect. This answer choice is irrelevant. It would not be a defense that the wallpaper hanger's sub-bid expressly requested acceptance by the general contractor. An option promise is simply an option, which is defined as a promise which meets the requirements for the formation of a contract and limits the promisor's power to revoke an offer.

C is incorrect. The mere fact that the general contractor would make a substantial profit on the contract does not make the effect of the mistake unconscionable.

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5. Which of the following additional facts, if established by the son, would best support his chance of obtaining rescission of the sale to the trainer?

Assume that soon after the sale, the horse won three races and earned $400,000 for the trainer. A son, who knew nothing about horses, inherited a thoroughbred colt whose disagreeable behavior made him a pest around the barn. The son sold the colt for $1,500 to an experienced racehorse-trainer who knew of the son's ignorance about horses. At the time of the sale, the son said to the trainer, "I hate to say it, but this horse is bad-tempered and nothing special."

- The son did not know until after the sale that the purchaser was an experienced racehorse-trainer
- **At a pre-sale exercise session of which the trainer knew that the son was not aware, the trainer clocked the horse in record-setting time, far surpassing any previous performance**
- The horse was the only thoroughbred that the son owned, and the son did not know how to evaluate young and untested racehorses
- At the time of the sale, the son was angry and upset over an incident in which the horse had reared and thrown a rider

Note:
B is correct. A person's nondisclosure of fact may be tantamount to a misrepresentation of fact sufficient to allow rescission of a contract where the person knows that disclosure of the fact would correct the other party's mistake with respect to a basic assumption of the contract, and where nondisclosure amounts to a failure to act in good faith. The fact that the horse earned $400,000 for the trainer soon after the sale (over 250 times the contract price) suggests that nondisclosure of the horse's true abilities related to a basic assumption of the contract relating to the horse's worth. If the son can establish that the trainer was aware that the horse was capable of running a race in record-setting time and that the son was ignorant of this fact, then the son has a plausible argument for rescission on grounds of nondisclosure.

A is incorrect. The son's ignorance of the horse trainer's expertise would not be sufficient to establish a basis to cancel the contract.

C are incorrect. The son's inexperience with evaluating horses alone would not be enough evidence to argue for recission.

D is incorrect. The son's anger is irrelevant to the enforceability of the contract for the horse's sale.

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6. Which one of the following scenarios would best support an action by the trainer, rather than the son, to rescind the sale?

A son, who knew nothing about horses, inherited a thoroughbred colt whose disagreeable behavior made him a pest around the barn. The son sold the colt for $1,500 to an experienced racehorse-trainer who knew of the son's ignorance about horses. At the time of the sale, the son said to the trainer, "I hate to say it, but this horse is bad-tempered and nothing special."

- **In his first race after the sale, the horse galloped to a huge lead but dropped dead 100 yards from the finish line because of a rare congenital heart defect that was undiscoverable except by autopsy**
- The horse won $5 million for the trainer over a three-year racing career but upon being retired was found to be incurably sterile and useless as a breeder
- After the horse had won three races for the trainer, it was discovered that by clerical error, unknown to either party, the horse's official birth registration listed an undistinguished racehorse as the sire rather than the famous racehorse that in fact was the sire
- A week after the sale, the horse went berserk and inflicted serious injuries upon the trainer that required his hospitalization for six months and a full year for his recovery

Note:
A mutual mistake is when a contract is based upon a mistake made by both parties. There are three requirements that must be satisfied before the adversely-affected party may avoid the contract based on mutual mistake: (i) the mistake must concern a basic assumption on which the contract was made; (ii) the mistake must have a material effect on the agreed exchange of performances; and (iii) the adversely-affected party must not bear the risk of the mistake. The party wishing to avoid the contract must show that the resulting imbalance in the agreed exchange is so severe that he cannot fairly be required to carry it out.

The general test for when a mutual mistake relates to the basic assumption on which the contract is founded is if one party will get an unexpected, unbargained-for gain and the other party will suffer an unexpected loss. However, market conditions and financial ability are not considered basic assumptions and a mutual mistake on those terms will not void the contract.

A is correct. If in his first race after the sale, the horse dropped dead of a rare, undiscoverable heart condition, the trainer could make a plausible argument that the contract could be rescinded on grounds of mistake. The condition related to a fundamental assumption (the horse's suitability for racing) that destroyed the subject matter of the contract, and since the heart condition was not expected or discoverable, a court might find that the trainer should not bear the risk of the mistake.

B is incorrect. Remember, the call of the question asks you to select the factual scenario that best supports an action to rescind the contract by the trainer. This is not a factor that relates to a fundamental assumption of the contract because the facts suggest that the horse was purchased as a racehorse and not a breeder. The contract involving the horse did not relate to the horse's future ability as a breeder, so the horse's sterility cannot be a fundamental assumption of contract for a racehorse.

C is incorrect. A mistake refers to a mistaken belief about an existing fact, not an erroneous belief about what will happen in the future. In this question, the contract is about the horse's ability as a racehorse. The mistake introduced in this answer choice has to do with an erroneous belief about what will happen in the future, i.e., that the horse will be a good stock for breeding AFTER racing. Thus, the horse's bloodline cannot be a basic assumption upon which the contract was formed.

D is incorrect. A disadvantaged party will not be able to avoid the contract if the risk of that mistake is still allocated to him. The risk can be allocated to the other party in three ways: (i) by agreement of the parties; (ii) when a party is aware at the time the contract is made that he has only limited knowledge with respect to the facts which the mistake relates but treats his limited knowledge as sufficient; or (iii) the risk is allocated by the court as is reasonable under the circumstances. The risk that the horse might go berserk was one of which the trainer had notice, and was, therefore, a risk that he should bear.

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7. On learning of the rejection, does the glove manufacturer have a cause of action against the ski-shop operator for breach of contract?

A ski-shop operator, in a telephone conversation with a glove manufacturer, ordered 12 pairs of vortex-lined ski gloves at the glove manufacturer's list price of $600 per dozen "for delivery in 30 days." The glove manufacturer orally accepted the offer, and immediately faxed to the ski-shop operator this signed memo: "Confirming our agreement today for your purchase of a dozen pairs of vortex-lined ski gloves for $600, the shipment will be delivered in 30 days." Although the ski-shop operator received and read the glove manufacturer's message within minutes after its dispatch, she changed her mind three weeks later about the purchase and rejected the conforming shipment when it timely arrived.

- Yes, because the gloves were identified in the contract and tendered to the ski-shop operator
- **Yes, because the glove manufacturer's faxed memo to the ski-shop operator was sufficient to make the agreement enforceable**
- No, because the agreed price was $600 and the ski-shop operator never signed a writing evidencing a contract with the glove manufacturer
- No, because the ski-shop operator neither paid for nor accepted any of the goods tendered

Note:
B is correct. Under the Uniform Commercial Code (UCC), a contract for the sale of goods for $500 or more must be evidenced by a writing that is signed by the person against whom enforcement is sought. As an exception to the rule, a signed writing will not be required between merchants where a written confirmation of a contract of sale has been sent and the recipient fails to give notice of objection to the confirmation within 10 days of its receipt.

The contract between the ski-shop operator and the glove manufacturer falls within the Statute of Frauds since it is for $600. However, because the ski-shop operator and the glove manufacturer both appear to be merchants and because the ski-shop operator failed to object to the writing within 10 days of its receipt, the glove manufacturer's faxed memo is a written confirmation that falls within the exception.

A is incorrect. The gloves being an express term in the contract does not have any legal bearing on the breach of contract claim.

C is incorrect. Although the contract falls within the Statute of Frauds provision, an exception to the rule applies.

D is incorrect. The ski-shop operator did not have the right to reject the shipment without breaching the contract.

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8. If, before the logger commences performance, the landholder's investment fortunes suddenly improve and he wishes to get out of the timber deal with the logger, which of the following legal concepts affords his best prospect of effective cancellation?

The logger offered to buy, sever, and remove the standing timber from the advertised tract at a cash price 70% lower than the regionally prevailing price for comparable timber rights. The landholder, by then in desperate financial straits and knowing little about timber values, signed and delivered to the logger a letter accepting the offer. A landholder was land-rich by inheritance but money-poor, having suffered severe losses on bad investments, but still owned several thousand acres of unencumbered timberland. He had a large family, and his normal, fixed personal expenses were high. Pressed for cash, he advertised a proposed sale of standing timber on a choice 2,000-acre tract. The only response was an offer by a logger, the owner of a large, integrated construction enterprise, after inspection of the advertised tract.

- Bad faith
- Equitable estoppel
- **Unconscionability**
- Duress

Note:
"Unconscionability" is the refusal of a court to enforce a provision, a modification, or an entire contract to avoid unfairness. A determination of unconscionability is made based on circumstances at the time the contract was formed.

One type of unconscionability is substantive, which is based on price alone. A price may be considered excessive, for example, if it is set at approximately two or three times the market price of similar goods. The crux of this determination is the set price is so far off from the market price that it is unconscionable.

Another type of unconscionability is procedural, which exists when there is some form of unequal bargaining power between the parties. A court will find procedural unconscionability when a party was somehow induced into agreeing to the contract without any meaningful choice. In other words, there was no possibility of true "bargaining," indicating a lack of assent. A finding of procedural unconscionability typically relies on various factors, including: (i) "belief by the stronger party that there is no reasonable probability that the weaker party will fully perform the contract"; (ii) "knowledge of the strongest party that the weaker will be unable to receive substantial benefits from the contract"; and (iii) knowledge of the stronger party that the weaker party is unable reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement. . . ." Rest. 2d, § 208, Comment d.

Contract law requires each party to act in good faith. "Good faith" has been defined in multiple ways, including honesty and remaining committed to the agreed common purpose as well as consistent with the other party's justifiable expectations. "Bad faith" has been defined as conduct that does not adhere to reasonable community standards around fairness and decency, such as abuse of power or interference with the other party's ability to perform. Rest. 2d § 205, comment.

Equitable estoppel is invoked to prevent a party from taking advantage of another party in an unfair way, often by way of false or fraudulent words or actions.

Contracts that are induced by duress will be voidable and may be rescinded. Duress may be by physical force or threats that leave a party with no viable alternative to entering into the contract.

C is correct. The landholder's best opportunity for effective cancellation of the contract is unconscionability, both substantive and procedural. If a court finds a contract unconscionable at the time it was made, it may refuse to enforce the entire contract or enforce only the remainder of the contract without the unconscionable term. Procedural unconscionability refers to unfairness in the bargaining process that leaves a party with no meaningful choice about whether to enter into the contract. Substantive unconscionability most often refers to price terms that unreasonably favor the other party.

Here, the landholder should invoke both procedural and substantive unconscionability. At the time the contract was made, the landholder was in desperate financial straits, specifically lacking cash and possessing only land value, with no other viable options. Moreover, the landholder was ignorant of the value of the rights he was selling. The logger offered to buy at a cash price that was 70% lower than the regionally prevailing price for comparable timber rights. As such, the landholder was effectively backed into a corner, without proper knowledge of what he possessed OR what he was receiving. By being presented with the opportunity to receive cash immediately, and without understanding that he could have gotten 70% more profit, these circumstances render unconscionability his best argument for cancellation of the contract.

A is incorrect. The mere fact that the logger won the contract with a below-market bid does not suggest bad faith. A finding of bad faith includes, for example, conduct that violates community standards of decency, fairness, or reasonableness, such as abuse of power or dishonesty. Without more evidence here, a claim that the logger acted in bad faith by making a below-market offer would be unlikely to succeed.

B is incorrect. There is no evidence of a statement of fact that would give rise to an estoppel claim because the logger, although he engaged in unfair dealing, did not intentionally misrepresent or fraudulently mislead the landholder such that he relied on false information.

D is incorrect. This would not be an effective basis for canceling the contract. In order to show duress, the landholder would need to show that the logger induced the landholder to make the contract by making some sort of a wrongful threat. There is no evidence of a threat of any kind, which means duress does not apply.

9. Which of the following will the court probably decide?

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. A breeder bought a two-month-old registered boar at auction from a seller for $800. No express warranty was made. 15 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.

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

Note:
A mutual mistake is when the contract is based upon a mistake made by both parties. There are three requirements that must be satisfied before the adversely-affected party may avoid the contract on the account of a mutual mistake: (i) the mistake must concern a basic assumption on which the contract was made; (ii) the mistake must have a material effect on the agreed exchange of performances; and (iii) the party seeking avoidance did not assume the risk of the mistake.

The test for the first element, whether the mutual mistake relates to a basic assumption on which the contract is founded, is if one party will get an unexpected, unbargained-for gain, and the other party will suffer an unexpected loss. Market conditions and financial ability are not considered assumptions that are basic to the contract, and a mutual mistake on those terms will NOT void the contract.

As to the second element, the person seeking to avoid the contract for mutual mistake must show that the mistake has a material effect on the agreed exchange of performances. This party must also show that the resulting imbalance in the agreed exchange is so severe that he cannot fairly be required to carry it out.

If the party seeking to avoid enforcement of the contract on the basis of mutual mistake is the one who originally took on the risk that there might be a mistake, he will not be able to raise a mutual mistake defense. This commonly occurs where one party is in a better position to know the risks than the other party (e.g., contractor vs. homeowner) or where the parties knew their assumption was doubtful (i.e., the parties were consciously aware of their ignorance). In other words, to be a defense, it must truly be a mistake, not uncertainty.

Implied in every contract for sale by a merchant who deals in goods of the kind sold is a warranty that the goods are merchantable. Most commonly, that the goods are "fit for the ordinary purposes for which such goods are used," and a failure to live up to this test is the usual claim in a merchantability suit. However, a warranty will also be implied in a contract for the sale of goods whenever: (i) any seller, merchant or not, has reason to know the particular purpose for which the goods are to be used and that the buyer is relying on the seller's skill and judgment to select suitable goods; and (ii) the buyer in fact relies on the seller's skill or judgment.

Unilateral mistakes arise most commonly when one party makes a mechanical error in computation. If only one of the parties is mistaken about facts relating to the agreement, the mistake will not prevent the formation of the contract. However, if the non-mistaken party knew or had reason to know of the mistake made by the other party, the contract is voidable by the mistaken party. As is the case with mutual mistake, for the contract to be voidable, the mistake must have a material effect on the agreed-upon exchange and the mistaken party must not have borne the risk of the mistake.

C is correct. A contract may be rescinded on grounds of mutual mistake of fact if the mistake relates to a fundamental assumption of the contract having a material effect on the exchange unless the court determines that the party asserting mistake should bear the risk of the mistake. Here, the effect of the mistake was material to the value of the exchange because it reduced the boar's value from $800 to $100. However, the boar's fertility could not be considered a fundamental assumption of the contract. The breeder bought a two-month-old boar and knew that fertility could not be determined until the boar was 12 months old, meaning there was no way of knowing the fertility at the time of the sale. In addition, although the breeder could not have investigated whether the boar was fertile at the time of sale, it seems likely that the court nonetheless would find that the breeder implicitly assumed the risk of the boar's infertility, since the breeder was aware of this possibility yet went forward with the purchase.

A is incorrect. The breeder is not likely to win because the status of the boar's fertility was not a mistake, but an uncertainty. When the breeder contracted to buy the boar, it was known that the fertility could not be evaluated for 10 months, which means the risk is assumed that the boar could be infertile.

B is incorrect. It would not have been feasible for the seller to have impliedly warranted that the boar was fit for breeding, even if the seller knew that was the reason the breeder wanted it. An implied warranty will exist where the seller knows why the buyer is purchasing the goods, that the buyer is relying on the seller's ability to select the goods, and the buyer in fact relied. However, this was not a matter of the seller using skill to ensure that the goods were fit for the breeder's specific purpose. The seller could not have known the status of the boar's fertility, so it would not have been possible to imply such a warranty.

D is incorrect. This answer reaches the correct answer with the wrong reasoning. The seller will win, but not because the mistake was unilateral rather than mutual. Either type of mistake will not apply here, where, not only did the breeder assume the risk that the boar might be infertile, but this was not a mistake. It was an uncertain issue regarding the boar, which neither party could have known at the time of the sale.

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10. In a suit by the manufacturer against the retailer, which of the following will be the probable decision?

A dry goods retailer telephoned a towel manufacturer and offered to buy for $5 each a minimum of 500 and a maximum of 1,000 large bath towels, to be delivered in 30 days. The manufacturer orally accepted this offer and promptly sent the following letter to the retailer, which the retailer received two days later: "This confirms our agreement today by telephone to sell you 500 large bath towels for 30-day delivery. /s/ Manufacturer." 28 days later, the manufacturer tendered to the retailer 1,000 (not 500) conforming bath towels, all of which the retailer rejected because it had found a better price term from another supplier. Because of a glut in the towel market, the manufacturer cannot resell the towels except at a loss.

- The manufacturer can enforce a contract for 1,000 towels, because the retailer ordered and the manufacturer tendered that quantity
- **The manufacturer can enforce a contract for 500 towels, because the manufacturer's letter of confirmation stated that quantity term**
- There is no enforceable agreement, because the retailer never signed a writing
- There is no enforceable agreement, because the manufacturer's letter of confirmation did not state a price term

Note:
B is correct. Under the Uniform Commercial Code's (UCC) Statute of Frauds, a contract for the sale of goods for $500 or more is not enforceable unless there is a writing sufficient to indicate that a contract has been made, which is signed by the party against whom enforcement is sought. The writing need not contain all of the terms of the contract, but it is only enforceable to the extent of the quantity term stated in the writing. The contract between the manufacturer and the retailer for the 500 towels falls within the UCC Statute of Frauds because it is for over $500. However, when dealing with two merchants, there is something called the Confirmatory Memo Rule. In contracts between merchants, if one party, within a reasonable time after an oral understanding has been reached, sends a written confirmation to the other party that binds the sender, it will satisfy the Statute of Frauds requirements against the recipient as well, if the recipient knew of the memo's contents and failed to object to the memo's contents in writing within 10 days of when the confirmatory memo was received. The retailer received the written confirmation and was thus bound by the confirmatory memo for the 500 towels.

A is incorrect. The contract is only enforceable to the extent of the quantity term stated in the confirmation.

C is incorrect. The writing only needs to be signed by one party when dealing with merchants.

D is incorrect. The UCC Statute of Frauds does not require that the price term be stated in the writing.
