

Claim 1: Acme Flooring**Applicable Law:**

- Although the costs of materials and labor are roughly equal, the primary purpose of the contract was for rendering services because the service component of installation slightly overwhelmed the material aspect. Supporting that deduction, Bud's purpose of contacting Acme was to install flooring in his stores, not to buy carpet and hardwood parquet. Therefore, common law controls.
 - Acme might argue that the contract was for the sale of goods. As will be seen in the analysis, any applicable differences are minimal and may even favor Bud if the UCC applied.

Enforceability:

- Offer and Acceptance: Bud offered to pay Acme to redo the flooring in all of his seventy-five stores; flooring to be 60% sealed hardwood parquet as they discussed and 40% carpet. Acme accepted the offer to redo Bud's flooring at the given percentages and price.
 - Acme will argue no mutual assent because the acceptance form adding the differing statute of limitations term was not a mirror image of the offer. Because both parties performed, however, the last shot rule upholds the formation of the contract with the terms being set forth in the last form sent.
 - UCC Difference: If the more lenient UCC governed, the contract for sale still does not fail for indefiniteness since the parties intended to make a contract.
- Consideration: Acme promised to do the installation work as outlined, and Bud promised to pay, which is an adequate exchange of promises supported by consideration.

- Promissory Estoppel: Even if consideration does not exist, enforcing Acme's promise to perform would avoid injustice because Acme could reasonably expect Bud to purchase SteamVacs in reliance on the promise.

Content of the Deal:

- Mistake/Misunderstanding: A court should construe "hardwood" to mean "solid hardwood" and not "engineered flooring." Bud wanted the flooring to be like the flooring in the Boston Garden, which is solid hardwood. Because Acme understood Bud's meaning of "hardwood," and Bud did not understand the meaning later attached by Acme, it was reasonable for Acme to bear the risk of the mistake and Bud's meaning prevails.
 - Acme will likely argue mutual mistake, that both parties were not aware of the understood meaning of "hardwood." Accordingly, Acme will claim the contract is voidable for lack of mutual assent. Bud was very clear about his meaning of "hardwood," however, thus no mutual mistake.
- Parol Evidence: Because Bud's term establishing liability for consequential damages was not included in Acme's form creating the enforceable contract under the last shot rule, the evidence is permissible notwithstanding the parol evidence rule. The fact pattern does not mention a merger clause in Acme's acknowledgment form, the existence of which may very well affect the analysis depending on Kushsylvania's Corbin vs. Williston viewpoint. The parol evidence rule, nonetheless, does not exclude evidence offered to prove communication made to flip the Hadley switch.
- Warranties: Since the common law governs the contract, *caveat emptor* dictates that there are no implied warranties for services.

- UCC Difference: If a court determines that the UCC governed the contract, Bud would get both implied warranties of merchantability and fitness for a particular purpose. These warranties would give Bud an additional avenue to claim contract breach.

Breach:

- Because a court will likely construe the term “hardwood” to mean “solid hardwood,” Acme materially breached the contract by installing engineered flooring in Bud’s stores.
 - Acme will argue that they substantially performed the contract with the installed engineered flooring. However, because engineered flooring is not as durable, stable, or resistant to swelling and shrinking from humidity as solid hardwood, the difference substantially impaired the value of the flooring; therefore, no substantial performance.
 - UCC Difference: If the UCC governed, perfect tender would require Acme to install the solid hardwood flooring understood in the contract with exactness.

Remedies:

- Expectation: The expectation interest puts Bud in as good a position as if Acme had fully performed the contract. A proper expectation measure of damages would be the difference in value of what Bud should have received and what he ended up with in the flooring installation: $75 * (\text{Incorrect hardwood material loss}) + \text{consequential damages for reasonable anticipated profits from each lost day during reinstallation} + \text{any applicable incidental damages in effecting cover}$.

- Reliance: A proper alternative reliance measure of damages would be the cost of the SteamVac cleaners + the money already paid to Acme + the cost of the Swedish Bona kits – value of the flooring installation at breach.
 - Acme will likely argue that the Swedish Bona kits were not reasonable expenditures spent in reliance on the contract, but rather a claim against Hoover. The damage to the hardwood parquet, however, resulted from the deviation in understood floor material. Acme should therefore be liable for the additional expenditure.
- Restitution: A proper restitution measure of damages would be the money already paid to Acme – the value of the flooring installation at time of breach.

Defenses:

- Illegality: Acme performed the contract before President Obama’s executive order and Kushsylvania’s legalization of marijuana. Consequently, Acme will claim that the contract was unenforceable because of illegality. Similar to the prostitute house case, a court will likely hold Acme’s installation contract did not actively participate in any illegal marijuana activity.
- Statute of Limitations: Bud must commence any action against Acme within the two-year statute of limitations, which may very well limit any claim against Acme depending on the dates of breach and commencement.
 - UCC Difference: The two-year statute of limitations term would also apply, unless a court deems it materially altered the contract under 2-207(2).

Claim 2: Hoover

Applicable Law:

- SteamVacs are goods; therefore, the UCC governs.

Enforceability:

- Offer and Acceptance: Hoover's salesperson demonstrated a willingness to enter a contract and invited acceptance by offering Bud 150 SteamVacs at \$200 per machine with free delivery and technician assembly. Bud reasonably accepted the offer by promptly faxing a purchase order to Hoover. Hoover sent an acknowledgment form with slightly different terms. Under 2-207(1), a paper deal was created despite the disagreement in forms.
- Consideration: Hoover promised to supply the SteamVacs, and Bud promised to pay the agreed upon price. Accordingly, consideration supported the agreement.
- Promissory Estoppel: Bud reasonably relied upon Hoover's promise to supply 150 SteamVacs; therefore, promissory estoppel established an enforceable promise.

Content of the Deal:

- Express Warranties: The email containing a description of the SteamVac created many express warranties pursuant to UCC 2-313. Notably, the SteamVac was able to clean a variety of surfaces, gently cleaning and squeegee drying the most delicate hard surfaces and sealed hardwood floors. Hoover, notwithstanding, attempted to disclaim any express warranties in the instruction booklet sent with the machines. A clause generally disclaiming all warranties, however, does not reduce Hoover's obligation with respect to the descriptions.
- Implied Warranty of Merchantability: Hoover was a merchant with respect to goods of the kind, thereby creating an implied warranty of merchantability. Although Hoover

reduced a disclaimer to writing and specifically mentioned “merchantability,” it was hardly conspicuous by being on page 29 of the instruction booklet found within the box of the machines when they arrived at the stores.

- Hoover will argue that the disclaimer was conspicuous, and Bud was aware of the limited warranty from the terms contained on their acknowledgment form. UCC 2-207(2) acknowledges that additional terms become part of an agreement between merchants; however, such terms do not become part of the deal if they materially alter the contract, as was the case in negating standard warranties. Therefore, the standard warranties apply.

- Implied Warranty of Fitness for a Particular Purpose: Hoover recommended the SteamVac for the particular purpose of cleaning both carpet and solid hardwood flooring. Bud relied on Hoover’s judgment, thereby creating an implied warranty of fitness for a particular purpose. Similar to the implied warranty of merchantability, Hoover’s disclaimer lacked conspicuousness and did not become part of the deal under 2-207(2).
- Contract Modifications: The two merchant parties mutually modified the original contract by dropping the requirement of technician assembly. UCC 2-209 provides that the mutual agreement did not need consideration for the modification to be binding.

Breach:

- Hoover breached the implied warranty of merchantability when the SteamVac tanks started leaking. Although the SteamVacs caused the engineered flooring to come apart, Hoover’s implied warranty of fitness for a particular purpose stems from recommending a product to clean solid hardwood floors. See Claim 1, supra.

Remedies:

- Expectation: Bud is entitled to buyer's remedies available in the UCC. Under UCC 2-714(2), Bud is entitled to the lost value of the defective cleaners, together with any incidental damages because of the breach. In light of the contract breach, Bud mitigated and covered by buying Bissell carpet cleaners without unreasonable delay and in good faith. Bud can therefore claim the difference in value between the SteamVac and the Bissell + the \$30k already paid to Hoover + the incidental shipping costs – the SteamVacs's value at breach.
 - Hoover will contest the value of the goods promised in the contract as being roughly equal to the value of the Bissell carpet cleaner, and that they should have had an opportunity to remedy the defect before effecting cover. Bud covered in good faith, however, because any unreasonable delay in receiving an adequate remedy would have a direct result on Bud's business.
- Reliance: Bud would be entitled to reliance damages to put him where he was before the contract formation. Bud can claim the money paid to Hoover for the SteamVacs + the salary/benefits of employees in accepting delivery and setting up the cleaners in the stores – the SteamVacs's value at breach.
- Restitution: Under UCC 2-711(1), Bud can claim restitution damages equal to the \$30k already paid to Hoover – the SteamVacs's value at breach.

Claim 3: Jesse

Applicable Law:

- Although producing the bongos required Jesse's labor, the primary thrust of the contract was for the sale of goods. Furthermore, the bongos are specially manufactured goods specifically outlined under Article 2. In either case, the UCC governs.

Enforceability:

- Offer and Acceptance: There was an objective manifestation of intent for Jesse to supply bongos to Bud. Bud offered to buy a target output of 500 bongos per month at \$50 per bong, with Jesse producing each bong in his shop. Jesse countered with \$60 per bong, and Bud accepted.
- Consideration: Bud promised to pay in exchange for Jesse's promise to supply the bongos, thus there was a promise for a promise.
- Promissory Estoppel: If a court holds that consideration was inadequate, enforcing Jesse's promise to produce the target amount of bongos would avoid injustice due to Bud's reasonable reliance on the contract by not seeking other bong producers.

Content of the Deal:

- Express Warranties: The contract was for production of 500 first-quality bongos per month at a cost of \$60 per bong. Additionally, Jesse was to produce each bong in his shop. Because these terms were part of the basis of the bargain, Jesse created express warranties that the bongos would conform as such. Further, Jesse did not disclaim these express warranties.
 - Jesse will likely contest the inclusion of the term requiring him to produce the bongos in his shop under parol evidence. UCC 2-202 requires, however, full integration of the agreement before parol evidence will deny the evidence's

admissibility. Neither party assented that any particular writing was the final expression of all the terms; therefore, parol evidence is admissible.

- Implied Warranties: An implied warranty of merchantability does not exist within the contract because Jesse was not a merchant with respect to goods of the kind. Likewise, Jesse did not create an implied warranty of fitness for a particular purpose since the bongs were for their ordinary purpose.

Breach:

- Although 2-306 output contracts allow some variation in output, Jesse reduced bong production in months seven through nine in bad faith because he allocated production to Nordstrom instead.
- Following the reduction, Jesse demanded an increase in price per bong for inducement into fulfilling his remaining contract obligations. Under the pre-existing duty rule, the modification to the contract was unenforceable for lack of separate consideration.
 - Jesse will likely argue the existence of separate consideration and the creation of an enforceable contract superseding any pre-existing obligations. Even if a court finds separate consideration for the increased price, Bud's acceptance came under duress and because of undue influence.
- Furthermore, Jesse increased production in bad faith during months ten through twelve to take advantage of the increased price per bong.
- Moreover, Jesse started producing the bongs in the Czech Republic, thereby breaching the express terms of the contract.

Remedies:

- Expectation: The expectation interest would place Bud where he would have been had the breach not occurred. Bud is therefore entitled to the lost profit derived from bong sales after the material breach. From the approximate 6,000 bongs expected over the course of the contract, Bud actually sold 4,750. Of the 4,750 sold, Bud sold 1,100 at a reduced profit margin due to the increased price demanded from Jesse. Bud is entitled to **\$44,000** in lost profits on the 1,100 bongs sold at the reduced margin, plus **\$112,500** in lost profits on the 1,250 bongs that could have been sold at the regular margin had the breach not occurred. Bud should revoke his acceptance of the 1,000 bongs still in his possession since non-conformity substantially impairs their value. Bud is also entitled to any incidental damages relating to the non-conforming goods.
 - Jesse will likely challenge the lost profit calculations on grounds of the new business rule. Bud had great success selling the bongs, however, even having customers back-order the item. Decrease in demand occurred only because of the newspaper article concerning the Czech knockoffs.
 - Jesse will also counterclaim for the \$100,000 still owed to him, stating Bud had already accepted the goods. Bud's proper revocation of acceptance promptly after discovering proper grounds will alleviate any obligation to pay. In order to prevent future litigation, however, Bud must hold the bongs with reasonable care for a time sufficient to permit Jesse to remove them.
- Reliance: The reliance interest would place Bud where he would have been had the contract not existed; any expenditure he made relying upon the contract would be appropriate.

- Restitution: Bud can make a claim for the value of the contract price already paid to Jesse. This type of remedy, though, will come under great scrutiny for Bud is no longer in possession of the goods and received enrichment from the profit of the sales.

Defenses:

- Statute of Frauds: Because the contract value was greater than \$500, Jesse will likely contend that the contract was within the statute of frauds and should require writing more substantial than the text messages. Despite the perhaps debatable method, the text messages satisfied the relaxed UCC requirements of evidencing a contract, having a signature, and specifying a quantity. The fact that the text message displays the sender of the text should be enough to satisfy the signature requirement. Nonetheless, since Bud received and paid for the bongs, performance by the parties can substitute for the required writing.

Word Count: 2500