GRADER'S GUIDE

***** QUESTION NO. 9 *****

SUBJECT: CONTRACTS

I. Andrew's Contractual Defenses to Jane's Breach of Contract Claim

1. Failure of Condition Precedent 25 %

A condition precedent is a fact or event which the parties intend must exist or take place before there is a right to performance. *Prichard v. Clay*, 780 P.2d 359 (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. *Id.*

Here, the parties' contract states that Andrew will begin planting when the bulbs arrived on September 15th. From this language, it appears that the parties assumed that the bulbs would arrive by September 15th, but the bulbs did not arrive. It is likely that a court would determine that arrival of the bulbs by September 15th was a condition precedent to Andrew's performance. Because the condition did not occur, Jane's right to enforce the contract likely did not come into existence. It is true that the bulbs arrived on September 29th, but one day was not enough time to plant the bulbs, as evidenced by Andrew's continuous planting of them with only 1,000 bulbs being planted by September 30th. Overall, it is likely that a court would conclude that a condition precedent – timely arrival of the bulbs – did not occur, thereby relieving Andrew of the obligation to fully perform the contract.

2. Impracticability 25 %

The Restatement (Second) of Contracts § 261 states:

> 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.

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

Here, the bulbs from Holland arrived on September 29th, only one day before Andrew was obligated to finish planting the bulbs. The fact pattern states that Jane ordered the bulbs in a timely manner. Both parties assumed that Andrew would have bulbs to plant beginning on September 15th. According to the fact pattern, Andrew planted continuously once Jane received the bulbs, but he was only able to plant a portion of the bulbs. Planting all of the bulbs in one day was a physical impossibility that made Andrew's performance of his obligations under the contract impracticable without his fault. Nothing in the contract undermines application of the impracticability doctrine. Andrew could successfully defend against Jane's breach of contract claim using the doctrine.

Examinees may use the term "impossibility" instead of "impracticability" in their answer. As explained in comment d to Restatement (Second) of Contracts §261: "Although the rule stated in this Section is sometimes phrased in terms '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), and it 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 1105-1106. Examinees should receive credit regardless of the term utilized.

3. 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 (Alaska 1995)(citing to Restatement (Second) of Contracts § 151 and holding that doctrine of mutual mistake does not apply to future events). A prediction or judgment as to future events (such as whether bulbs will arrive in a timely manner) is not a "mistake".

II. What Damages Would Jane be Entitled to Receive, if Any?

1. Mitigation of Damages 25 %

The Restatement (Second) of Contracts § 350 states:

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 (Alaska 1984) (adopting Restatement (Second) of Contracts § 350).

Parties have a duty to mitigate damages. Here, when Andrew could not finish planting the bulbs because he had to return to school, Jane placed an ad looking for a replacement worker for only three days. This is not a very long time, but the fact pattern stated that the planting season would end in two weeks. It is possible that placing the advertisement for three days was reasonable, considering that the planting season ended in two weeks. The fact pattern does state that Jane was allergic to bulbs, so it was reasonable for Jane not to plant the bulbs herself. Overall, it is difficult to say whether Jane acted reasonably in mitigating her damages in terms of her attempt to find another worker.

Another question relevant to whether Jane reasonably mitigated her damages is whether it is reasonable to have flowers flown in from Holland for a wedding. The fact pattern states that Jane wanted the bulbs planted because she wanted her daughter's spring wedding to be very special. Jane specifically ordered bulbs from Holland, indicating that the type of flowers she wanted for the wedding were those from Holland. Considering that Jane contracted for the purpose of having Holland flowers at her daughter's wedding, it is probably reasonable to fly in flowers from Holland for the wedding.

2. Measure of Damages 25 %

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 American Computer Institute, Inc. v. State, 995 P.2d 647 (Alaska 2000) (citing to Restatement (Second) of Contracts § 347).

If Jane is successful on her breach of contract claim and she reasonably mitigated her damages, she is entitled to the loss in value to her caused by Andrew's failure to perform, plus any incidental or consequential loss, minus any cost or loss avoided.

In order to recover for consequential damages, the damages must have been reasonably foreseeable. *See Foster v. Hanni*, 841 P.2d 164 (Alaska 1992)(citing to Restatement (Second) of Contracts § 351, Unforeseeability and Related Limitations on Damages). Here, Jane specifically told Andrew that the flowers were available only from Holland, so Andrew reasonably would have known that, if he breached the contract, consequential damages might involve obtaining the flowers from Holland.

Jane paid $5,000 for the flowers from Holland, but she avoided paying the $500 balance on Andrew's contract, plus she sold the unplanted bulbs for $2,500. $5,000 minus $3,000 ($2,500 plus $500) equals $2,000. Jane's damages would be $2,000.