1. Automated Transactions [60 points]. As more and more people use smartphones, mobile malware has become a major problem. Some phone apps cause phones to do things that their owners don’t know about. One type of fraud involves calling a “premium rate number,” which causes a charge to appear on the phone owner’s phone bill. As explained on Wikipedia,

Premium-rate telephone numbers are telephone numbers for telephone calls during which certain services are provided, and for which prices higher than normal are charged. Unlike a normal call, part of the call charge is paid to the service provider, thus enabling businesses to be funded via the calls. ... Telephone companies typically offer blocking services to allow telephone customers to prevent access to these number ranges from their telephones. In some jurisdictions, telephone companies are required by law to offer such blocking.

Adult chat lines (phone sex) and tech support are a very common use of premium-rate numbers. Other services include directory enquiries, weather forecasts, competitions and voting (especially relating to television shows).

On a regular call, the telephone company keeps the entire amount billed. On a premium rate call, the owner of the number that is called receives a percentage of the amount billed, often 50%. If an app calls a premium rate number, the owner of the number gets paid.

For example, malware called Mouabad.p waits until the phone is idle and the lock screen activates. It then dials a premium rate number owned by the distributor of Mouabad, who receives money for every call. If the user unlocks the phone, the call is immediately terminated.

Jim Fooley signed up for cell service with CellSense, a mobile provider, and received an Android phone for $0.99. He visited Google Play and downloaded an android app to his phone. He did not know (and Google did not know) that the app had been infected with Mouabad.p. After one month, his phone bill was $2537, of which only $37 represented legitimate phone calls. He never had any idea these calls were being made. If he were to pay the bill, the malware distributor would get $1250.

When Fooley got the bill, he immediately called CellSense and explained that he did not make or authorize the calls, he did not intend to be bound to pay the charges and that he
would not pay the bill. CellSense cut off his mobile service and sued him to collect the $2537. Fooley wants to find a defense.

The Pennsylvania version of the Uniform Electronic Transactions Act (UETA) has been effective since 2007. Here are some relevant provisions:

**Electronic Transactions Act, 73 P.S. §2260.310**

In an automated transaction, the following rules apply:

(1) A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements.

(2) A contract may be formed by the interaction of an electronic agent and an individual, acting on the individual's own behalf or for another person, including by an interaction in which the individual performs actions which the individual is free to refuse to perform and which the individual knows or has reason to know will cause the electronic agent to complete the transaction or performance.

(3) The terms of the contract are determined by the substantive law applicable to it.

There is also a section §2260.306. Effect of change or error:

If a change or error in an electronic record occurs in a transmission between parties to a transaction, the following rules apply:

(1) If the parties have agreed to use a security procedure to detect changes or errors and one party has conformed to the procedure but the other party has not, and the nonconforming party would have detected the change or error had that party also conformed, the conforming party may avoid the effect of the changed or erroneous electronic record.

(2) In an automated transaction involving an individual, the individual may avoid the effect of an electronic record that resulted from an error made by the individual in dealing with the electronic agent of another person if the electronic agent did not provide an opportunity for the prevention or correction of the error and, at the time the individual learns of the error, the individual:

   (i) promptly notifies the other person of the error and that the individual did not intend to be bound by the electronic record received by the other person;

   (ii) takes reasonable steps, including steps which conform to the other person's reasonable instructions, to return to the other person or, if instructed by the other person, to destroy the consideration received, if any, as a result of the erroneous electronic record; and
(iii) has not used or received any benefit or value from the consideration, if any, received from the other person.

(3) If neither paragraph (1) nor paragraph (2) applies, the change or error has the effect provided by other law, including the law of mistake, and the parties' contract, if any.

The statute also includes some definitions in §2260.103:

“Agreement.” The bargain of the parties in fact, as found in their language or inferred from other circumstances and from rules, regulations and procedures given the effect of agreements under laws otherwise applicable to a particular transaction.

“Automated transaction.” A transaction conducted or performed, in whole or in part, by electronic means or electronic records, in which the acts or records of one or both parties are not reviewed by an individual in the ordinary course in forming a contract, performing under an existing contract or fulfilling an obligation required by the transaction.

“Contract.” The total legal obligation resulting from the parties’ agreement as affected by this act and other applicable law.

“Electronic agent.” A computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances, in whole or in part, without review or action by an individual.

“Electronic record.” A record created, generated, sent, communicated, received or stored by electronic means.

“Record.” Information which is inscribed on a tangible medium or is stored in an electronic or other medium and which is retrievable in perceivable form.

“Security procedure.” A procedure employed for the purpose of verifying that an electronic signature, record or performance is that of a specific person or for detecting changes or errors in the information in an electronic record. The term includes a procedure which requires the use of algorithms or other codes, identifying words or numbers, encryption or callback or other acknowledgment procedures.

“Transaction.” An action or set of actions occurring between two or more persons relating to the conduct of business, commercial or governmental affairs.

Fooley’s contract with CellSense states: “You are responsible for any call made from your phone regardless of who makes the call.”
CellSense takes the position that it provided the requested service (connecting to the premium number) and that if Fooley installed malware it became his electronic agent because he voluntarily downloaded the app. CellSense will testify truthfully that it had no knowledge of Mouabad.p. The distributor of Mouabad is not a CellSense customer. CellSense says that it has a legal obligation to pay the phone company that operates the premium rate number.

Fooley raises the following defenses:

a. When Fooley’s agent (the malware) interacted with the agent of CellSense (to make the calls), CellSense did not provide an opportunity for prevention or correction of the error.

b. Fooley promptly notified CellSense that he did not intend to be bound by making the calls and he received no benefit from them.

**QUESTION 1:** Analyze the arguments of Fooley and CellSense and explain fully, based on UETA, whether the Court should force Fooley to pay the bill.

You can find the entire UETA statute [here](#) if you feel you need to consult it.

**2. Statute of Frauds [60 points].**

Don Dolley is a collector of classic dolls. He frequently buys expensive dolls on eBay. The Barbie doll “Talking Stacey,” in mint condition in its unopened original box from 1968, as shown in the photo, was offered on eBay for $12,000. Dolley logged on to eBay saw this page with a doll being offered by seller “Preduction”:

![Ebay listing for Talking Stacey Barbie](image)

He clicked on “Make Offer” and typed “11000.00” into the resulting text box:
He then hit “Review Offer” and received the following screen:

When Dolley placed his mouse over the three dots after the word “seller,” the following message appeared in a pop-up box: “If the seller accepts your offer and terms, you are responsible for reading the full item listing, including the seller's instructions and accepted payment methods.”

He then clicked on “Submit offer.” The Seller accepted the offer and sent Dolley instructions on how to pay for the doll. Dolley had second thoughts, however, and decided not to make payment. He of course did not receive the doll. After arguing via email with him, Preduction, the seller, brought suit in Pennsylvania to enforce the contract of sale. This is, Preduction wanted Dolley to pay $11,000 for the doll. Assume that both Dolley and Preduction are residents of Pennsylvania.

The Statute of Frauds requires certain contracts for the sale of goods to be in writing and signed by the party against whom enforcement is sought. Here are relevant provisions of
13 Pa. C.S. §2201

a) General rule.--Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. …

c) Enforceability of contracts not satisfying general requirements.--A contract which does not satisfy the requirements of subsection (a) but which is valid in other respects is enforceable:

(1) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the business of the seller and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement;

(2) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(3) with respect to goods for which payment has been made and accepted or which have been received and accepted (section 2606).

Preduction argues that a valid contract was made because the “Review and confirm offer” screen contained these words: “By clicking Submit offer, you are agreeing to and entering into a legally binding contract to purchase the item from the seller.” (You can see these words on the above screen.) Therefore, Dolley voluntarily agreed to be bound.

Dolley denies that a valid contract was made and argues that the Statute of Frauds is very clear that there must be a writing “signed by the party against whom enforcement is sought.” He says he never signed anything and therefore does not have to purchase the doll.

QUESTION 2: Analyze the arguments of Dolley and Preduction and explain fully, based on the law, whether the Court should find that there was an enforceable contract between them.

You may or may not find it useful to examine eBay’s User Agreement, which you can find here.

M. Shamos.