

**BarEssays.com Model Answer**  
**February 2016 – Question 4 (Remedies)**

Governing Law

The common law applies to transactions for services.

Here, Pop obtained a liability insurance policy, a transaction for services.

Thus, the common law applied.

1. What is the likelihood of success of Insurco’s complaint, and what defenses can Pop reasonably raise?

Valid Contract

A valid contract requires (1) offer, (2) acceptance, (3) consideration, and (4) no formation defenses.

Offer/Acceptance/Consideration

Here, the facts stated Pop obtained a liability insurance policy for \$100,000 from Insurco.

Thus, there were no issues with offer, acceptance, and consideration.

No Formation Defenses

Fraudulent Misrepresentation

If a party (1) induces another party to enter into a contract (2) asserting fraudulent misrepresentation (known untrue information), the contract is (3) voidable by the party who justifiably relies on the misrepresentation.

Here, Pop induced Insurco to enter into the insurance policy by asserting in the application that his cars were driven and located in Hometown. Pop knew the information was untrue for both cars. Sally, his daughter, kept and drove the Voka in Industry City. Pop kept the Turbo in Hometown, but drove Turbo in Industry City to attend Sally’s graduation. Insurco justifiably relied on the misrepresentation when it issued the policy. The policy was voidable by Insurco.

Thus, fraudulent misrepresentation was a contract formation defense.

Nonfraudulent Misrepresentation

A nonfraudulent misrepresentation is voidable by an adversely affected party if the party (1) justifiably relies on the misrepresentation, and (2) the misrepresentation is material. A

misrepresentation is material if (a) the information induces a reasonable person to agree, or (b) the misrepresentation maker knows the information causes a particular person to agree.

Here, Insurco justifiably relied on Pop's misrepresentation when issuing the insurance policy. The misrepresentation was material because where Pop stated the cars were driven and located affected the rates Insurco agreed to.

Thus, nonfraudulent misrepresentation was a contract formation defense.

#### Unilateral Mistake

A unilateral mistake by one party is insufficient to make a contract voidable, unless the non-mistaken party (1) knew or had reason to know of the mistake, or (2) had a duty to disclose the fact about which the other party was mistaken.

Here, the mistake on where Pop's cars were driven and located was not mutual, but unilateral because Pop knew his cars were not driven and located only in Hometown. Insurco's mistake in believing the cars were driven and located in Hometown was sufficient to void the contract. Pop knew his daughter drove and kept the Voka in Industrial City, and he drove the Turbo in Industrial City. Pop had a duty to disclose the where his cars were to Insurco because Insurco based its rates on how Pop completed his policy application.

Thus, Insurco's unilateral mistake was a contract formation defense.

#### Mutual Mistake

Mutual mistake occurs when both parties are mistaken as to an essential contract element. There must be a substantial difference between the contemplated and actual deal, with no intent by the parties to take a risk on the contract element. The contract is generally voidable by the party adversely affected by the mistake.

Here, the mistake on where Pop's cars were could have been mutual if Pop was not aware the cars were not always driven and located in Hometown at the time he completed the policy application, and Insurco was mistaken the cars were driven and located only in Hometown. There was a substantial difference between the contemplated and actual deal because Insurco charged lower rates for cars in Hometown. Insurco did not intend to lose premiums. The contract was voidable by Insurco, the party adversely affected by the mistake.

Thus, mutual mistake was a contract formation defense.

In conclusion, there was no valid contract for the \$100,000 policy limit.

#### Rescission

The non-defaulting party to a contract can rescind a contract, which requires a return of benefit conferred on the other party. Misrepresentation and mistake are grounds for rescission. Equitable rescission requires the legal remedy to be inadequate.

Here, six months after the accident, Insurco informed Pop it would not pay any claim. As analyzed above, fraudulent misrepresentation, nonfraudulent misrepresentation, unilateral mistake, and mutual mistake were grounds for Insurco to rescind the contract.

Thus, Insurco could rescind the contract.

### Defenses

Laches and unclean hands are defenses to equitable rescission. There are no defenses to fraud.

Here, no facts suggested Insurco was guilty of wrongful conduct. No facts suggested Insurco delayed in initiating a claim. As analyzed above, Pop committed fraud by stating in the policy application that both the Turbo and the Voka were driven and located in Hometown.

Thus, Pop had no defenses.

In conclusion, Insurco would likely succeed. Pop had no defenses.

2. What is the likelihood of success of Pop's cross-complaint, and what defenses can Insurco reasonably raise?

### Valid Contract

#### Preliminary Negotiation

Preliminary negotiation does not constitute an offer.

Here, Pop communicated to Insurco, an identifiable offeree, an express present intent to be legally bound to a \$500,000 insurance policy when he asked Insurco to increase his coverage, but there were no certain and definite terms such as premium amount.

Thus, Pop did not make an offer.

#### Offer

An offer requires (1) an express present intent to be legally bound to a contract, (2) certain and definite terms, and (3) communication to an identifiable offeree.

Here, Insurco expressed present intent to be legally bound to a \$500,000 policy limit if Pop, an identifiable offeree, paid a \$150 premium increase. The offer had certain and definite terms on policy coverage and premium amount.

Thus, Insurco made an offer.

### Unilateral Contract

In a unilateral contract, the offeror promises to perform in return for the offeree's act. The offeree's promise to perform is insufficient to constitute acceptance; the offeree must perform the act to accept the offer.

Here, Pop had to pay \$150 to accept the offer.

Thus, Insurco made an offer for a unilateral contract.

### Acceptance

Acceptance requires (1) unequivocal acceptance terms, (2) an offeree with power to accept, and (3) communication of acceptance.

Here, Pop accepted Insurco's offer when he paid \$150.

Thus, Pop accepted Insurco's offer.

### Consideration

Consideration involves (1) a bargain for exchange (2) of legal value.

Here, \$150, something of legal value, motivated Insurco to exchange to Pop a \$500,000 policy, a detriment incurred by Insurco for Pop's benefit.

Thus, there was consideration.

### No Formation Defenses

#### Unilateral Mistake

See rules above.

Here, there was a meeting of the minds between Pop and Insurco for Insurco to provide Pop insurance coverage up to \$500,000. Pop asked Insurco to increase his coverage to \$500,000 and Insurco agreed if Pop paid \$150. The mistake in coverage amount was not mutual, but unilateral because Insurco sent Pop an amended policy for \$250,000. When Insurco stated it would pay claims up to \$250,000, Insurco's mistake was insufficient to void the \$500,000 policy limit contract because Pop did not know of the mistake. Pop failed to notice the policy increased to \$250,000, not \$500,000.

Thus, Insurco's unilateral mistake was insufficient to void the \$500,000 policy limit contract.

### Mutual Mistake

See rules above.

Here, Pop and Insurco contemplated insurance coverage because after the accident, Pop submitted an insurance claim, and Insurco stated it would pay claims. Pop and Insurco contemplated a \$500,000 policy limit because during contract formation, Pop asked Insurco to increase his coverage to \$500,000 and Insurco agreed if Pop paid \$150. Insurco knew the wrong policy limit was in the amended policy when it stated it would pay claims up to \$250,000. The \$250,000 policy limit contract was voidable by Pop, the party adversely affected by the mistake.

Thus, mutual mistake was a contract formation defense.

### Parol Evidence Rule

Under the parol evidence rule, evidence of prior or contemporaneous negotiations or agreements that contradict, modify, or vary contractual terms is inadmissible if the written contract is intended as a complete and final expression of the parties. A merger clause (recital that the contract is complete on its face) strengthens the presumption the written document is final.

Here, Insurco's amended policy increased Pop's coverage to \$250,000 not \$500,000. The difference in coverage could be proven by parol evidence if the amended policy did not contain a merger clause, and was not intended as a complete and final expression on coverage.

Thus, parol evidence was admissible.

### Reformation

When a writing that evidences an agreement fails to express the agreement because of mistake as to the contents of the writing, the court may reform the writing to express the agreement.

Here, Pop received an amended policy for \$250,000, not \$500,000. Mutual mistake, as analyzed above, was Pop's ground for reformation.

Thus, the insurance policy limit could be reformed to \$500,000.

### Defenses

#### Unclean Hands

The party seeking relief must not have been guilty of wrongful conduct with respect to the transaction subject matter.

Here, as analyzed above, Pop misrepresented where the Turbo and Voka were located and driven in the application. Insurco relied on Pop's application to determine the policy limit, premium

amount, or insurance coverage. Pop was guilty of wrongful conduct with respect to the liability insurance policy.

Thus, unclean hands was a defense.

### Laches

The right to equitable relief is cut off when there has been unreasonable delay in initiating the claim, and the delay prejudices the defendant.

Here, no facts suggested Pop delayed in initiating his claim.

Thus, laches was not a defense.

In conclusion, Pop would unlikely succeed in his cross-complaint. Unclean hands was a defense for Insurco.

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