

**October 2018 Baby Bar
Question 1 Contracts
Model Answer**

1. What claims will Becky make and what remedies will she request? Discuss.

Mutual Assent

A valid contract requires a showing of mutual assent and consideration.

Becky is a highly employable and well-known bourbon distiller. A year ago she was offered and accepted a job as Chief Distiller at Western Sky Distillery (Western Sky) at \$200,000 annually for a period of five years. All the essential terms of the contract evidenced mutual assent, namely, Becky's agreement to work as the Chief Distiller for a period of five years, in exchange for Western Sky agreeing to pay \$200,000 to Becky annually.

Therefore, mutual assent is present.

Consideration

Consideration is that which is bargained for and given in exchange for a return promise requiring a benefit and legal detriment to all parties.

Western Sky bargained for Becky to work for its distillery as the Chief Distiller for a period of five years. In return, Western Sky promised to pay an annual salary of \$200,000 to Becky. Becky's detriment was to work for the distillery and her benefit would be to receive an annual salary of \$200,000. Western Sky's detriment would be to pay an annual salary of \$200,000 and its benefit would be to receive Becky's services.

Therefore, valid consideration exists.

Express Condition

An express condition is explicitly stated in a contract and is where one party expressly conditions performance on the performance of the other party in the contract terms.

The agreement expressly stated that if her employment was terminated early, she will receive \$400,000 per year in damages for the remaining term of her contract.

Therefore, an express condition did exist in the contract.

Defense - Unconscionability

If a court finds, as a matter of law, that a contract or any clause of the contract was the result of unfair bargaining at the time the contract was made, the court may refuse to enforce the contract or it may strike out the oppressive term and enforce the remainder of the contract.

Becky's contract with Western Sky provided an annual salary of \$200,000, for five years, but provided that if her employment was terminated early, she will receive \$400,000 per year in damages for the remaining term of her contract.

Western Sky will argue that the contract provided that Becky would be compensated double her salary if terminated earlier than her five year agreed period. Hence, the clause in the contract was unfair. In addition, if she does find alternative employment she will be compensated even though she has obtained a new job.

However, because Western Sky was the one that offered Becky the job with the express provision about early termination, it assumed the consequences. It was under the understanding that hiring a highly employable bourbon distiller in order to have a successful business it needed to assure Becky of her employment. Thus, the provision was placed in the contract in order to assure her employment, and should be considered in determining the fairness or unfairness of its bargaining position.

The contract contained a clause which compensated Becky for early termination from her employment with Western Sky. The term in the contract acted as an assurance in order to obtain her services since she was a highly well-known bourbon distiller. Hence, the provision for early termination is not unreasonable, unfair, or oppressive.

The court would probably not strike the early termination provision and enforce the remainder of the contract.

Breach

A breach is an unjustified failure to perform which goes to the essence of the bargain.

There was a growing popularity of distilleries over the past 10 years that has led to a worldwide shortage of oak barrels, which are required to age and produce bourbon. Western Sky has ceased production of bourbon, and it has fired Becky for that reason. Western Sky's conduct is an unjustified failure to perform. In addition, the termination clause in the contract went to the essence of the bargain in that Becky would be employed for a term of five years, and if not, would be handsomely compensated.

Therefore, Western Sky's conduct of firing Becky and not paying her \$400,000 per year in damages is an unjustified failure to the essence of the contract constituting major breach.

General Damages

General damages are damages that flow from a breach. The non-breaching party is entitled to expectancy damages under the contract.

Since Western Sky is the breaching party, and pursuant to the terms of the contract, Becky should receive her annual salary as her general damages under the contract.

Avoidable Consequence Doctrine

The non-breaching party has a duty to mitigate damages. If the plaintiff does not do so, their damages will be reduced by the amount that might have been avoided by mitigation.

Becky has sought alternate employment, and was offered a full time job as a host of a television show about bourbon producers. She is being paid \$100,000 a year.

Western Sky will argue since the television show is about bourbon producers, thus, it is in the same field of industry, and should be considered like employment. Therefore Becky would be obligated to accept it, and this salary would reduce her damages.

Becky will contend that being a host of a television show, even if it is about bourbon, is a substantially different job than a Chief Distiller at a bourbon factory. Therefore, Becky would not be obligated to accept the job. Becky has accepted the job as host, because she was unable to find another job as a bourbon distiller.

Becky will argue that because she could not find an alternate job as a distiller, she should be paid the full measure of damages, \$200,000 a year. Becky has fulfilled her obligation under the avoidable consequence doctrine, and Western Sky's damages will likely be reduced by the amount of salary Becky is receiving. Hence, her damages are \$200,000 annually over the next four years.

Liquidated Damages

A liquidated damage is a provision in a contract that sets a fixed amount of damages to recover in the event of a breach since it would be extremely difficult to estimate the damage. The damages must be based on the anticipated harm and cannot be a penalty.

Under the terms of the Becky/Western Sky contract the provision provided that if her employment was terminated early, she will receive \$400,000 per year in damages for the remaining term of her contract. This provision is a liquidated damage clause since it specified the amount of damages recoverable for Western Sky's breach. However, under the circumstances, it does not appear that Becky's damages would be difficult to estimate given that the amount of her compensation under the contract was specified at \$200,000 per year. The parties could easily estimate the amount of lost income and other damages, if any, sustained by Becky in the event of Western Sky's breach of contract.

Therefore, the liquidated damages clause would be seen as a penalty and not awarded.

2. What defenses, if any, will Western Sky raise in its response to Becky's lawsuit? Discuss.

Implied-In-Law – Constructive Condition Precedent

A condition is a fact or event in which the happening or non-happening of either creates or extinguishes an absolute duty to perform.

Western Sky will argue that Becky must work as its Chief Distiller, an event that must happen to create its absolute duty to pay her \$200,000 annually. Since, Becky's termination occurred before Western Sky duty to pay arose, Becky's performance was a constructive condition precedent.

Therefore, a constructive condition precedent exists.

Excuse for performance - Impossibility

Impossibility of performance exists where it becomes objectively impossible to perform a condition.

Western Sky will argue that the growing popularity of distilleries over the past 10 years has led to a worldwide shortage of oak barrels; which are required to age and produce bourbon. The shortage will in fact persist for at least several years or more, until such time that the barrel manufacturers will have increased production of the oak barrels. Western Sky had to cease production of bourbon, and fired Becky for that reason. The shortage had made it objectively impossible for Western Sky to produce bourbon.

Becky will argue Western Sky is a distillery. She could work on other productions of alcohol that Western Sky produces. Since Western Sky can still manufacture and sell its alcohol it has the ability to have Becky work in another area and paying her salary is not objectively impossible.

However, Becky was hired as a well-known bourbon distiller and was paid based on her ability. Since there is a shortage of oak barrels that is required to age bourbon, Western Sky can't produce bourbon, thus, manufacturing bourbon, which is the reason why Western Sky hired Becky, is objectively impossible.

Therefore, the defense of impossibility is viable.

Excuse for performance - Frustration of Purpose

Due to an unforeseeable event, the value of contract, as contemplated by both parties, is totally destroyed.

Western Sky will argue that a worldwide shortage of oak barrels is an unforeseeable event that frustrates the purpose of the parties' to the contract. Since Becky was hired because of her well-known ability to produce bourbon, and the fact that oak barrels are not available to age the bourbon, does totally destroy the purpose of the contract between Western Sky and Becky. Thus, Western Sky's purpose for hiring Becky was frustrated.

Therefore, frustration of purpose is a valid defense.

Commercial Impracticability

The defense of commercial impracticability is where a contract is entered into between the parties and an event renders performance commercially impossible, the event was a basic assumption on which the contract was made and the adversely affected party did not assume the risk of that event occurring.

Western Sky will argue that the shortage of oak barrels made it impossible to age and produce bourbon. The shortage will last at least several years until barrel manufactures increase the manufacturing of the oak barrels. Therefore, since there is no other way to age the bourbon the shortage had made its performance commercially impossible. However, the shortage or non-shortage of oak barrels was not a basic assumption on which the contract was made. The contract between the parties was made in order to have Becky produce a quality bourdon. Neither party assumed the risk that Western Sky would be prevented from manufacturing bourdon.

Thus, commercial impracticability does not excuse Western Sky of its performance.

3. What will be the likely outcome of the case? Discuss.

As discussed above, it is likely that Becky will be successful in recovering her salary for the remainder of her employment term as expectation damages, plus any incidental or reliance damages, for the next four years. Hence, she will receive \$100,000 annually since she took the hosts job.

Western Sky is likely to prevail in barring recovery of the liquidated damages stipulated in the contract since it would be seen as a penalty.