

ESSAY QUESTION NO. 6

Answer this question in booklet No. 6

Sue spends summers working as a dog handler in Denali National Park, and winters on a pineapple farm on Maui. Because Sue cannot return to Alaska during the winter months she hires someone to perform maintenance on her Denali cabin during the time she lives out of state. In September, Sue talked about her maintenance needs with Tina, a local woman who performs odd jobs around the Park. Sue told Tina, "I'm worried about my cabin roof getting overloaded with snow and I need someone to check the roof while I'm out of state and to clear any snow that has built up." Tina replied, "I would be happy to help you with that," and told Sue that she would charge her \$500 for the season. Sue agreed, saying "Great," shook Tina's hand, and left for Maui two days later.

Shortly thereafter, Tina sent a form agreement that she had used in the past with other property owners to Sue's Denali Park address. The agreement read: "Two-Below Tina's Services agrees to look at Sue's cabin roof every week. If there is excessive snow on the roof, Two-Below Tina's Services will remove it." Sue did not see the agreement and did not sign or return it to Tina. However, Tina received a check for \$500 from Maui in October, and she deposited the money.

There was heavy snow across Alaska in October and November, and Denali National Park was hit especially hard. Tina checked on Sue's cabin after each snowfall during those two months, and cleared the roof as the snow accumulated, sometimes shoveling daily. Then, in early December, Tina slipped into a crevasse while hiking on a glacier and broke her ankle. Her doctor advised her to stay off her ankle for two weeks. Tina followed the doctor's orders, and failed to find a substitute to check on Sue's roof during those 14 days.

Denali National Park received a record amount of snow in the two-week period that Tina was on bed-rest. When Tina finally emerged on her crutches, she discovered that Sue's cabin roof had collapsed under the tremendous weight of the new snow. Tina felt horrible and immediately wrote to Sue at her Maui address to notify her about the damage.

1. What arguments could Sue present to establish that Tina is liable for breach of contract?
2. What arguments could Tina raise in defense of any breach claims Sue might assert?
3. Sue wants Tina to pay for necessary repairs to the collapsed roof. Would an Alaska court be likely to award such damages?

GRADERS' GUIDE
***** QUESTION NO. 6 *****
CONTRACTS

1. Sue's Claim for Breach of Contract (45 points)

Examinees should present analysis as to whether the agreement between Sue and Tina formed a valid contract – without a contract, there can be no breach. In Alaska, the elements of a valid contract are: 1) an offer encompassing its essential terms, 2) unequivocal acceptance of the terms by the offeree, 3) consideration, and 4) mutual intent to be bound. *Childs v. Kalgin Island Lodge*, 779 P.2d 310 (Alaska 1988); *Davis v. Dykeman*, 938 P.2d 1002, 1006 (Alaska 1997).

Here, the elements of a valid contract appear to be present. Tina made Sue an offer to check on and shovel her roof by telling Sue “I would be happy to help you with that” in response to Sue’s explanation that she needed someone to check her cabin roof and to clear any snow that had built up while she out of state. Sue accepted the offer by saying “Great” and shaking Tina’s hand. Sue demonstrated her intent to be bound by the contract by sending Tina a check for the full contract price – \$500. Tina demonstrated her intent to be bound by depositing the check, forwarding the form agreement to Sue, and shoveling the roof in October and November.

In order to bring a viable claim for breach of contract before the court, examinees may note that Sue will have to show that Tina breached the agreement when she failed to remove the snow from Sue’s roof. The issue of breach may also be discussed under the final call relating to damages, but successful examinees will note that breach is a necessary element of Sue’s claim against Tina.

Alaska courts will attempt to enforce the reasonable expectations of the parties to a contract. *Davis*, 938 P.2d at 1006-07. Where the parties’ expectations cannot be discerned, or are incompatible, the contract will be not be enforced. *Compare Davis*, 938 P.2d at 1008; *Hall v. Add-Ventures, Ltd.*, 695 P.2d 1081, 1087-89 (Alaska 1985). Here, Sue expected that Tina would regularly check on her cabin roof and remove accumulated snow throughout the winter while she was away as evidenced by her statement that she was worried about the snow load and needed someone to manage it for her.

When determining the essential terms of a contract, an Alaska court will strive to “ascertain and give effect to the intentions of the parties.” *Sprucewood Inv. Corp. v. Alaska Housing Finance Corp.*, 33 P.3d 1156, 1164 (Alaska 2001). The court will attempt to determine the parties’ intentions by looking at any written contract, as well as extrinsic evidence regarding the parties’ intent at

the time they entered into the contract. *Id.* “When, at the time of formation, the parties attach the same meaning to a contract term and each party is aware of the other’s intended meaning, or has reason to be so aware, the contract is enforceable in accordance with that meaning.” *Id.*

Here, the facts could support the position of either party. Tina’s written contract, although not likely binding, might be admissible as evidence of her understanding of the terms of the contract: that is, that she check Sue’s cabin roof every week. Likewise, Sue would point out that she made it clear to Tina that she expected that her cabin roof would not get crushed under a heavy snow load -- not that Tina check the roof on a specific schedule. Therefore the form agreement shows Tina understood Sue’s expectations and agreed to meet them. That Sue didn’t see or execute the form agreement Tina sent doesn’t detract from its relevance in establishing Tina’s intent to be bound and her understanding of the essential terms of the contract. The fact that Tina occasionally shoveled the roof daily and regularly checked the roof more than once a week during October and November also suggests that Tina shared Sue’s understanding of the terms of the contract. Therefore, a court could conclude that the contract must be enforced in accordance with that understanding. Examinees need not reach a particular conclusion on this point – rather, they should be awarded points based on the depth of their analysis of these issues from each party’s perspective.

a. Statute of Frauds

Examinees may discuss whether the contract was required to be in writing, or, because Sue never signed Tina’s form agreement, whether the oral agreement between Sue and Tina was sufficient to form an enforceable contract. Alaska’s Statute of Frauds is patterned after the federal rule, and provides that certain types of contracts are “unenforceable unless [the contract] or some note or memorandum of it is in writing and subscribed by the party charged.” AS 09.25.010(a). Perceptive examinees will demonstrate they know which types of contracts fall within the statute of frauds (an agreement that cannot be performed within a year; contracts involving the sale of an interest in land; a promise to answer for the debts of another; promises based on the consideration of marriage; contracts for the sale of goods over \$500), as well as explain *why* this particular contract does not. The contract between Tina and Sue does not fall in any of the categories that the Statute specifies and therefore does not have to be in writing. Ultimately, the fact pattern demonstrates that Sue and Tina have mutually agreed on the essential terms of the contract, including a price and the services to be provided. Consideration was exchanged and both parties demonstrated their mutual intent to be bound to the agreement.

b. Implied Covenant of Good Faith and Fair Dealing

The examinees may recognize that the oral contract did not specify a specific schedule for Tina to check the roof and Sue probably cannot establish a breach merely because Tina did not check and remove snow daily or weekly. However, Sue can argue that Tina's performance violated the covenant of good faith and fair dealing that is implied in all contracts as a matter of law. See *Alaska Pacific Assurance Co. v. Collins*, 794 P.2d 936, 947 (Alaska 1990). The purpose of this covenant is twofold: to give effect to the reasonable expectations of the parties, thereby preventing each party from interfering with the other's right to receive the benefits of the agreement. *Hawken Northwest, Inc. v. State*, 76 P.3d 371, 381 (Alaska 2003). The implied covenant is made up of two prongs from the courts' perspective. The subjective prong prohibits one party from depriving another of the benefits of the contract, and the objective prong requires both parties to act in a way that a reasonable person would consider to be fair. *Id.*

Sue could argue that under the subjective prong the key benefit to her was that her roof would survive the winter's snow load, and that Tina's actions deprived her of that benefit. Under the objective prong, she would point out that it was unreasonable for Tina to ignore her cabin roof during two weeks of record snowfall. Tina's response would be that she had no subjective intent to deprive Sue of the benefit of the contract, and that her actions were reasonable under the unanticipated circumstances.

The examinees' conclusions on the above issues are not important. Rather the examinees should demonstrate ability to identify and provide a detailed discussion of the issues and Sue's relative positions. Any discussion of damages is unnecessary here as the third call of the question raises the issue directly.

It seems likely that Sue can establish a *prima facie* claim for breach of contract.

2. Tina's Defenses to Sue's Claim (30 points)

a. No valid contract

Depending on the examinee's conclusion as to the validity of a contract between Sue and Tina, this discussion may be included under either the first or second call of the question.

Examinees may note that Tina would have a good argument that no valid contract was formed between her and Sue. The Restatement discusses the requisite certainty of terms in a valid contract, noting: "[T]he agreement must be capable of being given an exact meaning" and "all the performances to be rendered must be certain." Restatement (Second) of Contracts § 33 (1981).

Likewise, Alaska law requires that the terms of a contract be sufficiently well-defined to be enforceable. *Metcalf Investments, Inc. v. Garrison*, 919 P.2d 1356, 1362 (Alaska 1996); *Brady v. State*, 965 P.2d 1, 10, n. 20 (Alaska 1998) (noting that offer and acceptance must be sufficiently definite and certain to be enforced). An agreement whose terms are indefinite or uncertain cannot be enforced. See *Davis*, 938 P.2d 1008 (ruling that an agreement was too indefinite to be enforced); see also Restatement (Second) at §33.

Examinees might point out that Tina could argue that her statement, “I would be happy to help you with that” is too vague to constitute an offer that would lead to an enforceable contract to shovel Sue’s roof. Similarly, Tina could argue that the terms of her performance under the agreement were not sufficiently certain (i.e., Sue did not ask her to shovel the roof daily), and therefore the agreement does not rise to the level of a valid contract.

b. No breach

Tina is likely to argue that she is not in breach of any agreement with Sue because she performed as required under the terms of the agreement. Sue’s request was: “I need someone to check the roof while I’m out of state and to clear any snow that has built up.” Tina could argue that she understood her obligation to be that she check the roof occasionally and clear any accumulated snow. The facts indicate that Tina regularly checked Sue’s roof and cleared away snow. Tina might point out that she never promised to check and clear the roof after *every* snowfall, nor did she guarantee that Sue’s roof would survive the winter. Accordingly, Tina will claim that she has complied with the terms of the parties’ agreement, and is not in breach.

Examinees may point out that Sue would respond by arguing that the fundamental essence of the contract was that her roof be shoveled whenever necessary to avoid excessive snow accumulation, and that Tina’s failure to check the roof when record snowfall was occurring was a clear breach of that agreement.

c. Impossibility

A court may excuse Tina or Sue from performing under the contract where the object of the contract has been rendered impossible or commercially impractical. *Mat-Su/Blackard/Stephan & Sons v. State*, 647 P.2d 1101, 1105 (Alaska 1982). Impossibility of performance is a valid defense to a breach of contract action when the promisor’s promise becomes commercially impracticable as a result of the frustration of a mutual expectation of the parties. *Murray E. Gildersleeve Logging v. Northern Timber*, 670 P.2d 372, 374 (Alaska 1983).

Here, it seems that both parties had a mutual expectation that Tina would not be injured or incapacitated in a way that would make her unable to perform under the contract. To succeed on this defense, however, Tina would have to show that she was not able to arrange for coverage while she was on bed-rest, or that the cost of sub-contracting a roof shoveler for Sue's cabin would have been excessive and unreasonable. The facts do not suggest that Tina made any efforts to arrange for emergency coverage of her duties under the contract, and therefore she would not be likely to persuade a court with her impossibility defense.

3. Damages (25 points)

Courts award damages for a breach of contract with the aim of placing the injured party in as good a position as she would have been had the contract been fully performed. *McBain v. Pratt*, 514 P.2d 823, 828 (Alaska 1973); *Green v. Koslosky*, 384 P.2d 591 (Alaska 1963). The Alaska Supreme Court has adopted the terms of the Restatement (Second) of Contracts, which provides:

Subject to the limitations stated in Sections 350-53, the injured party has a right to damages based on his expectation interest as measured by

- a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus
- b) any other loss, including incidental or consequential loss, caused by the breach, less
- c) any cost or other loss that he has avoided by not having to perform.

Restatement (Second) of Contracts, § 347, at 112 (1981); *cited in Alaskan Reclamation and Pest Control, Inc. v. United Bank Alaska*, 685 P.2d 1211, 1223 (Alaska 1984).

Alaska courts regularly award consequential damages in breach of contract actions. *See, e.g. Hancock v. Northcutt*, 808 P.2d 251, 257 (Alaska 1991) (consequential damages generally available); *American Computer Institute, Inc. v. State*, 995 P.2d 647, 655 (Alaska 2000) (plaintiffs awarded consequential damages as part of generally recoverable contract damages). "Consequential losses which the seller could reasonably have anticipated when

the contract was made are also recompensable.” *Guard v. P & R Enterprises, Inc.*, 631 P.2d 1068, 1071 (Alaska 1981) (citations omitted).

Generally, consequential damages will only be excluded from the range of a plaintiff’s potential recovery if they are specifically excluded by contractual agreement. *Pierce v. Catalina Yachts, Inc.*, 2 P.3d 618, 621 (Alaska 2000).

Here, the damages that Sue seeks to recover are all reasonably foreseeable consequences of a roof collapsing from an excessive snow load. The agreement between her and Tina did not exclude damages. Thus, a court would be likely to award her the cost of reasonable roof repairs as consequential damages.