GRADER'S GUIDE

***** QUESTION NO. 5 *****

SUBJECT: CONTRACTS

I. Tom's Action for Breach (25 Points)

The initial question to be answered with respect to whether Tom has a contract action against Joe is whether they formed a valid contract. The formation of a valid contract requires: (1) an offer encompassing all essential terms; (2) unequivocal acceptance by the offeree; (3) consideration, and; (4) a mutual intent to be bound. *Valdez Fisheries Development Ass'n, Inc. v. Alyeska Pipeline Service Co.*, 45 P.3d 657, 665 n.12 (Alaska 2002); *Davis v. Dykman*, 938 P.2d 1002, 1006 (Alaska 1997).

At first blush, the basic contract elements appear to be satisfied here, in that Joe made an offer to check on and shovel Tom's roof, Tom accepted the offer, Tom agreed to pay a flat fee for the services as consideration, and Joe indicated an intent to be bound by performing some work.

Examinees should, however, note that Joe could argue that no valid contract was formed, for several reasons. Examinees may discuss these contract formation issues in response to either the first call (regarding contract formation) or the second call (regarding Joe's defenses).

Joe may argue that his statement that "I guess I can do that for you" is too vague an offer to create an enforceable contract. Under Alaska law, the terms of a contract must be sufficiently well-defined to be enforceable. *Metcalfe Investments, Inc. v. Garrison*, 919 P.2d 1356, 1361 (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 is unenforceable if its terms are not reasonably certain. *See Davis v. Dykman*, 938 P.2d 1002, 1008 (Alaska 1997) (ruling that the agreement was not sufficiently definite to be enforceable); *Hall v. Add-Ventures, Ltd.*, 695 P.2d 1081, 1087-89 (Alaska 1985) (ruling that the agreement was sufficiently definite to be enforceable); *see also* Restatement (Second) of Contracts § 33 (1981).

Alaska courts must attempt to enforce the reasonable expectations of the parties to a contract. *Davis, supra*, 938 P.2d at 1006-07. Where the parties' expectations can be discerned and are compatible, then the terms of the contract are not too indefinite and can be enforced. *Davis, supra*, 938 P.2d at 1008; *Hall, supra*, 695 P.2d at 1087-89. Here, Tom's expectation was that Joe would check on and shovel his roof through the winter. This is not so

indefinite an expectation as to be unenforceable. More importantly, Tom's expectation is compatible with Joe's understanding of their agreement, as evidenced by Joe's actions in October and November.

Examinees may also see in the fact pattern an issue as to whether the contract is required to be in writing, or whether an oral agreement is sufficient. Alaska's Statute of Frauds, AS 09.25.010(a), provides that certain specific types of contracts are "unenforceable unless [the contract] or some note or memorandum of it is in writing and subscribed by the party charged ...." The contract at issue here does not fall within any of the specific categories of contract discussed in the statute, however, and the fact pattern indicates that the contract was only to run through the winter, and thus would not go on for over one year. *See* AS 09.25.010(a)(1). The contract at issue here, therefore, is not subject to the statute of frauds, and does not have to be in writing.

In sum, Joe and Tom have mutually agreed on the material terms of the contract including the price, the payment terms, and the services to be provided. Consideration was provided. Nothing in the question suggests that either Tom or Joe lacks the capacity to contract based on age, mental competence or other factors. Thus, the basic elements of a valid contract appear to be satisfied.

II. Joe's Defenses (50 points)

Joe may argue in his defense that he is not in breach because he complied with his obligations under the agreement. Tom asked Joe to "check on [the roof] every couple of weeks." Joe will argue that his understanding of his obligation, as evidenced by his version of the contract, was that he check on the roof every two weeks, and the facts indicate that Joe never did let more than two weeks pass before he checked on Tom's roof. Joe will argue that he did not agree to shovel the roof after every snowfall, nor did he guarantee that he would prevent any damage to Tom's roof. Joe will therefore claim that he complied with the terms of the agreement, and that he is not in breach.

In response to this, Tom will argue that the essence of the contract was for the roof to be shoveled when necessary to avoid excessive snow-loading, and that Joe's failure to check on the house when conditions warranted it was therefore a breach of the contract.

"In interpreting the provisions of a contract, it is the duty of the courts to ascertain and give effect to the intentions of the parties. To determine the intentions of the parties, we look not only to the written contract, but also to extrinsic evidence regarding the parties' intent at the time the contract was made. As a matter of law, 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." *Sprucewood Inv. Corp. v. Alaska Housing Finance Corp.*, 33 P.3d 1156, 1162 (Alaska 2001) (internal citations and quotations omitted).

Under the fact pattern of this question, there are facts to support the position of both parties. The contract written by Joe, although not necessarily binding, could be admitted as evidence of Joe's understanding of the terms of the agreement. At the same time, however, Tom made it clear to Joe that what he expected under the contract was for Joe to make sure that the roof did not get overloaded, not that the roof would be checked at any specific interval. Moreover, the fact that Joe checked the roof after each snowfall in October and November – instead of checking every two weeks – is evidence that Joe may have shared that understanding of the terms of the contract, and thus that the contract could be enforced in accordance with this understanding. Examinees should not be expected to take a side on this issue, nor should they be penalized for taking a side, so long as they recognize the issues both parties may raise.

Tom may also argue that Joe's actions violated the covenant of good faith and fair dealing. "A covenant of good faith and fair dealing is an implied component of all contracts as a matter of law." *Alaska Pacific Assurance Co. v. Collins*, 794 P.2d 936, 947 (Alaska 1990). The purpose of the implied covenant is to give effect to the reasonable expectations of the parties, preventing each party from interfering with another party's right to receive the benefits of the agreement. *Hawken Northwest, Inc. v. State, Dept. of Admin.*, 76 P.3d 371, 381 (Alaska 2003). The implied covenant has both a subjective and an objective prong. The subjective prong prohibits one party from acting to deprive the other of the benefits of the contract. The objective prong requires both parties to act in a way that a reasonable person would consider fair. *Id.*

Tom's argument would be that the benefit of the agreement to him was not simply that someone would look at his roof every once in a while, but rather that Joe would ensure that his roof did not get overloaded and collapse, and that Joe's actions deprived him of this benefit. Tom would argue that it was unfair and unreasonable for Joe to simply ignore Tom's roof during two whole weeks of heavy snow.

Joe would respond that he had no subjective intent to specifically deprive Tom of the benefit of the contract, and that his actions were reasonable and not unfair under the circumstances.

Again, the examinee should not be expected to take a side on this issue, nor should the examinee be penalized for doing so. The examinee should, however, be expected to identify the issue and Tom and Joe's respective positions.

A party to a contract may be excused from performance where the object of the contract has been rendered impossible or commercially impracticable. *See Mat-Su/Blackard/Stephan & Sons v. State*, 647 P.2d 1101, 1105 (Alaska 1982). "Impossibility of performance is recognized as a valid defense to an action for breach of contract when the promissor's performance becomes commercially impracticable as a result of the frustration of a mutual expectation of the contracting parties.... Commercial impracticability is demonstrated when performance can only be done at an excessive and unreasonable cost." *Murray E. Gildersleeve Logging v. Northern Timber*, 670 P.2d 372, 374 (Alaska 1983).

It is arguable that the parties had a mutual expectation that Joe would not become incapacitated, and that Joe was incapable of performing his duties under the contract. Joe would have to show, however, that he was unable to arrange for anyone else to perform his duties, or that the cost of such an arrangement was "excessive and unreasonable." The facts indicate that Joe made no effort to arrange substitute performance.

III. Damages (25 points)

The purpose of awarding damages for a breach of contract is to put the injured party in as good a position as that party 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 951, 952 (Alaska 1963). The Alaska Supreme Court has specifically adopted the terms of the Second Restatement, which provides:

> 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, <u>including incidental or consequential loss</u>, 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) (emphasis added), *cited in*, *Alaskan Reclamation and Pest Control, Inc. v. United Bank Alaska*, 685 P.2d 1211, 1223 (Alaska 1984).

The Alaska Supreme Court has made clear in numerous cases that consequential damages are generally available in breach of contract actions. *See Hancock v. Northcutt*, 808 P.2d 251, 257 (Alaska 1991) (consequential damages generally recoverable); *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 recompensible." *Guard v. P & R Enterprises, Inc.*, 631 P.2d 1068, 1071 (Alaska 1981), *citing* C. McCormick, Law of Damages §681 (1935).

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

In this case, the damages Tom seeks to recover are all reasonably foreseeable consequences of the roof collapsing, and thus would be generally allowable as consequential damages. Joe's argument that the damages should be limited to a refund will likely fail in the absence of a specific contractual provision limiting the availability of consequential damages.