

EXAMINERS' ANALYSIS OF QUESTION NO. 7

1. Larry's responses to Douglas:

This question raises two issues: promissory estoppel and anticipatory repudiation/breach.

Promissory estoppel

Douglas claims that there was no enforceable agreement to give Larry a ride. It is true that no contract was formed, as Larry offered no consideration in exchange for Douglas's promise to give him a ride. (Alternatively, no contract was formed because a material term—price—was missing.) However, Douglas's promise may be enforceable under the doctrine of promissory estoppel.

"Promissory estoppel . . . substitutes for consideration in a case where there are no mutual promises, enabling the promisee to assert a separate claim against the promisor. . . ." *Huhtala v Travelers Ins Co*, 401 Mich 118, 133 (1977). Under the doctrine of promissory estoppel, "'A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee . . . and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.'" *State Bank of Standish v Curry*, 442 Mich 76, 83 (1993) (footnote omitted) (quoting Restatement (Second) of Contracts §90[1] [1981]). Consequently, "[t]he elements of promissory estoppel 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, and (4) in circumstances such that the promise must be enforced if injustice is to be avoided." *Schmidt v Bretzlaff*, 208 Mich App 376, 378-79 (1995), *appeal denied*, 451 Mich 931 (1996). Each of these elements will be examined.

(1) Promise: "'A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.'" *State Bank of Standish*, 442 Mich at 85 (footnote omitted) (quoting Restatement, *supra*, §2). "[T]he sine qua non

of the theory of promissory estoppel is that the promise be clear and definite. . . ." *Id.* "To determine the existence and scope of a promise, we look to the words and actions of the transaction as well as the nature of the relationship between the parties and the circumstances surrounding their actions." *Id.* at 86. Here, Larry stated that without a ride, he would need to purchase an airline ticket. In response, Douglas "promised he would give Larry a ride." Although no price was agreed upon, Douglas's statement was more than merely an "expression . . . made in the course of preliminary negotiations when material terms of the agreement are lacking. . . ." *Id.* at 86 (internal quotation marks omitted). It was an explicit, "clear and definite" promise.

(2) Reasonably foreseeable reliance: "[T]he reliance interest protected by [Restatement §90] is *reasonable reliance*, and reliance is reasonable only if it is induced by an actual promise." *Id.* at 84 (internal quotation marks omitted). Here, Larry made clear that he would have to buy an airline ticket if Douglas did not give him a ride. In response, Douglas made "an actual promise" to give Larry a ride. Under these circumstances, Douglas "should reasonably have expected to induce action of a definite and substantial character on the part of [Larry]," *Schmidt*, 208 Mich App at 378--namely, that Larry would cancel plans to purchase an airline ticket.

(3) Actual reliance: The facts make clear that "Larry cancelled plans to purchase the ticket."

(4) , Avoidance of injustice: "[P]laintiff must also show that enforcement of the promises are necessary to avoid injustice." *Hawkins v Peoples Fed Sav & Loan Ass'n*, 155 Mich App 237, 244 (1986). Under the facts of this case, the best conclusion is that enforcement of Douglas's promise is necessary to avoid injustice. Douglas initiated his interaction with Larry, knowing that Larry intended to fly to Florida; Douglas assured Larry that they could work out a deal that would save Larry money; and in response to Larry's request for assurance of a ride and Larry's clear indication that the ride would be in place of the flight, Douglas "promised" to give Larry a ride.

Moreover, Larry's reliance on Douglas's promise caused Larry damages. Under promissory estoppel, "The guiding principle in determining an appropriate measure of damages is to

ensure that the promisee is compensated for the loss suffered to the extent of the promisee's reliance." *Joerger v Gordon Food Serv, Inc*, 224 Mich App 167, 173-74 (1997). Although the question does not ask examinees to calculate Larry's damages, the fact that he suffered damages is relevant in determining whether enforcement of the promise is necessary to avoid injustice. Because of Douglas's promise and subsequent anticipatory repudiation (discussed below), Larry had to pay \$500 for his airline ticket--twice the price he would have had to pay had he not relied on Larry's promise.

Anticipatory repudiation/breach

Douglas claims that if he had an enforceable agreement with Larry, Larry breached the agreement by taking the flight. However, by repudiating the agreement the night before the drive, Douglas was the party who breached, giving Larry a claim for damages.

"Under the doctrine of anticipatory breach, if a party to a contract, prior to the time of performance, unequivocally declares the intent not to perform, the innocent party has the option to either sue immediately for the breach of contract or wait until the time of performance." *Paul v Bogle*, 193 Mich App 479, 493 (1992) (internal quotation marks omitted); see also *Brauer v Hobbs*, 151 Mich App 769, 776 (1986) (same). "Regarding oral repudiation, 'a party's language must be sufficiently positive to be reasonably interpreted to mean that the party will not or cannot perform. . . .'" *Paul v Bogle*, 193 Mich App at 494 (quoting Restatement (Second) Contracts §250 cmt. b); see also *Washburn v Michailoff*, 240 Mich App 669, 673-74 (2000) ("[I]n order to invoke the doctrine, it must be demonstrated that a party to a contract unequivocally declared the intent not to perform."). "[U]nder Michigan law one party's complete repudiation of a contract is enough to establish breach." *Gardner v Heartland Indus Partners, LP*, 715 F 3d 609, 614 (6th Cir 2013).

"In order for a statement or an act to be a repudiation, the threatened breach must be of sufficient gravity that, if the breach actually occurred, it would of itself give the obligee a claim for damages for total breach." Restatement §250, *supra*, at cmt. d. "It is a fundamental rule that a party may cease performance under a contract when the other party is in material

anticipatory breach." *Midfield Concession Enters, Inc v Areas USA, Inc*, 2015 WL 5472286, at *9 (ED Mich Sept 17, 2015). See also *Franconia Assocs v United States*, 536 US 129, 143 (2002) ("[A] repudiation ripens into a breach prior to the time for performance . . . if the promisee elects to treat it as such." [Internal quotation marks omitted.]); *D & S Mach Prods, Inc v Thyssenkrupp Bilstein of America, Inc*, 434 Fed App'x 446, 450 (6th Cir 2011) (same).

Here, the night before the time of performance, Douglas "told Larry he was canceling the trip." His repudiation was unequivocal--he did not, for example, merely tell Larry he was *thinking* of canceling, or that he *might* cancel in the morning if the weather was bad enough. Douglas's statement was of sufficient gravity to constitute a repudiation because a cancellation of the trip, if it occurred, would have given Larry a claim for damages for total breach. Larry therefore had the option to treat Douglas's repudiation as a breach of the agreement and to cease his own performance under the agreement.

2. Douglas's claim against Nina

This question raises two issues: condition precedent and waiver of condition.

Condition precedent

"[P]arties to a contract may by specific provision . . . make performance by one party a condition precedent to liability on the part of the other. . . ." *Knox v Knox*, 337 Mich 109, 117 (1953). "A condition precedent is a fact or event which the parties intend must exist or take place before there is a right to performance. . . . If the condition is not fulfilled, the right to enforce the contract does not come into existence. Whether a provision in a contract is a condition the non-fulfillment of which excuses performance depends upon the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in the light of all the surrounding circumstances when they executed the contract." *Id.* at 118 (internal quotation marks and citations omitted). See also *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 411 (2002) ("A 'condition precedent' is a condition that must be met by one party before the other party is obligated to perform. . . .")

The circumstances of this case make clear that Douglas and Nina agreed to a condition precedent: Nina's obligation to pay \$50 for a ride was conditioned on Douglas's replacing the bald tire on his car prior to the trip. Because Douglas never replaced the tire, the condition was never fulfilled. Consequently, absent Nina's waiver (discussed below), Douglas's right to enforce the contract would not have come into existence, and Nina would not have been obligated to perform by paying Douglas \$50.

Waiver of condition

"Where the promisor himself . . . waives the performance" of a condition precedent, "the performance of a condition precedent is discharged or excused, and the conditional promise [is] made an absolute one. . . ." *Mehling v Evening News Ass'n*, 374 Mich 349, 352 (1965). Here, Nina waived performance of the condition precedent by stating that the bald tire "won't be a problem" and proceeding to ride with Douglas. Nina's statement and actions discharged the condition precedent, making her promise to pay \$50 for a ride absolute. Consequently, a court should hold that Nina owes Douglas \$50.

Quantum Meruit/Unjust Enrichment

Alternatively, one could conclude that no contract was formed because Douglas failed to satisfy the condition. In that case, Nina could nevertheless be required to pay Douglas under an equitable theory of quantum meruit, unjust enrichment, quasi-contract or implied contract. "Even though no contract may exist between two parties, under the equitable doctrine of unjust enrichment, a person who has been unjustly enriched at the expense of another is required to make restitution to the other. The remedy is one by which the law sometimes indulges in the fiction of a quasi or constructive contract, with an implied obligation to pay for benefits received to ensure that exact justice is obtained." *Michigan Educ Employees Mut Ins Co v Morris*, 460 Mich 180, 198 (1999) (internal quotation marks, brackets and citations omitted); *see also Kammer Asphalt Paving Co v E China Twp Sch*, 443 Mich 176, 185-86 (1993) (same).