ESSAY QUESTION NO. 7

Answer this question in booklet No. 7

Paper Co. agreed to pay *Timber Co.* a fixed price of $1,500,000 for 2 million board feet of timber from two tracts of land in Sitka, Alaska. The two tracts were separated by a small 20-acre parcel of private property owned by Mr. Jones that included a river stretching the length of the properties down to the ocean. *Timber Co.* issued an invitation to bid, advising prospective parties to inform themselves of all costs associated with logging in the area, including transportation costs. *Logger,* a Southeast Alaska logging company, was interested in logging the two tracts for *Timber Co.*

In the Spring prior to bidding on the contract, *Logger* discussed use of the river with Mr. Jones. Based on its own analysis, *Logger* had determined that transportation by river would cost no more than $600,000, while transportation by truck would cost closer to $1,000,000. *Logger* explained the lower costs associated with river transportation to Mr. Jones and was confident that it would be able to use the river, but *Logger* never actually entered into a contract with Mr. Jones for use of the river. *Timber Co.* was unaware of the discussions between *Logger* and Mr. Jones but *Timber Co.* knew that river transportation would cost significantly less than transport by truck.

On May 1, 2010, after submitting the successful bid, *Logger* entered into a valid contract with *Timber Co.* to log 2 million board feet of timber from the two tracts for payment of $900,000. The contract provided that *Logger* was responsible for "transportation of logs by river or truck to the ocean at *Logger's* expense and discretion for ultimate shipment to *Paper Co.*"

On May 15, 2010, *Logger* began clearing timber, but when it moved the timber to Mr. Jones's property it found that Mr. Jones had fenced off river access. *Logger* was advised that Mr. Jones had contracted to allow exclusive use of the river by the Southeast Alaska Sportsmen's Cooperative. Faced with higher transportation costs, *Logger* walked away from the project.

Under pressure to complete the clearing and sale of the property, *Timber Co.* logged the two tracts itself and trucked the timber off the property, at a total cost of $1,000,000. *Timber Co.* ultimately received the $1,500,000 payment for the 2 million board feet of timber. *Timber Co.* subsequently filed suit against *Logger.* In its Answer, *Logger* asserts the affirmative defenses of (1) mutual mistake, (2) commercial impracticability, and (3) frustration of purpose.

1. Discuss the merits of the affirmative defenses *Logger* has asserted.
2. Assuming *Timber Co.* is successful in its claims, discuss the proper measure of damages sustained by *Timber Co.*

GRADER'S GUIDE
*****QUESTION NO. 7*****
SUBJECT: CONTRACTS

1. **Discuss the merits of the affirmative defenses *Logger* has asserted. (75 points).**

A. Mutual Mistake.

The doctrine of mutual mistake does not permit rescission of a contract when the contract has expressly allocated the risk of a particular occurrence to one party and such an event has occurred. *Mat-Su/Blackard/Stephan & Sons v. State of Alaska*, 647, P.2d 1101, 1105 (1982). In *Mat-Su/Blackard/Stephan & Sons*, an invitation to bid stating that the bidder "must inform himself of wage conditions" was found to have amounted to an express requirement that the bidder bear that particular risk of mistake (higher wages than anticipated). In the case of *Timber Co.* v. *Logger*, a specific requirement was stated in the invitation to bid that prospective parties shoulder "advise themselves of all costs associated with logging in the area, including transportation and equipment costs." This is the specific risk against which *Logger* was advised.

Logger will argue that *Timber Co.* was aware that the cost of transporting the logs via river traffic is much lower than transport by truck and that it was apparent that the bid by *Logger* was premised on transportation by river. *Logger* will argue that *Timber Co.* knew that completion of the contract at the rate specified was not possible absent river transportation. This argument is unlikely to be successful because the invitation placed the burden of the specific risk on *Logger*.

B. Impossibility of Performance/Commercial Impracticability.

Impossibility of performance or commercial impracticability 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 frustration of a mutual expectation of the contracting parties. *Northern Corp. v. Chugach Electric Assoc.*, 518 P.2d 76, 80-82 (Alaska 1974). Commercial impracticability is demonstrated when performance "can only be done at an excessive and unreasonable cost." *Id.* at 81. While an explicit agreement is not necessary to establish a mutual expectation, there must be an assumption on both sides that an event will occur for its non-occurrence to excuse a breach. *Id.* at 81-82.

To succeed on the affirmative defense of impossibility, *Logger* will need to demonstrate to the court not only that it was the expectation of both parties to the contract that *Logger* would be able to ship logs down the river on Mr. Jones's property, but also that the inability to do so frustrated the expectations of both parties. While *Logger* expected to be able to transport the logs by river at the lower cost, this defense will be a difficult one to establish because (1) the invitation to bid required *Logger* to educate itself on transportation costs, (2) the invitation to bid acknowledged both river transportation and trucking as transportation alternatives, and (3) *Logger* did not inform *Timber Co.* of its negotiations with Mr. Jones regarding use of the river. *Logger* is therefore unlikely to be able to demonstrate that river transportation was an expectation of *Timber Co.*

C. Frustration of Purpose.

"Where, after a contract is made, a party's principal purpose is substantially frustrated 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 remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary." Restatement (Second) of Contracts, § 265 (1981). *See also Mat-Su/Blackard/Stephan & Sons v. State of Alaska*, 647 P.2d 1101, 1105 (1982). Commercial frustration of purpose is not available as a defense to a breach of contract claim if the event in question was foreseeable. *U.S. Smelting Ref. & Mining v. Wigger, 684 P.2d 850, 857 (Alaska 1984).*

Logger is unlikely to be successful in his "frustration of purpose" defense. First, Mr. Jones's agreement to allow *Logger* to transport logs from his property was not a basic assumption from *Timber Co.'s* perspective. While *Timber Co.* most surely knew that the bid by *Logger* relied on lower transportation costs that could only exist if river transportation were used, the language in the bid requires the bidder to inform itself regarding transportation costs. Moreover, the language in the actual contract provided that transportation by river or by truck would be the responsibility of *Logger.*

Second, it was not the purpose of the contract or the parties to transport logs via the river on Mr. Jones's property. It was the purpose of the contract and the parties to produce 2 million board feet of timber from the two tracts of land and to transport the timber to the ocean for transport to *Paper Co.*

2. Assuming *Timber Co.* is successful in its claims, discuss the proper measure of damages sustained by *Timber Co.* (25 points).

One 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 in had the contract been fully performed. *Guard v. P&R Enterprises, Inc.*, 631 P.2d 1068, 1071 (Alaska 1981) and Restatement (Second) of Conracts, § 344(a) (1979). The damages available in a breach of contract case are limited to those expenses which are the natural consequence of the breach. *Arctic Contractors, Inc. v. State*, 564 P.2d 30, 44-45 (Alaska 1977). Finally, while the wronged party in a breach of contract suit is entitled to the benefit of his bargain, he is not entitled to any more than his actual loss. *Murray E. Gildersleeve Logging Co. v. Northern Timber Corp.*, 670 P.2d 372, 378 (Alaska 1983).

Timber Co. contracted with *Logger* for the logging and production of 2 million board feet of timber for a total price of $900,000. The actual cost to *Timber Co.* for the logging and production of the 2 million board feet of timber was $1,000,000. There was an extra cost to *Timber Co.* of $100,000 and the loss was the natural consequence of *Logger's* breach of the contract. Further, given that *Timber Co.* ultimately received the $1,500,000 it was owed by *Paper Co.*, the profit earned was $500,000 rather than the $600,000 it would have earned had *Logger* fulfilled its contract. The damages to *Timber Co.* will be $100,000.