ESSAY ANSWER

A. **AWFUL v. Flint**

AWFUL will argue that Bea Wealthy made an enforceable promise to donate the building and land worth $2 million to AWFUL. It may argue there was consideration for the promise because they told her they would name the building after her and they would do so. Even if there was no consideration, they argue the promise should be enforced as a charitable subscription.

AWFUL asks for specific performance on the ground that land is a unique good, so that the promise to perform would be specifically enforced. In the alternative, AWFUL requests the value of the promised performance.

Flint will respond that there was no consideration for the statement of intention to make a gift by Bea and no reliance by AWFUL. Bea did not obtain the promise to name the building in exchange for her statement about a gift, and therefore no bargained for exchange existed. (*Kadimah*). Flint will also argue that there is no showing of any reliance by AWFUL. Bea did not give AWFUL any commitment in writing, which shows less of a commitment than a written promise and may raise Statute of Frauds problems. Although we have no statement of revocation made by Bea to AWFUL, she did tell Plan that she would not go ahead. In any event, her death revokes any promise to make a gift. (*Kadimah*)

If enforced at all, Flint will argue that recovery on the promise should be limited to the costs of any reliance. Certainly specific performance is improper in view of construction difficulties, and the value of the promise, if any existed, is much less now than at the time it was made.

Justification for Promise Enforcement

The first issue will be whether Bea Wealthy made an enforceable promise.

Whether a promise existed

Flint may claim that Bea never made a promise, only a statement of intention to build an office building and to give it to them. The failure to give them any writing is an indication that Bea's statement to them was not a commitment and that they could not reasonably regard it as a commitment. In addition, the problem does not state whether she supplied any details about the office building of her own design. If she did not, the statement would be too vague and uncertain to be an enforceable promise and would further suggest that it was not a commitment at that time. Bea's letter to Plan stated that he would be making a gift for which AWFUL would be grateful. That intimates the gratitude would come after the gift.

AWFUL will respond that Bea's statement was a promise. She told them what she would do and they responded with commitments. Thus, she should have known that they understood her to have made a commitment to them, but she said nothing to negate that impression. Further, she took concrete actions to implement the promise by proposing a contract with Plan with detailed specifications for the building. This was sufficient for a reasonable person to believe that she had made a commitment to give them the property with specifications sufficient to give certainty to that commitment. Thus, her statement was a promise.

Consideration

AWFUL will argue that the promise had consideration because they promised to name the new building after Bea. Even if she initially planned a gift, she knew of the promise to her and did not contract with Plan until after obtaining the naming promise. Thus, AWFUL may argue that her continued commitment was in exchange for the promise to name the building after her. Although the value of the building may seem disproportionate to the naming, inadequacy of consideration is not a defense. *Batsakis*. She wrote Plan that AWFUL would name the building after her, indicating that she valued the naming, which was done because of the promise and was dependent upon it being fulfilled.

Flint will respond that Wealthy's promise was not conditioned upon the naming. AWFUL did not promise to name the building until after Wealthy told them that she would make the gift. The statements to Plan indicated that the lot was a "gift" for which they will be grateful. The naming showed the gratitude, but the promise of the land was not given in exchange for it. Therefore there was no consideration for the promise. (*Kadimah*)

Reliance

AWFUL will argue that the promise should be enforced because they have relied upon it. (*R. §90*) First, they committed to naming the building after Bea Wealthy. Even if she did not make the promise contingent upon the naming, they acted to make her understand she was getting something for her generosity and would not withdraw. Second, they asked for the property or the monetary equivalent. Third, they were raising money and it can be surmised that they did not direct efforts toward a building fund because Wealthy had made the promise.

Flint would respond that AWFUL did not rely in a substantial manner. Their promise to name the building cost nothing and could be revoked since it was not bargained for. Their request and this suit are not the kind of reliance that makes it unjust not to enforce promises. If it was, all promises would be enforceable by the mere act of asking the promisor to keep the promise. Finally, the "reliance" asserted is not a positive act but the negative one of not starting a fund. AWFUL was paying rent and raising as much money as it could. There was no suggestion that they would have built rather than

rented if Wealthy had not made such a promise or that they raised less money because of Wealthy's promise. (*Kadimah*)

Charitable Subscription

AWFUL may argue that a pledge to a charity is enforceable without consideration or reliance. There were general money raising efforts occurring for AWFUL; this promise was a part of those and should be considered a charitable subscription which does not require a showing of reliance under Restatement §90(2) because charitable giving should be favored. The kind of general reliance that charities have on pledges should be recognized without requiring specific showings of reliance.

Flint will respond that most courts do not accept the charitable subscription exception to the requirement of §90 that a gift promise requires reliance to make it enforceable. It is not fair to compel a gift that may have been no more than a generous statement of intention. That is particularly so in situations like this one where a change in surrounding circumstances increases the need of the donor and impairs the value to the donor of making such a gift. If promisors are compelled to perform, they may be less willing to make a promise and that may reduce the total amount of charitable giving.

Even if the Court were willing to enforce charitable subscriptions without a showing of reliance, Flint would argue that the commitment required can only be shown with a written promise and that even the charitable exception to the proof of reliance in §90(2) requires that the promisor reasonably expect that the promise will induce action or forbearance. The offer of a building and land was distinct from the other monies being raised by Flint and there was no expectation of reliance on that specific promise. The building and lot would not be given until the work was completed in the future and therefore it would be unreasonable to expect reliance in the present. Thus it does not satisfy the requirement of §90 that the promisor reasonably expect that the promise would be relied upon.

AWFUL will contend that Bea could have reasonably expected that her promise to give the organization an office building would lead them to ignore building campaigns and would have affected their behavior in the rented building and their commitments to other activities. That should be sufficient to find that the promisor reasonably expected her promise to cause action or forbearance, and the promisee does not have to show actual reliance where there is a charitable subscription.

AWFUL will argue that the promise was in writing since Wealthy's letter to Plan stated that she was making a gift to AWFUL. Flint will respond that the writing was not given to AWFUL, which undercuts the extent of the commitment.

Statute of Frauds

Flint may argue that contracts for land are usually subject to the Statute of Frauds and there is no written promise to AWFUL.

AWFUL would respond that the promise was in the writing given to Sam Plan, so there is sufficient evidence of its existence. The letter to Plan contained a reference to written plans for the building, the price for the building and the lot and stated that she was giving the building and land to Plan. To the extent that the Statute of Frauds is designed to assure written evidence of a contract, the letter to Plan should satisfy any requirement that a promise to convey land be in writing, if such a requirement does exist in this jurisdiction.

Impact of Hurricane on Basic Assumptions

Frustration of Purpose

Flint may argue that Wealthy was excused from her obligation by frustration of her purpose. He would argue that the hurricane was an event the non-occurrence of which was a basic assumption on which the contract was made, because the hurricane destroyed the buildings and the city that AWFUL supported and it rendered support to AWFUL a hollow act. The role that AWFUL played in the city would have to be altered to deal with the new reality. (R. 265) (*Krell*)

AWFUL would respond that it remained in existence and might contribute significantly to the revival of the city. Further, when the city revives, it could return to the old role. All organizations must change with the situation, and donors take the risk of that change. The harm to Wealthy's own business from the hurricane that caused a shift in her priorities is a risk that she should bear because it does not defeat or frustrate the purpose of this contract, only shows a change of heart on whether to go through with it. (See *Transatlantic*)

Flint is unlikely to be able to argue impracticability against AWFUL because the hurricane did not affect the price of the work under the contract with Sam Plan. The only way that Flint could raise an argument of impracticability is by showing that Plan was excused from its obligations because of damages from the hurricane and that it would cost Flint much more than $1.5 million to hire another contractor. If performance of a gift promise is more expensive than anticipated when making the commitment, a court might be more willing than in other circumstances to find the promise excused. However, the Court might then simply find that damages based on the original contract price would be appropriate – and that would not be impracticable.

Remedies

Assuming that the promise is enforceable as a charitable subscription, the parties will have opposing arguments on the remedy for breach.

Specific Performance

AWFUL may argue for specific performance of the promise on the ground that damages are not inadequate for a promise to convey land. Each piece of land is unique as courts have historically held, and specific performance is warranted to compel the promisor to convey it. (*McCallister*)(R §360)

Flint will argue that specific performance is not reasonable in this case because the promise was not for an existing building but for one that is to be built in the future. The lot was only incidental to the building, but specific performance of the promise to convey a subsequently built structure would create difficulties of enforcement because Wealthy is no longer there to supervise the work to assure an office building like the one she designed. (*London Bucket*)(R.§366) Further, money damages would enable AWFUL to hire a builder, which is probably better for AWFUL than having Flint do the hiring and supervision of the building that is built for them.

Although a court would probably find Flint has no obligation, if the Court did find that Bea's promise is enforceable, they would likely give specific performance with respect to the lot and damages rather than specific performance of the obligation to build on that lot. However, since specific performance is an equitable remedy and the land is worth far more to AWFUL than any reliance costs, the Court might find under the circumstances that injustice can be avoided by reimbursing AWFUL for reliance expenditures without transferring the land to it.

Damages

AWFUL will argue that it is entitled to $2 million because the promisor wrote that it was the value of the promise. At the very least, it should receive the present value such a conveyance would have. Promises enforceable under §90(2) do not require a showing of reliance and thus enforcement of such promises is inherently one of expectation damages.

Flint will respond that even if the Court were to enforce Bea's promise, the basis of such enforcement would be an extremely tenuous reliance. When promises are enforced because of reliance, the remedy may be "as limited as justice requires." §90. In view of the lack of any substantial reliance and the difficulties of determining the value of the promise under present conditions, the most generous damages would be to pay the costs of hiring someone for a year to run a building fund campaign.

If the court were to enforce the promise and insist on awarding the value of the building and land, after the hurricane it may be substantially less than the $2 million it was worth at the time of the promise. Flint will argue that the promise was not to give money, but to give property whose value should be determined as of the time the breach occurred. Flint may even argue that the promise was to give an office building to AWFUL that was not described in the promise to them. Although she gave specific plans to Plan and told him the value of the whole, that was not a statement to AWFUL and therefore she could have changed the building for one of much lesser value without breaching any commitment to AWFUL. Since the value of the building cannot be

determined with certainty, Flint would argue it is speculative and should not be recoverable. (*Lefkowitz*)

In conclusion, the Court would probably find there was no consideration or reliance and deny any recovery in this case.

B. **Plan v. Flint**

Sam Plan will claim that he had a contract with Wealthy to build the building and Wealthy breached, for which her estate is liable. He will argue that he accepted her offer to build the land by his reply and by beginning work on the project, and that he has been damaged by $325,000, being the expenditures plus anticipated profit.

Flint will respond that Plan did not accept the offer of Wealthy because he added different terms. That was a counteroffer that terminated the original offer. Beginning performance was not acceptance because there was no offer on the table, and if it is treated as an offer to perform at the stated price, it was not accepted because Bea was not available to see it happening and accept or reject it. If there was a contract, Bea was excused by reason of frustration of purpose because the hurricane destroyed the reason for building the office, and by impossibility because her death made it impossible to satisfy a condition for payment under the contract. Finally, even if there is a contract, there are no damages because the costs avoided by not having to build after the hurricane may equal the contract price and Plan could not build in any event.

Settlement Claim and Assignment

Plan cannot claim that he is owed $300,000 under the contract as settlement of his claim because he assigned his rights under that promise by Bea to Foolish Finance. The assignor no longer has any right to assert against the debtor. *Ertel* Instead, he must argue that the $300,000 was a separate promise for his behavior in saving her house and not payment for his work on the office, so that he still has a claim under the original contract.

Flint is likely to agree with Plan's argument that the promise by Bea was just for saving her house because if the promise was a settlement of the controversy over the contract to build the office building, he would have no effective defense to Foolish Finance's claim. However, if Flint does pay Foolish Finance under part C, he would be able to defend against Plan's contract suit on the ground that it had been settled.

Formation

The first issue in Plan's suit for breach of the construction contract is whether a contract existed. That may depend on what statement was an offer and whether there was a valid acceptance.

Whether Sam's August email was an offer

Sam may claim that his email in August was an offer to build the building that Bea accepted by stating she would pay that price. He would say he responded to her inquiry on the price he would charge to construct the building, so that price should be understood as an offer to build the building for that price. Bea's answer was a commitment to that deal and therefore constituted an acceptance. Since he never refused

to perform that first agreement, any other or contradictory statements were not valid and were irrelevant to the contract.

Flint will contend that Sam's email was an invitation for Bea to make an offer. It said "about" $1.5 million which is not sufficiently precise to show a definite offer. Further, it was a price quote without any other details, which suggests preliminary negotiations asking for the other party to make the offer. Bea replied in the form of an offer – "I will pay you" – which indicates that she did not understand his email to be an offer, and Sam responded "I accept" which indicates that he understood that Bea was making an offer and not accepting one.

Whether Bea's September letter was an offer

Flint may contend that Bea's letter was also not an offer but a preliminary negotiation. Although it specified the price for the work, it did not include language about payment timing, when the work was to be done, or other details of their relationship. When Plan wrote back with "usual terms," it was Sam Plan that was making the offer. Bea did not accept that offer because she went to Finland and her first letter after return said that she was not going ahead with the building. That is clearly not an acceptance of his offer to build.

Plan will respond that Bea's letter was an offer. It responded to a price quote inviting an offer, made a commitment and included the detail of the work to be done. Other contractual terms can be filled in by the Court through the use of reasonableness, trade usage, course of dealing and the like.

Whether Bea's letter offer was accepted

Plan will argue that his letter was a definite acceptance of that offer. The very first sentence stated "I accept your offer and will begin work immediately." That is a definite acceptance.

Flint will argue that Plan's letter was not an acceptance because it stated additional or different terms than the offer when it specified the structure of the payments for the building and was therefore a counteroffer that terminated the original offer of Bea. (*Ardente*; R. §39) If time for payment is not mentioned, it reasonably should be upon completion of work for which the individual is being paid. Thus installment payments are not an acceptance but a counteroffer. A building contract is a service contract not subject to the UCC, and common law courts are more likely to find there is no acceptance where there are different terms and the parties negotiate directly with each other rather than using standard forms.

Plan will argue that his letter did not state different or additional terms. The payment terms were understood as the usual time for payment in the trade and did not change or add to the agreement. (e.g. *Nanakuli, Frigaliment*) Thus they did not modify his definite statement of acceptance of the offer.

If the payment terms stated in his acceptance were different than a court would have supplied as a default provision, Plan would argue they were simply proposals for changes that Bea could have rejected and left the contract as it would be without those specific terms. Indeed, they may not have been incorporated unless Bea accepted them.

Flint could respond that the language of the letter stated that the new provisions "apply" and that looks like a demand rather than a proposal. Thus the additional language made the letter a counteroffer. Since it was a counteroffer, it terminated the offer and Bea did not have to revoke it. (*Akers*)

Even if his letter did not constitute an acceptance, Plan will argue that beginning performance demonstrated acceptance. Flint will counter that no offer was on the table at that time because the counteroffer terminated Bea's offer. In that event, Plan's beginning performance was not an acceptance but the act of an "officious intermeddler" seeking to provide services for payment without an agreement to support it. At most it was an offer of his services that was not accepted by Wealthy because she was out of town and did not know about it. When she did learn of his actions, she immediately told him to stop. That cannot be acceptance. (See *Houston Dairy*)

Whether Bea's behavior accepted Plan's counteroffer

Plan may argue that Bea's behavior showed an acceptance of his counteroffer. Although silence is normally not acceptance, Bea "knew and trusted" Plan which suggests past relationships in which he built houses she designed. That is supported by Plan's reference to the "usual" terms. With such a relationship, leaving town after Sam wrote her a letter spelling out the terms would indicate to a reasonable person that those were acceptable. (See *Cole-McIntyre*) That explains Plan's behavior in proceeding directly to begin work.

Plan will also argue that Wealthy's statement of gratitude for saving her house showed no doubts about his behavior in working and should be seen as an acceptance of his work on the office building. She told him to stop because of a decision she made after returning and nothing in her letter indicated that she would have had any objection to the terms of their arrangement. Even if no point can be identified at which a contract existed, the parties acted as though a contract existed. Thus, a common law court should adopt the same principle as the UCC and find a contract exists in this case.

Whether "satisfactory" progress is a valid condition

Flint may argue that the deal proposed in Sam's letter was not enforceable because Bea had no obligation to pay unless progress was "satisfactory." Flint may argue that the condition meant she had no binding obligation, but Plan will respond that satisfaction was not with the deal but with the progress of construction and must be in good faith. Therefore there was sufficient consideration for the contract. (*Pannone*)

Excuse

There were two events that were not anticipated that disrupted the contract: the hurricane that wreaked havoc in the area, destroying the foundation work and tractor of Plan, and Bea's death. Flint will argue that each of them excused him from performance of the contract.

Frustration of Purpose

Flint may argue that Wealthy was excused from this contract by frustration of her purpose with respect to AWFUL. He would argue that Plan knew that the building was specifically for AWFUL, and therefore he bore the risk that a catastrophic event could make such a donation no longer suitable and lead to the termination of the contract.

In addition to the arguments that AWFUL would make in Part A to show there was no frustration, Plan would contend that the purpose of its contract with Wealthy was to build an office building and it did not take the risk that Wealthy would change its mind about whether she wanted it built. The office building would still be a valuable property when completed and could be given to other charities or sold on the market. Even if the hurricane made property in the area much less valuable, that kind of risk was one that Wealthy should bear as the owner of property. The harm to her own business that caused a shift in her priorities is a risk that she should bear because it does not defeat or frustrate the purpose of this contract, only shows a change of heart on whether to go through with it. (See *Transatlantic*).

Impossibility and Condition

Flint may also argue that if there was a contract on the terms stated by Plan, the existence of Wealthy was necessary for the performance of the contract because she was the architect who drew the plans and it was her vision that was being implemented. If she was unable to supervise the building, it could not satisfy the condition that progress be satisfactory. The condition on payment was dependent on her personal taste and no one else. Thus, the contract should be discharged for impossibility because she is not alive to certify that performance is satisfactory. (R. 262) If she had not repudiated, the contract would have been discharged for impossibility and thus her estate should not have to pay.

Plan may argue that "satisfactory progress" was intended to trigger the time for payment and was not a condition. (*Peacock Construction*) Her death makes it impossible for her to judge the satisfactory nature of the progress, but does not prevent her heirs or her executor from doing so. Thus, if satisfaction was a condition of the contract, impracticability excuses that condition and permits recovery without it. He will also contend that she had completed the plans before her death and that satisfaction was an objective standard with respect to progress. She had not reserved any right under their agreement to change any of the plans. Thus, her only duty was to make payments, and that can be done by her estate. Therefore, her existence was not necessary for the performance of the contract. Finally, she was alive when she repudiated, so her only

obligation then was to pay damages for the breach. Her death does not make that impossible.

Damages

Bea said that she would not go ahead with building an office for AWFUL. "I won't go ahead." Since that is what she hired Plan to do, she was telling him not to build. That was a repudiation of their contract and entitled Plan to sue for damages for total breach if Bea Wealthy's statement was not excused. (*Hochster*)

Expectation

If the Court finds that Wealthy contracted with Plan for the building and breached the agreement without excuse, Plan may sue for expectation damages equivalent to costs plus profit. He anticipated making $300,000 profit and has spent $25,000 on work done to date.

Flint may argue that there are no damages. Flint would contend that the storm rendered the foundation work useless and therefore construction would have required redoing all the dredging. Under Plan's own theory he cannot recover $300,000 profit because he spent an extra $25,000 that resulted in no product; thus, his expenses are that much higher than he calculated when saying his profit would be $300,000. Clearing land after a hurricane is more difficult and labor and material costs are likely to rise when rebuilding occurs after widespread destruction. Therefore, the cost avoided may now be equal to the entire cost of the job. Plan will have to show that he can still do the job at the cost he originally anticipated to get profit. Flint will argue that it would cost Plan $1.5 million more to perform the work and therefore the contract price minus avoidable costs results in no damages.

Reliance

Plan may argue that he should at least get reliance damages. He has spent $25,000 in labor and materials plus $250,000 for a new tractor needed for this job. Thus, he is out of pocket $275,000 under this contract and if the total costs are too uncertain to accurately calculate profits, he should at least get that much.

Flint would point out that Plan will get the use of the tractor on other jobs and so his expenditure leaves him with a tractor that has that value. Any claim for the destruction of the old tractor as a reliance expense has three flaws. First, the accident to the tractor was unexpected and did not contribute to the work contracted for; second, recovery is limited by expectation and Bea could not reasonably be expected to pay any more when an accident destroys the tractor on the job than she would pay under the contract if no such accident occurs, and third, the old tractor was worth much less than a new one.

Finally, Flint may argue that Wealthy is excused from performance because the destruction of Plan's machine made it impossible or impracticable for him to perform his obligations under the contract. Even though she had repudiated the contract, he would not have been able to perform and thus she would never have had to pay him if she had not repudiated the deal. Therefore, she has no liability to him.

Plan will respond that his purchase of a new tractor shows that he could have performed and that speculation about whether he would do so should not relieve a breaching party of their obligation. It was her fault that he does not have the opportunity to prove whether he could have done the work. She could have asked him to furnish assurances that he could complete the work rather than assuming he could not, but her failure to request assurances prevents her from finding Plan in breach or from using the tractor as an excuse.

Restitution

If there was no offer to be accepted when performance began or if performance was excused for impossibility or frustration of purpose, Plan could seek restitution for benefits conferred in starting the foundation.

Flint will say there was no basis for conferring the benefit without a contract. Further, the work done on the foundation did not result in a benefit to Wealthy with respect to the land where the work was done because the hurricane washed it all away. Any claim to benefit Wealthy's other property is not relevant to claims based on the contract for this building. If he has a restitutionary claim for benefit conferred on Wealthy's mansion, it has been assigned to Foolish Finance.

Courts tend to impose an obligation to perform on contractors when acts of God wipe out their work, so they must rebuild and can claim no benefit from the work done to the point where the disaster hit. On the other hand, where the disaster makes performance impossible, as in the destruction of an entire building they contracted to remodel, they may be able to get benefits for the work done up to the point of the disaster. Plan will argue that he should therefore get $25,000 as the value of the work done to the point where the hurricane hit, because Bea repudiated the contract and therefore he could do no more work under it.

Flint will respond that Bea did not act until after the hurricane had destroyed Plan's work. If there was no contract breach, the value of the work done should be the same as it is for any builder whose work is destroyed before completion – none.

C. **Foolish Finance v. Flint**

Foolish Finance argues that they are the assignee of Wealthy's promise to pay Plan $300,000 and therefore have the rights that Plan would have under that promise. They will argue that Plan was entitled to restitution for saving Wealthy's house, because she promised him $300,000 for the benefit he conferred. That benefit arose out of work for the house, so they may also argue that the promise was based on recognition that termination of the building breached Plan's contract and was a settlement. Even if it was a gift promise, it should be enforced because Plan relied upon it by using it as collateral in borrowing money from Foolish Finance.

Flint will argue that Foolish takes subject to the defenses of Wealthy against Plan that there was no enforceable promise made because there was no consideration, no injustice in not enforcing it for a past benefit and no substantial reliance by the promisee Plan that could be reasonably expected. Indeed the assignment itself is the reliance, and that would suggest that assignment changes the liability of the obligor and thus makes the assignment invalid.

Consideration

Foolish Finance might argue that there was consideration for Wealthy's promise to pay Plan $300,000 as consideration for settlement of any claim for breach of contract in building the house. Her letter recognized the prior deal – discussing the excavation work that had been done and prospects for future work. It terminated that arrangement, and referred to payment for efforts that preserved her home. Since the work that was done that preserved her house was done as part of the excavation that Plan claims he was contracted to do, her promise to pay for the work and no more was an offer to settle any dispute about the contract. Settlements in good faith are consideration regardless of the merits of the underlying suit. (*Dyer*). Even if there was no contract for the construction of the office building, there was a colorable claim of a contractual right, and that is sufficient consideration for the promise to pay.

Flint would argue that Wealthy did not demand a promise not to sue on the contract and therefore the promise to pay should not be construed as an offer to settle. She was expressing gratitude for a benefit to something that was not part of the alleged contract, and thus the promise was unrelated to that contract.

Past Consideration

Foolish would then argue that the promise was enforceable because it was for a benefit previously received that was not conferred as a gift. (R. §86) Since he was already working on her property, Plan could reasonably assume that she would want him to act to preserve neighboring property and would expect to pay for it. Wealthy avoided damage to her $2 million mansion, which is a benefit worth at least $300,000. Further it was not unjust to enforce the promise for $300,000 because Plan suffered almost that much damages in the loss of a tractor that cost $250,000 to replace as well as spending

$25,000 in doing the work. Consequently, $300,000 is not disproportionate recovery for the benefit conferred. (*Webb*)

Flint would respond first that the house was saved before the promise was made, so it was not a bargained-for exchange. Second, the behavior of Plan seemed to be of little effort in terms of the cost since it just involved piling up dirt in another location while doing the grading. If Plan anticipated payment for work, it would have been for the value of the work on the market, which was less than $25,000 (since that was the cost of doing all the excavation including piling the dirt to protect Wealthy). *Sparks.* It was a nice thing he was doing, but it looked like part of the job he was doing on the lot and not a separate act for which he would anticipate additional compensation. Injury to his equipment in the amount of $250,000 was not an inevitable result of the moving of the earth but an accident that might have occurred in any event. Thus, it is not inequitable to deny recovery in this situation. (*Mills*)

Reliance

Finally, Foolish may argue that the promise should be enforced because Plan relied on it by using it as collateral for a loan. In effect, he relied on the promise to borrow $250,000. Foolish itself relied on the promise by lending the money on its security. Thus, Foolish claims it would be unjust not to enforce the promise.

Flint may respond that Foolish was foolish to rely on a promise that lacked consideration. The promisor cannot reasonably anticipate that anyone other than the promisee (Plan) would rely on the promise. Promisors are not liable because others rely on a promise, only when the promisee relies on the promise should the promisee be able to enforce it.

Even if Plan relied on the promise to raise the money, it would not be unjust to refuse to allow collection. First, he was not injured by using the promise as collateral since he needed the tractor and would have had to get it anyway. Second, Wealthy could not reasonably anticipate that Plan would rely on the promise of money. She did not make the promise in order to enable him to do any specific thing with it, so he should have been cautious about relying on it before she actually came through with the money.

Foolish may counter that Wealthy knew that Plan needed a tractor and so should have reasonably expected he would purchase one in reliance on her promise of an amount sufficient to pay for it. The reliance is the commitment to purchase the tractor and not the assignment, so the assignment should be valid.

Flint will argue that at least the promise was intended in substitute for any liability in contract, and Plant should be limited to one recovery and not be allowed to claim recovery under both the promise to hire and the promise to pay for saving the house.

NOTES:

A. AWFUL

There may be some ambiguity over the nature of AWFUL and what it does because the question does not specify its activities. Some answers considered it to be a landlord that rents office space because the question says "AWFUL rents its office space." But a rental business for profit is inconsistent with the remainder of the sentence that says AWFUL raises money to support its efforts. A gift to an organization that raises money to support its efforts is likely to be a gift to a nonprofit that would be considered a charity. That is supported by the organization's name, which includes "Foundation." Perhaps one can imagine that it rents property at below cost to support persons who cannot pay, but that would mean that the rentals are not profitable. Thus discussion of the value of the building in terms of lost profits is unlikely.

In fact, AWFUL probably does not rent office space to others, but merely rents the space that it currently uses. When Wealthy refers to "an office for AWFUL," it suggests that the building is to be occupied by AWFUL so that the organization can own instead of rent its own headquarters. It is most likely that AWFUL is a charity that supports the arts. Wealthy seems to refer to AWFUL later when she says that the city does not need "cultural refinements."

There is no possibility of a Third Party Beneficiary argument on behalf of AWFUL. Neither Plan nor Wealthy promised in their contract with each other to confer a benefit on AWFUL. AWFUL may use the mention of the gift in that contract as written proof that Wealthy made it a promise, but the deal between Plan and Wealthy does not require Wealthy to give the property to AWFUL. Any rights of AWFUL come from the promise that Wealthy made to it, not from the mention of that promise in another document.

The question does not ask about a suit by AWFUL against Plan. In any event, AWFUL is not a third party beneficiary of the promise of Plan to build because the building when completed would be on Wealthy's land. It is not an AWFUL building until Wealthy conveys the land and building to it. AWFUL would have to make Wealthy a party to the suit to get an order transferring the property to it. Since both Wealthy and Plan would have to be parties in order for AWFUL to get any benefit, there is no benefit to either of them in having AWFUL be able to sue. Thus it is clear that AWFUL would not be intended to be able to sue. Further, if AWFUL were to sue Plan for the building, Plan could respond that it had no obligations under its contract with Wealthy because Wealthy repudiated and informed Plan he should not build the office.

In the suit against Flint, AWFUL is not a third party beneficiary of the promise of Wealthy to pay Plan. Plan is the promisee and the recipient of the money. Unless he builds the building, AWFUL would get no benefit from the money going to Plan. The only benefit, if any, to AWFUL from the contract is the work of Plan and the preceding paragraph addressed that issue.

There is, of course, no restitution against AWFUL because AWFUL has not provided anything that Wealthy or her estate currently benefits from.

Acceptance is necessary for a bargained for exchange because the promise of one party is contingent on promise or performance of the other party. The offer to perform is contingent on obtaining a promise in return. However, when enforcement is not based on bargained-for exchange, there is no need for acceptance. Such promises are not "offers" (R. 24 – "an offer is the manifestation of willingness to enter a bargain . . ."), but commitments. They are not revocable if the basis for enforcement exists. Thus, promises that are relied upon do not require "acceptance" except in the sense that the promisee has acted on them. Promises based on past benefits received similarly do not require "acceptance" because the promissee is not asked to do or say anything after the promise is made.

B. Plan

Although Plan does not earn any money under the contract terms he proposed until the foundation is completed, if Bea terminates the contract without excuse she has materially breached and Plan is immediately entitled to full expectation damages for breach. His progress on the building is irrelevant – parties get expectation damages for anticipatory repudiation when neither party has yet done anything at all under the contract. There is no reason to limit damages to the first installment, the repudiation of the contract is total and affects the entire agreement.

This is not a divisible contract – payments are made on the basis of time elapsed with satisfactory progress, not on the basis of a specific amount of work done, thus there is no one-for-one correlation of work being worth any specific payment. Further, there are no consequences if it is a divisible contract – Plan has not completed the foundation, and the breach by Wealthy, if any, is a repudiation of the total contract. The division into installment payments is relevant only insofar as it relates to whether the parties had agreed to a contract in the first place and whether the satisfaction clause in the progress payments made the contract illusory or made Wealthy's death an excuse because the condition of payment in the contract would not be possible to perform.

This was not an offer that can only be accepted by performance. It is unrealistic to expect one party to commence work without an obligation from the other party. Similarly the progress payments referred to in the letters would occur before the building is completed, so again the proposals do not envision that there will not be a contract until the building is done. All discussions between the parties envision that the contract would be made by an exchange of promises. Although Plan may argue that beginning performance was relevant as an acceptance if his answer did not suffice, it would not hold an offer open because the offer was either accepted or terminated by the exchange of emails.

There is no suggestion in the problem that Plan breached. Plan started work on the project after responding to Bea's September 1 letter, the hurricane hit on September

11 and Bea wrote "when the hurricane had passed" to terminate the project. She went to Finland for two weeks after Sam replied so she must have returned in mid-September and died in October. While Plan presumably stopped excavation work after the destruction of his tractor on September 11, he had a temporary impossibility excuse. More importantly, there is no specific time given for completion of the foundation and no payments were due until the foundation was complete. The delay while preparing to go forward would not be a breach, and Bea terminated the project before he could start up again. She asserts Plan cannot work because his tractor is broken, but he gets a tractor shortly thereafter. The destruction could have given her reason to request assurances from Plan that he would complete, but she did not. Thus, Plan is suing for the repudiation and breach, which itself indicates that he was not in breach.

There is no issue of impracticability from the hurricane in Wealthy's performance under the contract with Sam Plan. Wealthy's only obligation was to pay for the building and determine whether progress was satisfactory. The hurricane does not affect either – it is the same amount of money that she owes and the same decision on progress.

Plan is not likely to claim impracticability with respect to his own performance because that would deny him recovery under the contract for Wealthy's breach. In any event, Wealthy stated that the reason for her decision not to go ahead with the contract was that an office "would be a waste." That does not suggest that it could not be built. The primary problem is that the previous work must be totally redone – "none of your excavation work is of any use after this hurricane" – not that a foundation cannot be laid.

The builder of a $1.5 million building must be employing others. Therefore he takes the risk that his expenses will be greater than his contract price and he may lose money. For that reason, other jobs obtained because he has free time will not be considered mitigation of damages, but independent contracts. See *Fertigo*.

The Statute of Frauds is not likely to apply to the construction contract of Plan and Wealthy because it is for services and not real estate (Wealthy already owns the land and automatically owns the building when constructed). Nothing in the agreement terms requires the contract to last for a year. The payment is not for goods (the building is not a moveable) so the UCC does not apply. In any event, the promises by Plan and Wealthy to each other are signed letters or emails. Similarly a note is, by definition, a written instrument, and any lien and assignment securing it is likely to be in writing as well. Certainly nothing in the problem indicates that the securities for the note were oral. Thus, the Statute of Frauds issue arises only in the AWFUL promise because that is the only promise made orally involving matters likely to be subject to the statute of frauds.

C. Foolish Finance

The question states that Sam notified Flint that he should pay FF. Thus lack of notification cannot be a defense to paying the assignee.

The assignment was not gratuitous, but was given as part of the deal in exchange for the loan of $300,000. Thus, the assignment could not be revoked and the death of

Bea is irrelevant to the vesting of the right – although it may be relevant to whether the right itself exists, because her death revokes the effect of a gratuitous promise unless there is sufficient reliance.

Foolish Financial cannot be a third party beneficiary of any contract because it had no rights in the contract between Plan and Wealthy at the time it was entered. Thus, neither party made any promise to give FF a benefit. FF did not agree to perform any obligations of Plan, so no one is a third party beneficiary of FF. The issue is solely one of assignment of rights. Payment of monies can be made to anyone so there is no problem in assigning the rights to FF. The only issue in the case of FF is what defenses Flint can raise on Wealthy's behalf to payment of the promise she made to Plan.

The problem did not state what payment Plan promised to make to FF, so it is hard to find that the transaction between them was unconscionable. The assignment was as security. Suit assumes nonpayment by Plan (reasonable if Plan didn't get paid by Flint), so FF is a proper assignee who will then have to give to Plan any money from Flint in excess of the amount that Plan owes FF.