

## QUESTION 4

Travelco ran a promotional advertisement which included a contest, promising to fly the contest winner to Scotland for a one-week vacation. Travelco's advertisement stated: "The winner's name will be picked at random from the telephone book for this trip to 'Golfer's Heaven.' If you're in the book, you will be eligible for this dream vacation!"

After reading Travelco's advertisement, Polly had the telephone company change her unlisted number to a listed one just in time for it to appear in the telephone book that Travelco used to select the winner. Luckily for Polly, her name was picked, and Travelco notified her. That night Polly celebrated her good fortune by buying and drinking an expensive bottle of champagne.

The next day Polly bought new luggage and costly new golfing clothes for the trip. When her boss refused to give her a week's unpaid leave so she could take the trip, she quit, thinking that she could look for a new job when she returned from Scotland.

After it was too late for Polly to retract her job resignation, Travelco advised her that it was no longer financially able to award the free trip that it had promised.

Polly sues for breach of contract and seeks to recover damages for the following: (1) cost of listing her telephone number; (2) the champagne; (3) the luggage and clothing; (4) loss of her job; and (5) the value of the trip to Scotland.

1. What defenses should Travelco assert on the merits of Polly's breach of contract claim, and what is the likely outcome? Discuss.

2. Which items of damages, if any, is Polly likely to recover? Discuss.

### ANSWER A TO ESSAY QUESTION 4

1. What defenses should Travelco assert on the merits of P's breach of contract claim, and what is the likely outcome?

First, Travelco should defend on the grounds that no valid contract was formed.

Formation – Offer, acceptance, consideration.

First, Travelco ("T") will argue that the promotional ad was not an offer at all. Usually, ads are a mere invitation to deal; an offer requires, on the other hand, a manifestation of an intent to commit, communication, and definite terms—ads don't usually show an intent to commit. However, this ad could be construed as an offer to enter into a unilateral contract ("K")—it is like a "first come, first served" ad—where even if the offeree is not named, there can still be a binding offer; here, the language you will be eligible if you're in the book expresses enough intent to be bound for the ad to constitute an offer.

Next, T should argue that even if they made an offer, offers are generally revocable until accepted and that T validly revoked. Offers are revocable before acceptance unless supported by consideration; also, in a unilateral K, which is an offer that can only be accepted by performance, once performance is begun the offer is to be held open for a reasonable time. T's argument here will probably fail, because T notified Polly ("P") before revoking the offer, so P probably had already accepted.

Consideration

T should argue that there was no contract because there was no consideration. Contracts require some mutuality of obligation, a bargained for exchange, to be enforceable. Some courts require a bargained for legal detriment, and others allow a bargained for benefit. T will argue that the ad was a gratuitous promise, and that P cannot enforce against T because P was not mutually bound—P did not give up anything. P may argue that getting listed in the phone book was consideration, but this is not a good argument because that did not confer any benefit on Travelco (unless Travelco owns the phone book company...). In fact, there is no consideration supporting this agreement because P is not bound to do or give up anything.

### Promissory Estoppel/Detrimental Reliance

If T defends on the grounds of no enforceable contract, T will have to defend against P's claim of detrimental reliance. Even when an agreement also lacks consideration, it may still be enforceable if P foreseeably and reasonably detrimentally relied on the agreement. Here, P did detrimentally rely — she spent money by buying new luggage and clothes, and quitting her job, after being notified by T she had won.

T will argue that P's reliance was unforeseeable and unreasonable. However, things like buying luggage and clothes, for a vacation you have won, is reasonable, and T should have foreseen P's change in position in reliance on T's notification she had won the trip.

T will correctly argue that P's quitting her job was not foreseeable (see below); but because the luggage, clothes, champagne were foreseeable, P can enforce the contracts, and T will raise this in the damages phase.

### Statute of Frauds

The facts don't indicate whether the contract was in writing; but regardless, SOF is not a good defense to formation because this agreement, (not for the sale of goods, can be performed within one year...) is not required to be in writing. Also, P's reliance would wipe out this defense.

### Impossibility

T will argue that they are excused from performance by impossibility. This is judged from an objective standard, and applies when because of unforeseen events judged at formation, there is truly no way at all that T could perform. T is no longer financially able to perform. However, mere difficulty in paying is unlikely to rise to the level of impossibility so this defense is unlikely to work.

### Impracticability

This defense applies where circumstances unforeseeable at formation would cause T severe economic hardship if T had to perform. Here, there is no indication how severe the hardship would be to T; also, the short time between the ad and breach make it look like T should have foreseen financial difficulty.

### Frustration of Purpose

This applies where changed circumstances unforeseeable at formation completely wipe out the purpose, known to both parties, of the contract. This defense will not work for T, because P still wants a trip; it has merely become financially difficult/impossible for T to pay.

### Mistake

T may try to argue their unilateral mistake in their solvency should void the contract. However, unilateral mistake is not a good defense unless P knew of T's mistake, where here, P did not.

### Good Faith

Because it appears that T's breach may be in bad faith—that they placed the ad to drum up business, never expecting to award the trip—they may have to defend on good faith—this will not relieve them of their underlying obligations, however.

Therefore, T is liable because their K became enforceable on P's foreseeable detrimental reliance; or because there was a valid unilateral contract supported by P's putting her name in the telephone book.

## 2. Damages

Generally, for breach of K, P will be entitled to her expectancy—the benefit of the bargain—plus any consequential not unduly speculative reasonably foreseeable to T. Punitive damages are generally disallowed in breach of K.

(1) The cost of listing her phone number:

This took place before any K was formed, and may even be viewed as P's consideration for the deal. There was no K until P actually won the trip, so she won't collect this.

(2) The champagne:

P will argue that the cost of the champagne is recoverable as a consequential—it was not part of the K, but it was foreseeable that some one would buy champagne after winning—basically, she will argue reliance damages.

T will argue that buying costly champagne was unforeseeable, thus not recoverable.

P will recover if the court takes a reliance view, but possibly not on a benefit-of-the bargain view.

Probably she will recover because champagne is foreseeable.

### (3) Luggage and Clothing

P and T will make the same arguments as above; the luggage was probably a foreseeable consequential, but the clothes may not have been, if they were too “costly”.

### (4) Loss of her Job

T will not be liable for the loss of P’s job, because under either a reliance or expectancy theory, it was unreasonable and unforeseeable that P would quit her job just to take a vacation. Also, P would have a duty to mitigate, by searching for comparable employment, which she probably will be able to find, since she thought she could look for a new job when she returned.

### (5) Value of Trip

If the court takes a pure reliance approach, based on promissory estoppel, P will not be awarded the cost of the trip.

But under the standard breach of K expectancy, which is the standard measure of K damages, P is entitled to what she would have gotten absent T’s breach, which is the value of the trip.

Note that restitutionary damages are not available, because T has not been unjustly enriched.

## ANSWER B TO ESSAY QUESTION 4

### TRAVELCO'S DEFENSES

#### No Valid Contract was Formed: Lack of Consideration, Promissory Estoppel

The first defense that Travelco will assert is that there is no valid contract for them to breach. The issue is whether there was consideration for Travelco's promised prize. For a valid contract to form, there must be a bargained for exchange. The court will not look into the sufficiency of the consideration, whether it was a fair exchange, only if there was some legal detriment exchanged by the parties. Here, Travelco will assert that they made a gratuitous promise to award a travel prize at random to someone listed in the phone book. The winner did not have to give anything in exchange for the promise, therefore there was no consideration given by the winner for the promised prize. Without consideration, Travelco will assert that there was not valid contract, and therefore they could not be in breach of the contract.

Polly will respond with two arguments. First, she will try to assert that being listed in the phone book was the consideration required. The Travelco prize stated that a person must be listed in the phone book to be eligible. Polly took the step of changing her unlisted number to a listed one in order to qualify for the contest. While this is not a significant legal detriment on Polly's part, she was not required to list her number, and therefore it would qualify as consideration. As mentioned, the court will not examine the amount of consideration. Travelco will respond that there was no bargained for exchange because the advertisement was not asking for persons to be listed in the phone book in exchange for the prize. Had the advertisement been run by the phone company, the situation may be characterized as an exchange. However, here the advertisement was run by what appears to be a travel agency. Therefore, it appears that Travelco has the better argument, and there was no bargained for exchange. Without the exchange, lack of consideration means that no valid contract was formed unless there is a consideration substitute.

Polly's second argument is that even though there was no consideration for the promise, she can claim contract rights by promissory estoppel. Here, the issue is whether Polly detrimentally relied on Travelco's promise to award a trip in a reasonable matter that would make it unjust for Travelco not to honor their promise. Polly can assert that she detrimentally relied on the promise in several ways. First, she listed her number in the phone book. Polly will claim that

changing her number from unlisted to listed was a detrimental reliance. The detriment is that she will now be more likely to receive unwanted phone calls. Her second claim is that purchase of champagne. Her reliance will be the cost of the champagne. Third, she purchased golf clothes and luggage. Again, the lost purchase price is her reliance. Finally, she quit her job. Clearly this is a detrimental reliance.

Travelco will respond that the changing of the phone number is not sufficient because it was done before the awarding of the prize, not in response to it. And even if it was in response to their ad it was not a foreseeable result of running the ad and it is not a sufficient detriment to require equity to award a week long trip. They will assert the same argument concerning the bottle of champagne, clothes, luggage and quitting the job: not a foreseeable response, and/or it is not sufficient to warrant requiring that they comply with their promise.

The court should find that there was sufficient foreseeable detrimental reliance to warrant enforcement of the promise by promissory estoppel. While Travelco may be right concerning the listing of the phone number, the actions taken by Polly after the prize was awarded are sufficient. It is clearly foreseeable that someone would celebrate winning a prize as well as purchase clothing and luggage for the trip. Whether this is sufficient to warrant equitable enforcement of the promise depends on the cost of the trip and the price of the purchased items. It appears to be sufficient. The quitting of the job will not be considered because it is not a foreseeable response to winning a 1 week trip. However, given Polly's other actions, the promise should be enforced by promissory estoppel.

### Impossibility

Travelco's next defense will be that they no longer able to perform their promise because they are not financially able to do so. Whether this excuse will be accepted depends on whether there is true impossibility, or if it is simply financially difficult. If in fact Travelco has gone broke or will be forced into bankruptcy in awarding the trip, they may be excused. However, this seems unlikely, and the court will probably reject this claim.

### POLLY'S DAMAGES RECOVERY

The purpose of damages is to put the plaintiff in the position they would have been in had the other party not breached. Damages include the compensatory,

as well as incidental and consequential damages. Consequential damages must be foreseeable by the party at the time the contract was formed. Punitive damages are not typically awarded in contract cases unless the breach can be characterized as a tort (e.g. fraud or misrepresentation) and then punitive damages may be appropriate if the breach was intentional.

### Phone Listing

Polly wishes to claim the cost of listing her number in the phone book. The question is whether this cost is something that Polly would have had to bear had Travelco performed as promised, because listing her number was not in response to the promised prize, but was instead a cost that Polly had to incur to be eligible, she should not recover this cost. If the court awards this cost, Travelco will argue that this is a cost Polly would have borne, and should not be recovered if she is awarded the value of the trip. (See below).

### Champagne

Here, the question is whether that purchase of an expensive bottle of champagne is a foreseeable response to the awarding of the prize. It appears to be a reasonable response, since it could be expected that a person would celebrate. Therefore, Polly should recover this cost. Travelco will argue that this is a cost Polly would have borne, and should not be recovered if she is awarded the value of the trip. (See below).

### Luggage, Clothing

As with the champagne, this is a foreseeable cost that would be incurred in response to the awarding of the prize, and therefore will be recovered as a consequential damage. Travelco will argue that this is a cost Polly would have borne, and should not be recovered if she is awarded the value of trip. (See below).

### Loss of Job

Travelco will argue that this is not reasonable cost in response to the awarding of a 1 week vacation. They will claim that at the time they awarded the prize, they could not have foreseen that someone would quit their job to take a one week vacation. Polly will respond that it is a foreseeable response, and therefore she should recover as a consequential damage. The court is likely to agree with



Travelco, that this is not a foreseeable result of the promise of the vacation. Therefore, Polly should not be able to recover damages for the loss of her job.

### The Price of the Vacation

Here, Polly will argue that she should be awarded the cost of the promised vacation. This is the purpose of compensatory damages, to put Polly in the position she would have been in had Travelco not breached. The court will therefore award Polly the value of the vacation. Because money damages are sufficient in this case, and there is no indication that Polly sought specific performance anyway, the court will not force Travelco to actually award the trip.

Travelco will try to argue that because Polly is being awarded the value of the trip, she should not be awarded damages for the phone, champagne, clothes, or luggage. To award these damages and the trip would put Polly in a better position than she would have been in had Travelco performed. Had Travelco awarded the trip as promised, the cost of these items would have been borne by Polly, not Travelco. Therefore, Polly should either be able to recover the value of the trip and not these other damages, or alternatively, Polly should recover these damages and not the trip. The latter solution would put Polly in the position she would have been in before the promise was made (except for the job, which is not recoverable because it was not reasonable or foreseeable).

The court should find Travelco's argument persuasive. Therefore it will award Polly only the value of the trip, or alternatively, it will award Polly damages for the champagne, luggage, clothing, and possibly the phone listing.