ESSAY QUESTION NO. 4

Answer this question in booklet No. 4

*Bobby Day Golf World (*hereafter *"BD"),* a national company in the business of constructing and operating golf courses, decided to construct and operate a 36-hole course in Anchorage, Alaska. Upon making their plans known, *BD* was approached by *Arctic Spring* (hereafter "*AS"),* a research and development company with expertise in designing drainage systems that greatly reduced down time on golf courses, thereby increasing profits. *AS* informed *BD* that it was a new company and that this could be the first project for which they designed the drainage system. After substantial negotiation, the parties came to terms and entered into a valid contract.

The contract called for the construction of a 36-hole course over a four-month period. According to the terms of the contract, *BD* agreed to pay *AS* $200,000 in four equal payments over the course of the project. In return, AS would provide the details of the *AS* drainage system design to *BD* and would consult with *BD* as the drainage system was constructed.

Approximately three months into the four-month project, *BD* obtained an additional piece of land adjacent to the course under construction and asked *AS* to extend their designs for the drainage system to accommodate an additional 9-hole course, stating that additional compensation for the new work would be provided. *AS* agreed to expand their drainage system design to cover the 9-hole course and to complete the project within the original four-month period if *BD* would increase the original contract amount by $50,000. *BD* did not respond, but *AS* continued to consult on the 9-hole course. When *AS* submitted its final invoice to *BD* for $100,000 rather than for $50,000 due to the increased cost of designing the drainage system to include the additional 9-hole course, *BD* refused to pay.

Unfortunately, this was *AS*'s first project and it was in desperate need of cash to fund additional projects and avoid complete financial collapse. When *BD* offered to settle the dispute for a final payment of $50,000, *AS* agreed. The parties signed a Settlement and Release Agreement that purported to settle "all disputes arising from Anchorage golf course project."

1. Discuss whether a valid contract was formed between *BD* and *AS* for the expansion of the drainage system design project to cover the 9-hole course.

2. Discuss whether *AS* has a legitimate basis for pursuing additional sums from *BD* arising from the golf course project, despite the execution of the Release Agreement.

GRADERS' GUIDE
*** * * QUESTION NO. 4 * * ***
CONTRACTS

1. **Discuss whether a valid contract was formed between *BD* and *AS* for the expansion of the drainage system design project to cover the 9-hole course**. (50 points).

The four elements of contract formation are: "an offer encompassing all essential terms, unequivocal acceptance by the offeree, consideration, and intent to be bound." *Wyatt v. Wyatt*, 65 P.3d 825, 828 (Alaska 2003) (quoting *Davis v. Dykman*, 938 P.2d 1002, 1006 (Alaska 1997)). Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only: .... (c) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept. *Brigdon v. Lamb*, 929 P.2d 1274
(Alaska 1997) (*citing* Restatement (Second) of Contracts § 69(1)).

[A] contract implied in fact arises under circumstances which, according to the ordinary course of dealing and common understanding of men, show a mutual intention to contract .... A contract is implied in fact where the intention is not manifested by direct or explicit words between the parties, but is to be gathered by implication or proper deduction from the conduct of the parties, language used or things done by them, or other pertinent circumstances attending the transaction. *Brigdon*, 929 P.2nd at 1278. "An election may be shown by promise or by conduct. Conduct basically will take one of two forms. One, where the innocent party continues his own performance after failure of condition ... the other where he allows the other party to continue his performance ...." *Id.*

BD offered to pay *AS* "additional compensation" in return for the design of the drainage system for the additional 9-hole course. *AS's* response may be interpreted as a counteroffer, agreeing to do the work for an additional $50,000. *BD* did not respond. Therefore, the basis for finding a contract must be the existence of an implied-in-fact contract.

AS should argue that it had an existing contract with *BD* that equated to $50,000 for every nine holes of course to which it provided drainage. *AS* had completed three-fourths of that work when the additional offer was made by *BD,* so a course of dealing had been established. *AS* should argue that the property for the 9-hole course was obtained by *BD* and that *AS* was asked to complete the project in return for additional compensation. *BD* also allowed *AS* to consult on the 9-hole course through completion of the project without addressing the price of the work. And *AS* should argue that it is common knowledge, and certainly would be apparent to *BD*, a national company in the

business of building golf courses, that the additional drainage required additional labor and materials that must be covered in the new contract to allow for the successful completion of the project. It is more likely than not that there was an implied-in-fact contract in fact created.

The examinee may also address the covenant of good faith and fair dealing, which exists in every contract and most certainly existed in the initial contract between the parties. By extension, such an obligation would have extended to the additional work that *AS* performed for *BD* on the new 9-hole course. This examination of the covenant of good faith and fair dealing contributes only slightly to the analysis regarding the implied-in-fact contract, provding some nominal support for its existence.

2. Discuss whether *AS* has a legitimate basis for pursuing additional sums from *BD* arising from the golf course project, despite the execution of the Settlement and Release Agreement. (50 points).

"[S]tipulations and settlements are favored in law because they simplify, shorten and settle litigation without taking up valuable court resources." *Murphy v. Murphy*, 812 P.2d 960, 965 (Alaska 1991) (internal quotations omitted). Generally, " '[s]ound judicial policy indicates that private settlements and stipulations between the parties are to be favored and should not be lightly set aside.' " *DeSalvo v. Bryant*, 42 P.3rd 525, 528 (Alaska 2002) (*citing Henash v. Ipalook*, 985 P.2d 442, 450 (Alaska 1999).

Settlement agreements and releases, like any other contracts, are susceptible to attack for mistake, fraud, misrepresentation, and duress. *Industrial Commercial Elec., Inc. v. McLees*, 101 P.3d 593, 597-98 (Alaska 2004); *Old Harbor Native Corp. v. Afognak Joint Venture*, 30 P.3d 101, 105 (Alaska 2001). There is no apparent basis in the instant case for claims of mistake, fraud or misrepresentation.

Fraud would require proof of a knowingly false statement by *BD* intended to induce *AS* to settle. *Industrial Commercial Elec., Inc. v. McLees*
101 P.3d at 600. While *BD* may have committed fraud, or at least may have misrepresented its intent to pay AS additional compensation for the work done on the additional 9-hole course, those misrepresentations were not involved in inducing *AS* to enter into the settlement agreement.

Duress generally requires a threat that arouses such a fear as to preclude a party from exercising free will and judgment or that "[the duress] must be such as would induce assent on the part of a brave person or a person of ordinary firmness." *Crane v. Crane*, 986 P.2d 881, 887 (Alaska 1999) (*citing* 25 Am.Jur.2d Duress and Undue Influence § 1 (1996)); *see also Mullins v. Oates*, 179 P.3d 930, 937 (Alaska 2008). Economic duress is slightly different.

Economic duress exists where "(1) one party involuntarily accepted the terms of another, (2) circumstances permitted no other alternative, and (3) such circumstances were the result of coercive acts of the other party." *Northern Fabrication Co., Inc. v. Unocal*, 980 P.2d 958, 960 (Alaska 1999); *Zeilinger v. SOHIO Alaska Petroleum Co.*, 823 P.2d 653, 657 (Alaska 1992) (*quoting Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Service Co.*, 584 P.2d 15 (Alaska 1978)). The third prong of the test embodies two requirements: (a) coercive acts on the part of the other party and (b) a causal link between the coercive acts and the circumstances of economic duress." *Zeilinger*, 823 P.2d at 658.

BD and *AS* entered into a Settlement and Release Agreement in which *BD* offered to pay *AS* $50,000 in exchange for full resolution of all disputes arising from the Anchorage golf course, including the dispute over the alleged losses *AS* sustained from the additional 9-hole course.

AS should argue that it involuntarily accepted the terms of the Settlement and Release Agreement in order to avoid the financial collapse of the company. This should satisfy the subjective component of the test.

AS should then argue that it had no alternative but to sign the Settlement and Release Agreement. It will be required to demonstrate that absent the immediate payment of the cash, albeit less than what *AS* claims it was owed, it would have failed. *BD* would argue that *AS* had other remedies it could have pursued – it could have filed suit against *BD* for breach of contract or failure to pay for the additional work requested by *BD* and performed by *AS* rather than accept unacceptable terms. Whether the time to recover through litigation was prohibitive will be a question for the jury.

The third element of the test requires that *AS* demonstrate that *BD* performed coercive acts that caused the duress. It is not necessary that the acts be criminal, or even actionable. Moral wrong is sufficient under *Zeilinger*, 823 P.2d at 658. *AS* may be able to demonstrate that *BD* satisfied the third element. *BD* offered to pay *AS* additional compensation in return for the additional work on the 9-hole course. *BD* allowed the work to continue to completion without responding to *AS's* counteroffer regarding the specific sum required for completion or to otherwise address the cost of the new work. When the project was completed, *BD* refused to pay. *AS* will argue that *BD* refused to pay because it hoped to negotiate a lower settlement than the fee requested by *AS* and that it was able to do so because it knew that *AS* was a new company relying on this, its first project, for revenue.

In light of judicial policy favoring settlements and the option of *AS* to file suit against *BD* for recovery rather than entering into the Settlement and Release Agreement, it is more likely than not that a court would uphold the Agreement and deny any additional recovery – but this is a relatively close call and may be argued either way.