ESSAY QUESTION NO. 9

Answer this question in booklet No. 9

Ann manages a home improvement store in Palmer, Alaska. In 1998, Ann hired Bob, the owner of a construction company, to build her a new home. While discussing the home's design, Bob asked Ann whether she wanted her outside deck to be constructed with exterior-grade lumber or less expensive regular-grade lumber (which was not weather resistant and would be more susceptible to wood rot). In response, Ann told Bob to use exterior-grade lumber for the deck. She explained to Bob that while she understood it would cost more, having the deck built with exterior-grade lumber would result in a safer, stronger deck. Both grades of lumber look almost identical, and are distinguishable only upon close inspection.

The next day, Ann and Bob signed a construction contract, which stated that the outside deck would be built with regular-grade lumber. The contract contained an integration clause stating: "This contract is intended by the parties as a final expression of their agreement and as a complete and exclusive statement of its terms."

The following day, Ann re-read the construction contract and noticed that it called for her deck to be built with regular-grade lumber. She immediately called Bob, who acknowledged that this provision was incorrect. Bob orally confirmed that he would construct the deck with exterior-grade lumber. One year later, Bob completed Ann's home and Ann moved in.

In 2001, Ann noticed that her outside deck was showing evidence of decay. Concerned, she spoke with Bob who suggested that she apply a coating of wood-preservative stain to the deck. Based on this advice, she purchased wood-preservative stain from work with the intention of applying it to the deck. She never did.

In 2005, Ann's deck collapsed. Upon close inspection, Ann noticed that the deck was built with regular-grade lumber. Ann sues Bob in the Alaska Superior Court at Palmer for breach of contract because he failed to use exterior-grade lumber for the deck.

1. Discuss whether evidence of the oral conversation between Ann and Bob before they executed the written contract may be used to prove Bob breached the contract.

2. Discuss whether evidence of the oral conversation between Ann and Bob after they executed the written contract may be used to prove Bob breached the contract.

3. Discuss whether Ann's breach of contract claim is time-barred.

GRADER'S GUIDE

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

SUBJECT: CONTRACTS

1. Effect of Oral Conversations on Ann's Breach of Contract Claim
(30 points)

This question tests the examinee's knowledge of the parol evidence rule as it applies to integrated agreements.

Ann is claiming that Bob failed to construct her outside deck with exterior-grade lumber in violation of their written agreement. The facts state, however, that the contract expressly provides that Bob is to use regular-grade lumber. The oral discussions between Ann and Bob before and after the contract was signed are favorable to Ann's claim that Bob was required to build the deck with exterior-grade lumber. Accordingly, Ann will want to use evidence of both conversations in support of her claim.

When the terms of an agreement between contracting parties are set forth in writing, the parol evidence rule generally precludes the parties from using evidence of prior agreements to contradict the written terms. *Philbin v. Matanuska-Susitna Borough*, 991 P.2d 1263, 1270 (Alaska 1999); *Alaska Diversified Contractors, Inc. v. Lower Kuskokwim Sch. Dist.*, 778 P.2d 581, 583 (Alaska 1989); *See* AS 45.02.202 (parol or extrinsic evidence). The parol evidence rule is implicated when one party seeks to introduce extrinsic evidence which varies or contradicts an integrated contract. Once triggered, the parties' reasonable expectations are determined by applying a three-step test:

"The first step is to determine whether the contract is integrated. The second step is to determine what the contract means.... Extrinsic evidence may always be received in resolving these first two inquiries. The third step is to determine whether the prior agreement conflicts with the integrated writing. Whether there is conflicting extrinsic evidence depends on whether the prior agreement is inconsistent with the integration. Inconsistency is defined as "the absence of reasonable harmony in terms of the language and respective obligations of the parties." *Western Pioneer, Inc. v. Harbor Enters., Inc.*, 818 P.2d 654, 657 n.4 (Alaska 1991) (citations omitted).

The parol evidence rule does not apply, however, where a contract has been formed as a result of mutual mistake, and a party is seeking reformation. *Alaska N. Dev. Inc. v. Alyeska Pipeline Serv. Co.*, 666 P.2d 33, 41 (Alaska 1983)

(Lower court correctly dismissed breach of contract claim because the parol evidence rule barred introduction of extrinsic evidence; claim for reformation is a separate equitable claim to which the parol evidence rule does not apply); *Gablick v. Wolfe*, 469 P.2d 391, 395 (Alaska 1970) (The parol evidence rule is a rule of contract interpretation which has no direct application to the equitable action of reformation.); *Diagnostic Imaging Center Associates v. H & P*, 815 P.2d 865, 867 (Alaska 1991) (The parol evidence rule does not apply when reformation or rescission of the agreement is sought as a result of misrepresentation or mistake); *Still v. Cunningham*, 94 P.3d 1104, 1110 (Alaska 2004);

a. Evidence of Pre-Contact Conversation

Evidence of the pre-contract conversation between Ann and Bob implicates the parol evidence rule because it is extrinsic evidence and their discussion occurred prior to consummation of the written contract. The facts indicate that the contract is an integrated agreement. The written contract states that Ann's deck is to be constructed with regular-grade lumber. The meaning of this provision is clear. As evidence of Ann and Bob's conversation conflicts with this meaning, the parol evidence rule would properly preclude use of this conflicting evidence to contradict the agreement's written terms. While the facts indicate the contract was formed as a result of mutual mistake, the question states Ann is suing for breach of contract, not reformation. Thus, the parol evidence rule precludes use of Ann and Bob's conversation to prove Bob breached the written contract.

2. Evidence of Post-Contract Conversation (20 points)

Since the parol evidence rule is triggered by prior extrinsic evidence, this rule is not implicated by Ann and Bob's post-contract conversation. Thus, evidence of Ann and Bob's conversation may be used by Ann in her breach of contract claim against Bob.

3. Whether Ann's claims against Bob are Time-Barred (50 points)

This question tests the examinee's understanding of the applicable statute of limitations period for contract actions and the discovery rule.

a. Statute of Limitations for Contract Actions (15 points)

Alaska Statute 09.10.053 states, "Unless the action is commenced within three years, a person may not bring an action upon a contract or liability, express or implied, except as provided in AS 09.10.040, or as otherwise provided by law, or except if the provisions of this section are waived by contract." AS 09.10.053 (emphasis added). The examinee should acknowledge that Alaska's current statute of limitations period to bring contract actions is three years.

b. Discovery Rule (35 points)

Based on the facts, there are three possible accrual dates for Ann's breach of contract claim: 1999, 2001 and 2005.

The first accrual date is 1999, after Bob completed the deck. At that time, Ann had three years to bring her breach of contract suit against Bob. Based on this date, Ann's time to file suit expired in 2002. Ann will claim, however, that she had no knowledge of Bob's breach at the time she moved into her new home in 1999, and that the discovery rule applies.

Where an element of a cause of action is not immediately apparent, the discovery rule provides the test for the date on which the statute of limitations begins to run. *John's Heating Service v. Lamb*, 46 P.3d 1024 (Alaska 2002). The Alaska Supreme Court has further elaborated:

"[T]he statute of limitations does not begin to run until the claimant discovers, or reasonably should have discovered, the existence of all elements essential to the cause of action. Thus we have said the relevant inquiry is the date when the claimant reasonably should have known of the facts supporting her cause of action. We look to the date when a reasonable person has enough information to alert that person that he or she has a potential cause of action or should begin an inquiry to protect his or her rights." *John's Heating Service*, 46 P.3d at 1031 (quoting *Mine Safety Appliances v. Stiles*, 756 P.2d 288, 292 (Alaska 1998) (emphasis added).

Ann will argue that she did not discover Bob's failure to use exterior-grade lumber until the deck collapsed in 2005. Based on this accrual date, Ann will argue that she has until 2008 to file suit. Bob will argue that Ann is the manager of a home improvement store and, as such, should be able to distinguish between these two grades of lumber. Bob will argue that Ann therefore reasonably should have known in 1999 that her deck was not constructed from exterior-grade lumber. Ann will argue that, based on Bob's subsequent oral promise to use exterior-grade lumber, she had no reason to believe her deck would not be constructed with exterior-grade lumber. Further, Ann will argue that since both grades look the same from afar, she could not be expected to tell the difference without a close inspection, which she did not undertake because she had no reason to believe one was necessary. As discussed above, a 1999 accrual date means Ann's time to file suit expired in 2002.

Even were she unable to tell right away, Bob will argue, Ann was alerted to the potential claim, or at least had inquiry notice, when she saw the deck was beginning to decay in 2001 - as evidenced by Ann's plan to apply the wood-preservative stain to the deck. Ann will argue that, while she did observe signs

her deck was beginning to decay, exterior-grade lumber is only weather-resistant (not weather-proof), and so will still degrade over time. Ann will argue that her deck was two years old in 2001, and some decay could reasonably be expected by that time. Ann will also claim she had no reason to otherwise believe Bob had failed to use exterior-grade lumber. Based on this accrual date, however, Ann's contract claim expired in 2004. There are facts that could be argued for any of these accrual dates.

The 10 year statute of repose (AS 09.10.55) is not applicable because in any event 10 years has not passed from the accrual date.

There are no facts that show the disclosures necessary to trigger AS 09.10.54 (limits on construction causes of action).

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Alaska
Bar Examination

JULY
2005

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Question **No. 9** *Only*

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9)

1. First question is who drew up the contract since the court will usually hold the drafter to a higher standard. If Ann had it drawn then she had the opportunity to go over every item before she presented it to Bob for their signatures. Usually the builder has the contract drawn up. If Bob did have the drafting done then he was responsible for the incorrect lumber identification.

we have a contract (offer, bid acceptance).

It is written and has an non integration clause in it.

Exception can be made when there is OR is not a meeting of the minds

Here both agreed to exterior lumber prior to the contract and both were expecting to have it in the contract. here the K doesn't meet what they had agreed to. Ann gave notice of the problem within 24 hours so they could have added an addition or explanation to the K and saved all this hassle for the future but that is why people need attorneys. Bob is given plenty of notice since only one day passed. Bob verbally agreed to the upgrade in lumber. The meeting of the minds was exterior lumber and both agreed to that, it was the writing that was a mistake. Oral agreements can be added if they are only to clarify rather than change the K.

2. The discussion after is again a clarification rather than a change of the K. They were both identical in their expectation of the K. Further consideration can be needed when the K is changed but here this is clarification. So the oral agreement comes in.

Ann works in a home improvement store so she has knowledge of the need for stain to stop wood rot so Bob might he able to mitigate since Ann never painted the deck.

3. in previous years AK SOL for contracts was seven years and was reduced to 3 years during the nineties. I seem to remember it was 1997 that the change took place. If the new SOL became the law before 1998 then older SOL takes precedent and she may have a cause but she missed the deadline. If the K preceded the change law date then she could have a case because 7 years was the old period of time for SOL. Assuming 7 years applies then the month and day of 1998 is needed as well as the specific date Ann filed. example if K signed on Jan 2, 1998 and suit filed on July 1 2005 then 7 years are gone. But if original signing was done on Oct 1, 1998 then the seven years have not totally expired.

I believe that the 7 years SOL applies and she has time yet to sue.

END OF EXAM

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This Book is for your answer to

Question **No. 9** *Only*

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1. The parol evidence rule applies where there is an integrated contract, but additional information is being presented to clarify the terms of the contract. Evidence that changes the terms or contradicts the terms of an integrated contract are generally not considered in a contract dispute. An exception exists when there is a claim that the contract is not in fact integrated and does not convey all the terms.

If a judge finds that a contract is not integrated, despite its appearance, s/he may allow in additional evidence of other terms. This is an exception because the evidence may add to the terms, modify or contradict them.

Here Ann is seeking to have evidence considered, under the parol evidence exception, that the contract is not in fact integrated, but that there was an oral understanding that is not reflected in the contract, actually contradicts the contract.

If the judge allows the oral understanding to be considered, he may find that the contract was breached if he accepts that the contract was wrong to state regular-grade lumber rather than exterior-grade.

2. The oral conversation after the contract was signed would be a modification of the terms of the contract, in essence, an acknowledgment that the lumber should be exterior-grade not regular

grade. An oral modification is enforceable by the courts and would indicate that if ~~Bob~~ Bob failed to perform as promised by using regular-grade not exterior-grade, then he breached the contract. He would have to replace the deck.

3. The statute of limitations on a contract issue is six years; however, the breach was not discovered until 2005. Although seven years had elapsed from the actual breach of the contract, Ann did not discover the breach until 2005 (actual breach was 1998 and breach discovered in 2005). Even if it were time-barred, Bob would have to raise the defense or it would be waived; therefore Ann should file the action.

Ann might also be able to persuade a judge that the breach was discovered in 2001, within the statute of limitations, and that only an expert would have been able to tell the difference before there were signs of decay.

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Bar Examination

JULY
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This Book is for your answer to

Question **No. 9** *Only*

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Issue: Does the "Parol Evidence Rule" apply to the conversation between Ann and Bob before they executed the written Contract.

Rule: The Parol Evidence Rule bars any prior or Contemporaneous Verbal or written agreements that contradict a written Contract that appears to be fully integrated. "The four corners Rule"

Reading the Rule you would expect its interpretation to be very strict however the Rule will allow in any Evidence that shows the intent of the parties, mistake, fraud, clarification of the terms, but disallows terms that Contradict the Writing.

In this example the prior conversation about what grade of lumber was to be used, would be allowed in because it clarifies a term of the Contract "what lumber is to be used". Not "Cement v. Wood". So it clears a term of the contract up it dosn't contradict it.

2. Would the oral conversation b/t Ann and Bob after the executed Contract be enough proof that Bob Breached the Contract.

IF the Contract b/t Ann and Bob could not be proved through Parol Evidence b/c of the integration Clause (which presumably disallows any oral waiver) the statement would probably be admitted in a breach of cause action.

When a person signs a contract with an integration clause they are bound by the contracts terms, IF the contract says no oral waivers, the contracting party should be aware they are to make no oral waivers or they will be deemed to have waived the clause. Bobs proper business practice would have been a novation to the Contract and a signing of the new term. The Court will not allow him to waive the clause and benefit from his breach of his oral promise.

3/4

Issue: Is Ann's Breach of Contract claims Time-barred.

No. Although the new statute of limitation for Contracts Claims in Alaska is three years Ann's Cause of action did not start until the defect in the deck was "Reasonably discoverable."

The fact indicate that the two lumbers where identicle in looks and appearance and it took a Close inspection to discover the defect not Reasonable dinspection.

The statute of limitations would be tolled until the defect could be known.

If you argue that Ann Reasonably New when the deck started to rot the statute would be further tolled because Bob contrived to conceil the defect by his suggestion to apply preservitive.

Arguably: Under alaska "Statute of Repose" Ann would have 10 years to bring her

4/4

Claim for property Damage.

Line

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2005

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Question **No. 9** *Only*

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1. In determining whether parol evidence will be admitted, the court will first determine whether the contract was integrated, then will determine the meaning of the contract, and will then determine whether the parol evidence conflicts with the contract. Here the contract clearly contains an integration clause. Thus the court would only look at the terms of the contract. The court will then determine what the contract means regarding regular lumber. This does not appear to be an ambiguous term so the court would apply the plain meaning, concluding that the integrated contract required to use of special exterior grade lumber. While the parol evidence conflicts with the written contract, the contract is integrated and the prior discussions may not be introduced.

2. The oral conversation may be admissible as a modification to an existing contract. Parties may make oral modifications to written contracts. Here however, there was no additional consideration given for the agreement to use a more expensive type of lumber, which may be a factor in determining the validity of the modification.

Additionally, Ann could argue mutual mistake. Even though the contract was integrated, Ann could offer as evidence the conversation after the contract was made because it is not a prior statement and thus not barred by the parol evidence rule.

3. The statute of limitations on contracts is generally three years. This means that Ann has three years from the time she discovers the breach, not from the time Bob actually breached by using the wrong wood, to bring suit. Bob would argue that Ann had constructive notice of the breach in 2001 when she noticed evidence of decay. However, since the wood looks identical

upon inspection, Bob would likely not succeed on this claim. Rather since she discovered the breach in 2005, she had three years to act upon the breach, which she did. Thus the time is not time-barred.

END OF EXAM

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Alaska
Bar Examination

JULY
2008

This Book is for your answer to

Question **No. 9** *Only*

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1. Under the parol evidence rule, evidence of an oral agreement made before entering into an written contract cannot be used to displace terms written into the contract. Alaska courts will attempt to enforce contracts so as to enforce the intent of the parties at the time of entering into the contract but are limited in what they may consider in determining the intent of the parties. The court's analysis goes like this: 1) Is the contract integrated? 2) What does the contract mean? 3) Does the prior agreement conflict with any of the terms written into the contract?

The contract at issue here contains an integration clause. In Alaska, an integration clause raises the presumption that the contract is integrated and is conclusive evidence on the partial integration of any terms expressly contained in the written contract. The contract (K) at issue here explicitly says that the deck will be made with regular-grade lumber. Along with the integration clause, this is conclusive evidence that this was the intent of the parties. In determining what the K means, the words of the K are the best evidence and based on the facts given here, there is apparently no issue over what the terms of the K mean. The court may consider extrinsic evidence in making determinations on the first two prongs of the test. The express provision for regular-grade lumber conflicts with their earlier agreement that the deck be made with exterior grade lumber so evidence of the prior oral agreement will not be allowed in.

2. Evidence of an oral agreement made after two parties have executed a written contract may be used. Here, there was a mutal mistake. A mutal mistake claim can be brought where the mistake relates to an assumption that is the basis of the K and the mistake is material. Both parties agreed that the provision of the K dealing with the lumber to be used for the deck was incorrect. The parties can then replace the K term with an appropriate term. Although it would

have been beneficial for Ann had they made the agreement in writing, she can still introduce evidence of the oral agreement made after the K was entered into since the parol evidence rule only applies to agreements made before a K is entered into.

3. The statute of limitations on K claims is 3 years from the time the claim arises (ie. 3 years from breach). The discovery rule applies in that time begins running from the time the breach is or should be discovered. The breach actually occurred in 1999 when Bob finished building the house using substandard lumber for the deck, different from what they agreed upon. However, the facts indicate that the lumber is almost identical in appearance and is only distinguishable upon close inspection. In 2001, Anee noticed that her deck was showing signs of decay. This maybe put her on enough notice that she should have more closely inspected the deck to determine whether the correct lumber had been used the build it. She should have been able to discover the breach upon inspection since she was able to do so later in 2005. She obviously knew enough about what to look for that she could distinguish between the two lumbers. If she should have discovered the breach at this time, her claim may be barred by the statute of limitations if a full four years have passed.

If upon inspection in 2001, Ann could not have discovered the breach, she was definitely on notice when the deck collapsed in 2005 and then she saw that the wrong lumber was used. If the time started running from the collapse, she has 4 years in which to bring her claim.

END OF EXAM