

EXAMINER'S ANALYSIS OF QUESTION NO. 14

Validity of contract

Illegality

The contract provision calling for installation of Drain-Rite is void because it violates public policy. "[N]either law nor equity will enforce a contract . . . that is in violation of public policy." *Krause v Boraks*, 341 Mich 149, 155 (1954) (quotation marks omitted); see also *Allard v Allard*, 318 Mich App 583, 598 (2017) ("[C]ontracts in violation of public policy . . . are void." (quotation marks omitted)); *Peeples v City of Detroit*, 99 Mich App 285, 302 (1980) ("Contracts which are in contravention of public policy are unenforceable."). Public policy "is to be found in . . . statutes and when they have not directly spoken, then in the decisions of the courts" *Maids Int'l, Inc v Saunders, Inc*, 224 Mich App 508, 511 (1997); see also *Rory v Continental Ins Co*, 473 Mich 457, 471 (2005) ("In ascertaining the parameters of our public policy, we must look to policies . . . reflected in our state and federal constitutions, our statutes, and the common law.").

Here, a Michigan court declared that any agency contract provision requiring the use of Drain-Rite violates public policy. Consequently, the provision in the contract between the roofing company and the agency calling for the roofing company to replace gutters on clients' homes with Drain-Rite violates public policy. The provision is therefore void and unenforceable.

Severability

Although the Drain-Rite provision is void, it is severable from the rest of the contract, which remains enforceable. Under the doctrine of severability, "[a]n unlawful term in a contract is severable from the whole unless that term is central to the parties' agreement. Hence, the failure of a distinct part of a contract does not void valid, severable provisions." *Co of Ingham v Mich Co Rd Comm'n Self-Insurance Pool*, 329 Mich App 295, ____ (2019) (quotation marks, citations, and brackets omitted) [App Pndg]; see also *Prof Rehab Assocs v State Farm Mut Auto Ins Co*, 228 Mich App 167, 174 (1998). The Michigan Supreme Court has explained the severability analysis:

As a general rule, a contract is entire when, by its terms, nature and purpose, it contemplates that each and all of its parts are interdependent and common to one

another and to the consideration, and is severable when, in its nature and purpose, it is susceptible of division and apportionment.

The singleness or apportionability of the consideration appears to be the principal test. The question is ordinarily determined by inquiring whether the contract embraces one or more subject matters, whether the obligation is due at the same time to the same person, and whether the consideration is entire or apportioned.

Dumas v Auto Club Ins Ass'n, 437 Mich 521, 537-38 (1991) (quotation marks and citation omitted). "When the price is expressly apportioned by the contract . . . to each item to be performed, the contract will generally be held to be severable." *Id.* at 538 (citation and emphasis omitted) (finding severability because "[t]here is no problem apportioning the consideration," *Id.* at 539).

Here, the Drain-Rite provision is not central to the main purpose of the contract, which is to replace leaking roofs. The Drain-Rite provision and the roofing provisions address different subject matters and are supported by separate consideration. Consequently, the invalid Drain-Rite provision can be severed from the contract, and the remainder is enforceable.

Alternative Analysis

Some answers may argue that when the court declared Drain-Rite provisions to be in violation of public policy, the contract between the roofing company and the agency had already been signed or had already been performed. Alternative credit will be given to those answers therefore concluding that 1) the roofer is still liable under the contract because the law at the time of contracting governs; or 2) the roofer is liable for any work performed before the court ruling.

Third-party beneficiaries

"In Michigan, a person who is a nonparty to a contract may be entitled to sue to enforce the contract as a third-party beneficiary." *Farm Bureau Ins Co v TNT Equip, Inc*, 328 Mich App 667, 674 (2019). MCL 600.1405 states:

Any person for whose benefit a promise is made by way of contract . . . has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.

(1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person.

This statute "does not empower just any person who benefits from a contract to enforce it. Rather, it states that a person is a third-party beneficiary of a contract only when the promisor undertakes an obligation 'directly' to or for the person." *Shay v Aldrich*, 487 Mich 648, 663 (2010), quoting *Koenig v City of South Haven*, 460 Mich 667 (1999). Contracting parties must be "clearly aware that the scope of their contractual undertakings encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract." *Id.* at 664-665 "However . . . this Court has long held that the standard for determining whether a person is a third-party beneficiary is an objective standard and must be determined from the language of the contract only." *Id.* at 664.

Here, the purpose of the contract between the roofer and the agency is to benefit the agency's indigent clients. The contract explicitly requires the roofer to perform work on clients' homes and provide clients with a written guarantee of the work. The clients are thus intended beneficiaries of the contract. As a client whose roof was replaced pursuant to the contract, then, Hans is an intended beneficiary of the contract and can sue to enforce it.

Franz, in contrast, is only an incidental beneficiary. He has no ownership interest in the house but is merely a visitor who derives benefits from the contract only because Hans allows him to stay there. "Only intended beneficiaries, not incidental beneficiaries, may enforce a contract under 1405." *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 429 (2003); see also *Kisiel v Holz*, 272 Mich App 168, 170-71 (2006) ("A third person cannot maintain an action on a simple contract merely because he or she would receive a benefit from its performance or would be injured by its breach."). Because he is merely an incidental beneficiary, Franz cannot sue to enforce the contract.