

ESSAY QUESTION NO. 2

Answer the question in booklet No. 2

One spring Carl decided to order new, “super catch” Russian crab pots that he planned to use for the fall crabbing season in the Bering Sea. The season would begin on October 1, and Carl wanted new gear to replace his unusable, trouble-prone equipment that lay in a shed in Dutch Harbor. Carl lived in Anchorage, over 800 miles from the fishing grounds and the port of Dutch Harbor in the Aleutian Islands, so he hired Sam, a Dutch Harbor resident, to receive and unload the shipment of pots when it arrived at the port.

Carl explained to Sam that the pots he had purchased were only available from Russia and that he was relying upon Sam to unload the crab pots because he could not be there to do the work himself. Sam said that he understood and offered to receive and unload the shipment, to which Carl exclaimed, “That is great news.” Sam told Carl he had a job lined up in October for another fisherman, and Carl assured him that the equipment would arrive by the first of September, allowing Sam to finish the work before October 1. The men signed a written agreement that read:

Sam will receive and unload 500 crab pots in Dutch Harbor, Alaska. When the pots arrive from Russia on September 1, Sam will start unloading immediately, and will finish the job no later than October 1, the opening day of the crab fishing season. Carl has paid \$500 to Sam, and he will pay him an additional \$500 when Sam unloads the last pot.

Carl ordered the pots as planned, at a cost of \$10,000. The equipment manufacturer promised that the pots would arrive before September 1. However, the shipment did not arrive until September 20. Sam worked nonstop to unload them, but he only managed to unload 250 by October 1. Carl had arrived in Dutch Harbor by this time, and he demanded that Sam keep working until the shipment was completely unloaded, but Sam refused because he had to start his other job the next day. Carl did not pay Sam the remaining \$500 under their agreement.

Carl placed a “help wanted/for sale” advertisement in the local Dutch Harbor paper for two days, hoping to find someone who would unload his shipment. One of Carl’s fiercest competitors in the fishery offered to buy the unloaded pots at a 10% markup from what Carl had paid, but Carl refused to sell to her. Ultimately, no one else answered the ad, and Carl was forced to sell the unloaded pots to another, novice fisherman for exactly what he paid for them in an effort to recover some of his expenses during a season that was already underway. Unfortunately for Carl, it proved to be a record year in which every boat on the water filled its pots and made a profit. Carl sued Sam for breach of contract.

1. Did Carl and Sam form a valid contract? Discuss.
2. Assuming that Carl and Sam formed a valid contract, does Sam have any contractual defenses to Carl's breach of contract claim? Discuss.
3. If Carl's claim is successful, what legal theories affect the types of damages he is entitled to receive, if any? Discuss.

GRADERS' GUIDE
***** QUESTION NO. 2 *****
CONTRACTS

Did Carl and Sam form a valid contract? Discuss.

1. Contract Formation (10 points)

Under Alaska law, the following four elements are required to form a valid contract: (1) an offer encompassing all essential terms; (2) an unequivocal acceptance of those terms by the offeree; (3) consideration; and (4) a mutual intent to be bound by the contract. *Sykes v. Melba Creek Mining, Inc.*, 952 P.2d 1164, 1167 (Alaska 1998). Examinees should present some brief analysis as to whether the agreement between Sam and Carl formed a valid contract – without a contract, there can be no breach.

Here, the elements of a valid, express contract appear to be present. Sam has offered to unload Carl's shipment and Carl has accepted Sam's offer. There is consideration in the form of Sam's promise to do the work and in Carl's promise to pay Sam \$1,000 for the work. The parties both signed the written memorandum of their agreement, demonstrating their mutual intent to be bound by the terms therein.

Does Sam have any contractual defenses to Carl's breach of contract claim? Discuss.

2. Sam's Potential Contractual Defenses (40 points)

a. Failure of a Condition Precedent (20 points)

A condition precedent is a fact or an event that the parties understand and intend must exist or take place before there is a right to performance. *Prichard v. Clay*, 780 P.2d 359, 362 (Alaska 1989)(citing to Restatement (Second) of Contracts § 224). If the condition is not fulfilled, the right to enforce the contract does not come into existence. *Id.* Whether a provision in a contract is a condition depends upon the intent of the parties to the agreement. *Id.*

Here, Carl and Sam's contract states that Sam will begin unloading the shipment when the pots arrive on September 1. Sam told Carl he had another job to do in October and Carl reassured Sam that the shipment would arrive by September 1. From this language it appears that the parties assumed that the pots would arrive by September 1, but the pots did not. It is likely that a court would determine that arrival of the pots by September 1 was a condition precedent to Sam's performance under the agreement.

Because the condition did not occur, Carl's right to enforce the contract likely did not come into existence. It is true that the pots arrived on September 20, but ten days was not enough time to unload the shipment, as illustrated by Sam's continuous effort resulting in only 250 pots being unloaded by October 1. Overall, it is likely that Sam could convince a court to find that a condition precedent, the timely arrival of the crab pots, did not occur, thereby relieving Sam of the obligation to fully perform the contract.

b. Impracticability (20 points)

The Restatement (Second) of Contracts § 261 provides:

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

The Alaska Supreme Court has adopted the Restatement (Second) of Contracts § 261. See, e.g., *Mat-Su/Blackard/Stephan & Sons v. State*, 647 P.2d 1101, 1104 (Alaska 1982).

Here, the crab pots arrived from Russia on September 20, only ten days before Sam was to have completed the task of unloading the entire shipment. There are no facts to suggest that Carl was dilatory in placing his equipment order, and both parties assumed that Sam would be able to begin unloading the shipment on September 1 and assumed that he could complete the job by October 1. Unloading the entire shipment of 500 pots was a physical impossibility that made Sam's performance of his obligations under the contract impracticable through no fault of his own. Nothing in the parties' contract undermines the application of the impossibility doctrine to this situation. Sam could likely successfully defend against Carl's breach of contract claim using the doctrine.

Examinees may use the term "impossibility" instead of "impracticability" in their answer. As set out in comment d to the Restatement (Second) of Contracts § 261: "Although the rule stated in this Section is sometimes phrased in terms of 'impossibility', it has long been recognized that it may operate to discharge a party's duty even though the event has not made performance absolutely impossible. This Section, therefore, uses 'impracticable', the term employed by the Uniform Commercial Code § 2-615 (a), to describe the required extent of the impediment to performance." Alaska has used the term "impossibility" in analyzing an impracticability defense. See, e.g., *Murray E. Gildersleeve Logging Co. v. Northern Timber Corp.*, 670 P.2d 372, 375 (Alaska 1983). The court has also noted that performance need not be literally impossible for the defense to apply, merely impracticable. *Mat-*

Su/Blackard/Stephan, 647 P.2d at 1105-06. Examinees should receive credit for use of either term so long as they recognize that actual impossibility is not required to evoke the defense.

c. Other Issues

Examinees may discuss mistake as a defense to the contract, but a “mistake” is a “belief that is not in accord with the facts” as those facts exist at the time of contracting. Restatement (Second) of Contracts § 151. *See also Stormont v. Astoria Ltd.*, 889 P.2d 1059, 1061 (Alaska 1995)(citing to Restatement (Second) of Contracts § 151 and holding that doctrine of mutual mistake does not apply to future events). A predication or judgment as to future events, such as whether a shipment of crab pots will arrive in a timely manner, is not a “mistake” for the purposes of this defense to a breach of contract claim. Examinees should not receive credit for a mistake analysis.

If Carl’s claim is successful, what legal theories affect the types of damages he is entitled to receive, if any? Discuss.

3. Legal Theories that May Impact Carl’s Damages (50 points)

a. *Mitigation of Damages* (25 points)

The Restatement (Second) of Contracts § 350 provides:
Avoidability as a limitation on damages

- (1) Except as stated in Subsection (2), damages are not recoverable for loss that the injured party could have avoided without undue risk, burden, or humiliation.
- (2) The injured party is not precluded from recovery by the rule stated in Subsection (1) to the extent that he has made reasonable but unsuccessful efforts to avoid loss.

See also Alaska Children’s Services, Inc. v. Smart, 677 P.2d 899, 902-03 (Alaska 1984)(adopting Restatement (Second) of Contracts § 350).

Parties have a duty to mitigate their damages under Alaska law. Here, when Sam was unable to finish unloading the shipment because he was due on another job, Carl placed an advertisement seeking help in the local paper for two days. Examinees may note that this is not a very long time to run the ad, but the facts state that the crabbing season was already underway. It is possible that placing the advertisement for two days was reasonable, considering that the season had begun.

Examinees should identify Carl's refusal of the best offer from a competitor as potentially problematic. A court would not likely be sympathetic to Carl's refusal to sell to a staunch competitor, and would expect him to mitigate by selling the equipment for the best price, if possible. Moreover, a court might suggest that Carl could have unloaded the equipment himself to the extent that he was able to do so.

The examinees' ultimate conclusion on the sufficiency of Carl's mitigation effort is not important, but examinees should be awarded points based on their identification of the issues and analysis of the facts provided.

b. Foreseeability and Measure of Damages (15 points)

The Restatement (Second) of Contracts § 347 states:

Subject to the limitations stated in §§ 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.

See also Native Alaskan Reclamation and Pest Control, Inc. v. United Bank Alaska, 685 P.2d 1211, 1223 (Alaska 1984)(citing to Restatement (Second) of Contracts § 347).

If Carl succeeds with his breach of contract claim and the court finds that he reasonably mitigated his damages, he is entitled to recover the loss in value of the equipment that he experienced caused by Sam's failure to perform, plus any incidental or consequential loss, minus any cost or loss avoided. Examinees should apply this principle to the facts, discussing the reasonableness and sufficiency of Carl's mitigation efforts.

c. Consequential Damages (10 points)

Carl will also likely seek consequential damages -- his lost profits for missing the fishing season. The facts state that it was a record breaking year in which anyone on the water was able to catch crab, and examinees could assume that Carl would have caught crab had he been able to fish with his new equipment. In order to recover consequential damages, the damages must have been reasonably foreseeable. *See Foster v. Hanni*, 841 P.2d 164, 173

(Alaska 1992)(citing to Restatement (Second) of Contracts § 351). Sam lives in a busy fishing community and it seems likely that he is familiar with the time constraints of hectic fishing seasons. Sam probably knew that Carl would lose money as a result of his inability to fully perform under the contract. Examinees need not reach a particular conclusion on these points – rather, they should be awarded points based on the depth of their analysis of the issues from each party’s perspective.