

ANSWER TO QUESTION NO. 11

Carl made two promises to Paula in December 2011 in exchange for her agreement to manage his 2012 Congressional campaign: (A) to pay her a consulting fee of \$15,000 per month through the November 6, 2012 general election, and (B) to pay her \$8,000 per month throughout calendar year 2013. The question suggests the following issues:

(1) Can Paula bring suit now for payments that are not yet due?

(2) Is there consideration to support any unperformed part of the contract?

(3) Are Carl's promises enforceable in light of the statute of frauds?

(4) Is the contract severable so that one of Carl's promises can be enforced even if the statute renders the other unenforceable?

(5) To the degree that the contract is unenforceable because of the statute of frauds, is there a non-contractual theory that will afford Paula relief?

(6) Is Paula entitled to any damages or restitution, and how should they be measured?

The threshold question is whether a lawsuit would be premature before any of Carl's remaining payments to Paula are due. Carl has made a definite and unequivocal statement to Paula, the other party to the contract, that he cannot and will not perform the balance of the contract at the agreed time. This constitutes an anticipatory repudiation which may be treated as a current breach of the contract. *Paul v Bogle*, 193 Mich App 479, 493-494 (1992).

Some examinees may argue that if the breaching party's only remaining obligation is the payment of money, a repudiation does not give rise to a claim for the payment of installments not yet due. See Restatement 2d, Contracts, §243(3); *Jackson v American Can Co*, 485 F Supp 370, 375 (WD Mich 1980). Because Carl will not be going to Washington, all that remains for him to do under the contract is to pay Paula money. Credit is given to both the examinees who point out this limitation on the anticipatory

repudiation principle and those who do not, but state the general principle correctly.

Carl made oral promises of payment to Paula in exchange for her oral promise to give a particular performance: managing his campaign for as long as he was a candidate, a state of affairs that would end in early August if he did not win the primary. There was consideration to support this contract. Consideration is a legal detriment which has been bargained for in exchange for a promise. *Higgins v Monroe Evening News*, 404 Mich 1 (1978). A promise may be valid consideration of another's promise, as can a performance. *Smith v Thompson*, 250 Mich 302, 305 (1930); *General Motors Corp v Dept of Treasury*, 466 Mich 231, 239 (2002). There was thus a contract supported by consideration from the time the parties exchanged these promises in the form of an offer and acceptance in December 2011. Paula also incurred the detriment of foregoing other consulting opportunities. Beyond that, Paula fully performed her part of the contract until Carl's August 8, 2012 repudiation. The fact that there is no longer a campaign for her to work on does not detract from this.

But not every contract is enforceable. The Michigan statute of frauds, MCL 566.132(1), declares that certain contracts or promises are void unless they or a note or memorandum of the contract or promise "is in writing and signed with an authorized signature by the party to be charged [therewith]." One such category is an agreement "that, by its terms, is not to be performed within 1 year from the making of the agreement." MCL 566.132(1)(a). Here, no writing memorialized Carl's promises to make payments to Paula. One promise ended on November 6, 2012, less than one year from its making and thus outside the statute, while the other promise extended through December 2013, over two years from its making, and therefore was made unenforceable by the statute.

The question whether Paula can enforce the first promise raises an issue of severability. If Paula and Carl's understandings are treated as a single contract, the entire contract is unenforceable against Carl because his obligations cannot be performed within one year of its making. See Restatement 2d, Contracts, §147(3). But parts of a contract can sometimes be treated as severable, so that certain promises can be enforced as "outside" the statute of frauds even if other parts of the contract are "within" the statute and unenforceable. *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 537 (1991), citing *Cassidy v Kraft-Phenix Cheese Corp*, 285 Mich 426 (1938); 73 Am Jur 2d, Statute of Frauds, §523, p 153. Restatement 2d, Contracts, §147(1) and comment a, states that if the part of the contract that renders it subject to

the statute benefits only the party seeking enforcement (here, Paula), that party may agree to forego the "faulty" provision and enforce the rest. Under the Restatement, Paula could agree to forego the payments promised for 2013 and enforce Carl's promise to pay her \$15,000 per month from the August primary through the November general election. [NOTE: There appears to be no Michigan law applying this rather fine point.] An examinee might argue, more generally, that the ability to sever depends upon whether the consideration for the promises is divisible. *City of Lansing v Lansing Twp*, 356 Mich 641, 658 (1959). Here, Carl made two separate promises in exchange for Paula's promise of a single, indivisible consideration -- managing Carl's campaign as long as he was a candidate. Carl's assurance to Paula that he would provide her with an \$8,000 per month income stream in 2013 even if he lost was part of the offer that induced her to agree to provide him with management services. Under this analysis, the statute of frauds voids the entire contract and Paula cannot recover on a contract theory. Spotting the severability issue and providing a cogent answer is more important than which path an examinee chooses to take.

Another approach some examinees may propose is to apply the rule stated in Restatement 2d, Contracts, §130(2): "When one party to a contract has completed his performance, the one-year provision of the statute does not prevent enforcement of the promises of other parties." Now that Carl's campaign is over, Paula's performance is complete, and under this rule the statute would no longer prevent her from seeking to enforce the contract. Although Michigan does not follow this rule, *Ordon v Johnson*, 346 Mich 38, 43-44 (1956), credit will be given to those who apply this commonly recognized principle.

The foregoing approach based on Paula's full performance must be distinguished from the incorrect argument that Carl's "part performance" of his obligations takes the contract outside the statute. The doctrine of part performance is generally applied only to contracts involving the sale of land (or governed by the UCC), and Michigan has declined to extend it. *Dumas, supra*, at 540-541.]

Examinees should also address whether Carl's promises can be enforced under the doctrine of promissory estoppel. The elements of promissory estoppel -- drawing on Sections 139 and 90 of Restatement 2d, Contracts -- are: (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, (3) which in fact produced reliance or forbearance of that nature, (4) in circumstances such that the promise must be enforced if

injustice is to be avoided. If promissory estoppel can be applied, the first three elements are clearly met, and only the fourth is debatable. One could argue that sufficient "injustice" is being done to Paula to require full enforcement of Carl's promise about 2012 payments. After all, she finds herself in Michigan and unable to return to her Chicago home for almost five months and without three months of additional income that she was promised. It is difficult to argue convincingly that injustice can be avoided only by Carl's promise to pay Paula in 2013. She has adequate time before then to plan to restart her business and seek new engagements, and the sublease on her apartment expires at the end of 2012.

While some might suggest Paula can recover in *quantum meruit*, that theory is not the appropriate option because Carl paid Paula the standard rate for her services as long as she was rendering them.

NOTE: Michigan courts have been reluctant to apply promissory estoppel to enforce oral employment agreements. *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438 (1993). While the consulting arrangement between Carl and Paula is not on its face structured as an employment relationship, it is analogous.

What can Paula recover? For an examinee who has concluded that the entire contract is unenforceable under the statute of frauds and promissory estoppel does not apply, the correct answer is "nothing beyond what she has already received." An examinee who has concluded that the contract is severable and that Carl's promise to pay Paula's \$15,000 monthly fee through the November 2012 general election is enforceable, should conclude that Paula is entitled to receive expectation damages: the remaining three months of consulting fees at \$15,000 per month. Her loss on the sublet of her Chicago apartment and the cost of her rental in Michigan are incidental to her performing the contract and are not recoverable. That is also the correct approach for examinees who conclude that the 2012 payment promises must be fully enforced on an estoppel theory because Paula's extensive reliance makes enforcement necessary to avoid injustice. Because the remedy for promissory estoppel may be limited as justice requires, and because Michigan courts often say the doctrine must be applied cautiously, a more conservative and fully acceptable alternative is to conclude that, beyond payment for the services she rendered through the primary, Paula can recover only "reliance damages", i.e., her loss on subleasing her Chicago apartment, the cost of her apartment in Michigan, and her moving expenses.

Paula's duty to mitigate should also be discussed by examinees who conclude she can recover expectation damages. During the three months remaining until the November general election, candidates in

Michigan or elsewhere may want to make changes or additions to their staffs, and she should exercise reasonable diligence in seeking out other opportunities. And consulting work will be available in 2013 as well, though assignments may be harder to obtain.