

## Question 1

Percy and Daria entered into a valid written contract for Percy to design and install landscaping for an exclusive housing development that Daria owned. Percy agreed to perform the work for \$15,000, payable upon completion. Percy estimated that he would work approximately 100 hours a month on the project and would complete the project in three months. His usual hourly fee was \$100, but he agreed to reduce his fee because Daria agreed to let him photograph the entire landscaping project for an article he planned to propose to *Beautiful Yards and Gardens* magazine. He anticipated that publicity from the article would more than compensate him for his reduced fee.

Percy completed two months' work on the project when Daria unjustifiably repudiated the contract. He secured a different project with Stuart in the third month, which paid him \$1,500 and took 15 hours to complete. He could have completed Daria's project at the same time.

At the time Daria unjustifiably repudiated the contract, Percy was negotiating with Tammy to landscape her property for \$30,000. Once Tammy learned what had happened, she stopped negotiation.

Percy has sued Daria. Ideally, he would like to finish the project with her.

What remedy or remedies may Percy reasonably seek and what is the likely outcome? Discuss.

## QUESTION 1: SELECTED ANSWER A

### Contract Law - Common Law

In contract law, the common law governs service contracts or land sale contracts, and the UCC governs the sale of goods. This is relevant because there are certain differences in remedies between the two areas of law, and certain remedies that are specific to the UCC.

This was a service contract, because Percy was to perform the service of landscaping the yard. Therefore, the common law and its remedies apply, which will be discussed below.

### Breach Of Contract and a Valid Contract

A breach of contract claim requires there be 1) a valid contract, 2) a breach, and 3) damages. The problem says they entered a valid written contract, so there is no issue there.

### Breach - Anticipatory Repudiation

Anticipatory repudiation occurs when a party clearly and unequivocally communicates or manifests that it will not perform its duties on the contract. When there is an anticipatory repudiation, the other party may treat the repudiation as a breach or ignore it and demand performance until the original performance was due. When one party has entirely performed before the agreed upon date, and the other party repudiates by refusing to pay - i.e. the only duty remaining is for one party to pay - the non-breaching party may not sue for damages until the original agreed upon date.

Here, Daria clearly manifested that she would not pay, and the problem says it was unjustifiable. Percy can take this as a breach of the contract. Also, Percy had not completed performance and so there are more duties due than simply one party paying.

Therefore, Percy may bring a breach of contract claim for any resulting damages, discussed below.

### **Monetary Damages**

The general and presumed damages in contract law are monetary damages, with seek to compensate the non-breaching party with money. In certain situations, which will be discussed below, equitable remedies such as specific performance will be granted. But the default is damages, so these will be discussed first.

### **Expectation Damages**

The default contract remedy is expectations damages. Expectation damages seek to place the non-breaching party in the same position he or she would have been in had the breaching party performed. Said another way, expectation damages seek to give the non-breaching party the benefit of its initial bargain. The general formula for expectation damages is the difference amount of price or the amount to be paid for a service or good under the contract and the amount of replacing (the market price) it, plus any incidental damages, plus any foreseeable consequential damages, less any amount saved by the non-breaching party.

Here, the general damages to which Percy would be entitled include the amount of money he stood to earn under the contract (\$15,000) less the amount he could get paid for replacement work. There is a tricky issue regarding the magazine spread in Beautiful Yards and Gardens, because Percy can possibly argue that the value of that was at least \$15,000, and so his total expectation was \$30,000, and therefore if the court does not grant specific performance (see below), it should award him expectation damages of \$30,000 minus any replacement services he provides and any amount he saves. This is because Percy would have completed 300 total hours of work (100 hours a month X 3 months) and he would normally charge \$100 for each hour (300 X 100 = \$30,000). Daria might argue that he only expected to make \$15,000 and so that should be the amount from which to measure Percy's expectation damages.

Because the initial contract amount was only for \$15,000, Daria has a strong argument that that amount was the only amount Percy could reasonably have expected to make. In the event the specific performance is not granted, and therefore Percy does not get the added publicity, it will be difficult for him to claim he expected to earn more than \$15,000 and so arguing for his traditional hourly rate will probably fail. If he wants to collect more in the absence of specific performance, he could possibly argue under a restitution theory.

### Consequential Damages: Lost Contract with Tammy

Consequential damages are damages that are unique to an individual party (i.e. they are not those that are clearly within the contract, such as the contract price) but that are the natural and foreseeable consequences of a contract breach or are contemplated by the parties when contracting. Importantly, to collect consequential damages, the damages must be proven with reasonable certainty and they must be foreseeable.

Here, Percy will argue that his lost contract with Tammy was a consequence of Daria repudiating their contract, and therefore the consequential damages of that \$30,000 contract should be included in his damages with Daria. He will point to the timing, and that he and Tammy were negotiating a deal but Tammy stopped upon learning that Percy's contract with Daria ended. Percy might argue that Tammy stopped negotiating because the broken contract with Daria gave Tammy reservations about contracting with Percy.

Percy's consequential damages argument is subject to many counter-arguments by Daria, which will probably win out.

### *Causation of Breach*

First, there is a causation issue. Daria can convincingly argue there is no proof that her repudiation even caused Tammy to stop negotiating. Therefore, it might not even be a "consequence" of her repudiation and should not be included in Percy's damages claim.

### *Certainty*

Tammy can argue that there is no certain amount of the consequential damages with Tammy. They were negotiating over a price of \$30,000, but that was not the final, agreed upon price, which could have been less. Further, there might not have been a contract at all. Therefore, there is no reasonable certainty that but for Daria's repudiation, Percy would have earned \$30,000 from Tammy.

### *Foreseeability*

Lastly, even if Daria's repudiation caused Tammy to cease negotiating, Daria can argue it was not a natural and foreseeable consequence of her repudiation, nor did Daria contemplate such a consequence when entering the contract. Daria repudiated the contract unilaterally. She never alleged that Percy was doing a bad job, and she has done nothing further to impugn his business reputation. While it is arguably foreseeable that someone canceling a contract might make the other party look bad, it is likely not a natural consequence of one individual's repudiation to cause another party to back out of a contract.

### *Disposition*

Percy should not be able to collect consequential damages from the lost deal with Tammy in his claims against Daria.

### Incidental Damages

Incidental damages are naturally arising damages that a party occurs when trying to fix the situation after another party breaches. Incidental damages include costs such as trying to renegotiate other deals. Here, it is unclear any specific incidental damages Percy may collect, but he will be able to collect any that do exist.

### **Mitigation and contract with Stuart**

A non-breaching party has a duty to mitigate damages by seeking reasonable replacements or substitutes for goods or services. Thus, in his third month on the job, Percy had a duty to mitigate by finding replacement work. Any damages Percy collects

from Daria must be reduced by what Percy earns from these mitigating contracts, and if he does not mitigate, the law will treat Percy as if he did and not allow him to collect if there were reasonable replacements for his contract with Daria.

Here, Percy entered into a contract with Stuart to complete 15 hours of work for \$1500 in the third month. Daria will argue that this was mitigation and therefore that any damages he collects from her should be reduced by this amount as adequate cover.

### Lost-Volume Seller

A party does not need to reduce expectation damages by the cost of cover or replacement performance if the party is a lost-volume seller. Generally, this applies to sellers of goods who have enough supplies to meet the demands of their customers, such that the other party breaching does not just allow the seller to sell to a new party, but the breaching party merely constitutes a lost sale the seller could have met anyways. If a party is a lost volume seller, cover or replacement service will not reduce its damages.

Here, Percy was not a seller of goods, but he could have performed the contract for Daria and the contract for Stuart. Thus, the contract for Stuart makes Percy look like a lost volume seller because he could've performed both and thus could've made the \$15,000 from Daria and the \$1500 from Stuart. Therefore, the \$1500 from Stuart should not count as mitigation and should not reduce any damages he collects from Daria.

### Other Mitigation

There are no specific facts about seeking cover, but the fact he negotiated a deal with Stuart and was attempting to enter a deal with Tammy suggests he was looking for adequate replacements. Thus, Percy has met his duty to mitigate and his damages from Daria should not be reduced.

### Disposition of Expectation Damages

He is entitled to the \$15,000 regardless of specific performance (see below) because he expected to make that, but not the lost contract with Tammy and not reduced by the contract with Stuart. This should be increased by incidental damages and decreased by any amount he saves by not having to further perform. If he does not get specific performance, he might recover extra in restitutionary damages for the benefit conferred on Daria (See below).

### Reliance

Reliance damages seek to place the non-breaching party in the position he or she would have been in if the party had never entered into a contract. Thus, reliance damages generally consist of reasonable expenses the non-breaching party has incurred in preparing and partially performing the contract.

Here, there are no clear reliance damages amounts, but Percy could collect any amounts he's spent on tools specifically for Daria or other related expenses.

However, these are likely to be less than the \$15,000 expectation damages, and a party may not collect both expectation and reliance damages, so Percy will likely not try and collect these damages.

### Restitution

Restitutionary damages seek to compensate the non-breaching party for benefits he has conferred on the breaching party in order to prevent unjust enrichment by the breaching party. In some circumstances a breaching party may even be able to collect restitutionary damages if he has substantially performed and thus conferred a substantial benefit on the other party. Restitutionary damages may take the form of either the amount of improvement the breaching party has enjoyed, or the value of the services provided by the non-breaching party. Courts have equitable power to choose one or the other, and will consider factors such as the blameworthiness of the parties.

Here, Percy has performed 2 months of work at 200 hours total and thus the market value of his benefit conferred upon Daria was \$20,000. Percy will argue he should at least get paid this if he cannot finish the contract. This is more than the \$15,000 in expectation damages, but it is arguably fairer if he doesn't get specific performance because this is the value he conferred on her. Daria might argue that he did not substantially perform because he only completed 2/3 of the work, but Percy was not a breaching party, and so he is not blameworthy and therefore he needn't substantially perform to seek restitution.

If the amount of increased value of her land is even higher, Percy might argue for that, but such a number is unclear from these facts. Because he's conferred \$20,000 worth of services and thus benefited Daria to that amount, Percy can argue for this amount as well instead of expectation damages if he wants. If he gets specific performance and finishes and the original contract is enforced, he would not get restitution damages because the other remedies would suffice.

### **No Punitive Damages**

Even though Daria's breach was intentional and without justification, punitive damages are not awarded for breach of contract claims, and therefore Percy may not collect any.

### **Specific Performance**

It is within a court's equitable powers to grant specific performance as a remedy in certain circumstances. Specific performance requires that both parties actually complete the contract, rather than compensate each other in money for any breach. Specific performance requires 1) a valid contract, 2) with clear provisions that can be enforced, 3) an inadequate legal remedy (i.e. money damages are insufficient for some reason, such as the good or service is unique), 4) balancing the hardships, performance is equitable, and 5) enforcing the performance is feasible.



### Valid contract with clear terms

The contract was valid and the terms were clear as the payment and services were unambiguous.

### Inadequate legal remedies

Percy will claim that mere expectation or restitutionary damages are insufficient because he entered the contract thinking he would be able to photograph it and get more publicity to further his business. Specifically, he will claim that it is difficult to value the worth of this increased publicity and therefore it cannot be remedied with mere dollars and can only be remedied by allowing him to finish performance.

Daria can argue that he can be compensated for his time adequately by paying him his normal hourly rate, and that he can always just photograph another project of his. This is a close issue. If Daria's yard would've been particularly nice or a particularly good display of Percy's work, then maybe this performance was unique. If it was any ordinary yard, then absent a showing that Percy needed to place the advertisement now, legal remedies should suffice and Percy could just photograph another project.

### Equitable

In terms of balancing the hardships, it is unclear why Daria repudiated the contract or if she has any sort of reason for not wanting performance complete. The question says it was unjustified and so there likely is not. On the other side, Percy has done nothing wrong and appears to have performed adequately. Daria arguably could have to pay more under a restitutionary theory if there is no specific performance (the \$20,000 in received benefit as opposed to the initial \$15,000 under the contract), so it would not be harder to enforce. However, it may be difficult because of their soured relationship, but that should not be a strong equitable argument considering Daria caused this potential issue.

### Feasibility

Lastly, specific performance must be feasible to enforce. Courts consider how long the contract will last, the amount of supervision required, and other related factors. Here, the contract would only take one more month and 100 more hours. This is relatively short for a contract, and the parties could just come back in a month or so to a court to show it was enforced. Daria might argue the court would not want to spend this time, but that could apply to almost any specific performance remedy, and if a 1-month service contract with clear plans/designs already made by Percy is not feasible, then almost any specific performance would not be.

### Disposition

While feasibility is not a clear issue, performance would likely be feasible. The biggest issue is whether a court thinks a legal remedy is inadequate. If there is something special about Percy completing this project, then a court will likely order specific performance. If it is just any other landscaping project, it will likely hold that damages (discussed above) will suffice.

## **QUESTION 1: SELECTED ANSWER B**

### **Applicable Law**

It must first be determined what applicable law applies to the contract involved in this dispute between Percy (P) and Daria (D).

Rule: The Uniform Commercial Code applies to contracts for the sale of goods. All other contracts are governed by the common law, such as services contracts and contracts for the sale of land.

The contract between P and D involved the design and installation of landscaping for an exclusive housing development that D owned. As such, this is a contract for services, which makes the common law applicable and governing.

Conclusion: The common law applies.

### **Contract Formation**

A contract is an agreement that is legally enforceable. A valid contract requires an offer, acceptance, and consideration.

The facts state P and D entered into a valid written contract, thus there was a valid contract between them.

Conclusion: There was a valid contract formed between P and D for the design and installation of landscaping.

### **Anticipatory Repudiation**

Did Daria breach the contract by anticipatorily repudiating?

Rule: When one party unequivocally and unambiguously indicates to the other contracting party before the time for performance arrives that they are not going to perform on the contract, this is considered an anticipatory repudiation and a total breach of the contract. The non-breaching party is entitled to all remedies at this time so long as the non-breaching party has not already fully performed their part. If the non-breaching party has in fact fully performed their duties under the contract when the anticipatory repudiation is made, they must then wait until the time for performance to seek remedies.

Two months into the project, Daria "unjustifiably repudiated the contract." This will be regarded as a material and total breach, and at that time P was entitled to all remedies available.

Conclusion: D breached the contract by anticipatorily repudiating, and P is entitled to all remedies at this time.

### **Remedies**

What remedies may P seek from D?

A party may seek legal, restitutionary, and equitable remedies depending on the facts and circumstances of the case.

### **Legal Remedies**

What legal remedies is P entitled to?

Rule: Legal remedies take the form of monetary damages.

## **Compensatory Damages**

Compensatory damages are a common legal remedy in contracts disputes. They can be in the form of expectation damages, consequential damages, and incidental damages, as well as reliance damages.

Expectation damages seek to place the non-breaching party in the position he would have been in had there been no breach. They seek to provide the non-breaching party with his expectations under the contract.

Consequential damages are a form of compensatory damages that are more special in nature and result from the non-breaching party's particular circumstances. These must be known to both parties at the time of contract formation in order for the non-breaching party to be able to recover them.

Reliance damages are used when expectation damages and consequential damages are too speculative and uncertain. They provide the non-breaching party with damages in the amount of how much that party spent in performance and reliance on the contract.

All contract damages must be causal (but for causation), foreseeable at the time of contracting, certain, and unavoidable (non-breaching party's duty to mitigate).

## **Expectation Damages for the Contract Price**

The contract payment price was \$15,000. Expectation damages for P would be \$15,000 because this is what he expected to receive had the contract been fully performed by both parties.

## **Consequential Damages for the Photographs**

P will also argue that he is owed consequential damages for the loss he incurred due to not being able to photograph the completed gardens and landscaping which he planned to include in his project for an article he planned to propose to Beautiful Yards

and Gardens. Since this loss is not a direct expectation damage, P will have to show that the damages are causal, foreseeable, certain, and unavoidable. He will argue that they are causal because D breached the contract only two months into the deal when the work was not yet completely done; he is no longer able to photograph the entire landscaping project and use it in his article which he plans to propose to the magazine. But for the breach, P would be able to have taken the pictures and included them in his article to propose to the magazine. However P will have a hard time arguing that the damages were foreseeable and certain. He may try and argue that these damages were foreseeable to both him and D because he agreed to a reduced fee only because D agreed to let him take the pictures of the completed landscaping project. If P can show that D was aware of the fact that he wanted to use the pictures in a proposal to magazine, he may have an argument this loss was foreseeable to both him and D. Also the fact that he accepted a significantly lower fee might suggest that D was in fact aware that that the photographs were an important "payment" for P. P normally charged \$100 per hour for his work and planned to work 100 hours on this project a month for three months. Thus, his normal fee for such a project would have been \$30,000, but instead he charged D only \$15,000 because she agreed to allow him to photograph the landscaping. He anticipated "that publicity from the article would more than compensate him for his reduced fee." P will argue further that his damages are certain because they amount to \$15,000 (the difference between his usual fee of \$30,000 for this type of project and what he agreed to with D, \$15,000). D will counter that these damages are not certain because they are too speculative. It would be hard to determine and set a monetary amount for how much P would have received in publicity from the article. D can also argue that P only planned to use the pictures in a proposal to propose to the magazine, and that P was not even definitely given an article spot in the magazine.

Regarding the factor of unavoidable, a party is under a duty to mitigate damages. P did in fact mitigate damages by securing a different project with Stuart in the third month that paid him \$1,500 and took 15 hours to complete. However P will argue that he could have completed this project at the same time as D's, thus is this is

in fact the case, then P's damages would not be offset by the \$1,500 he earned from the other job because he could have done both projects at the same time, thus he still lost out on the profits from D's breach.

Conclusion: P may have a claim that he is entitled to \$15,000 for the loss in being able to photograph the completed project, but there are issues as to the foreseeability and certainty of these damages.

### **Consequential Damages for the \$30,000 Tammy deal**

P will also argue that he is owed consequential damages for the \$30,000 deal with Tammy. P was negotiating with Tammy to landscape her property for \$30,000 but once Tammy learned of the unjustifiable repudiation by D she stopped negotiating. P will have to argue that but for D's breach, he would have secured the landscaping job with Tammy for \$30,000. The facts do state that "once Tammy learned what happened" she immediately stopped negotiation which suggests that this news caused her to stop negotiating with P. However, P may have some trouble arguing that these damages are foreseeable because D may not have known at all that P was also negotiating with other individuals at the time for similar projects. P will try and make the argument that he is entitled to these damages because D should have known or even did in fact know that by breaching a major landscaping deal for an exclusive housing development news of this would spread and could affect P's reputation in the industry and lead others to refrain from doing business with him under the assumption that he was not an ideal business man since a previous client backed out of a contract with him. This could appear to others to be that P is not skilled and qualified to do landscaping jobs. These damages are likely certain because they were negotiating for an amount of \$30,000 for the project and P can also rely on his past business deals to show this amount was accurate. There is no issue as to unavoidability here because there was no way P could have mitigate the loss from the Tammy deal.

Conclusion: P may have a claim for the \$30,000 in lost profits from the deal with Tammy, but again these damages likely may be considered too speculative since the parties were only in the negotiations stage.

### **Incidental Damages**

In addition to compensatory and consequential damages a party is always entitled to incidental damages which cover costs directly associated and incidental to the breach. In a contracts case this is usually expenses in negotiating with other parties for completion of the contracted for work.

If P incurred any costs or expenses in finding new work such as with Stuart as well as if he spent any more or time looking for other work to mitigate his losses from D's breach he would be entitled to such damages as well.

Conclusion: If P incurred any damages incidental to D's breach he can recover these in addition to receiving compensatory, expectation, and consequential damages.

### **Reliance Damages**

P has a strong case for expectation damages amounting to \$15,000, but he may have some trouble proving lost profits from the photographs and also the deal with Tammy. Instead of recovering such damages, P could elect to recover reliance damages, which would amount to all the costs P incurred thus far in reliance on the contract. Such expenses would include money spent on landscaping tools and items such as bushes and plants and flowers. It seems likely that this amount would be less than the \$15,000 and potentially the consequential damages, so P likely would elect to recover those since they would be more money for him.

Conclusion: P could receive reliance damages and incidental damages in lieu of expectation and consequential damages.



## **Restitutionary Remedies**

Restitutionary Remedies can be legal and equitable. Legal restitutionary remedies are applicable here. If a contract is breached or in fact no contract was formed or if a contract later fails for some reason and is no longer enforceable a party can still recover for the value of their services so that the other party will not be unjustly enriched. The value of this is based on the value of the party's services even if this amount is more than they were entitled to under the contract. Restitutionary remedies would be in lieu of legal remedies.

P could also elect to recover restitutionary damages instead of the above legal damages. These would be based on the fact that he completed two months' worth of work on the project at the time of breach. P estimated spending 100 hours of work on the project each month, thus he likely spent 200 hours on the project at the time of breach. P can argue that the value of his services was \$100 an hour since this is what he normally charged for his work. As such P would be entitled to \$20,000 in restitutionary remedies since D has received the benefits of P's work over the past two months. This would prevent D from being unjustly enriched. The fact that P's hourly rate under the contract was only \$50 per hour would not stop P from being able to recover for \$100 per hour of work so long as P can demonstrate that the value of his services was \$100 an hour, which as discussed above, he likely can do.

Conclusion: P could seek the restitutionary remedy of restitutionary legal damages for \$20,000 for the value of his work conferred upon D to prevent unjust enrichment.

## **Equitable Remedies**

### **Specific Performance**

Since P ideally would like to finish the project with D he would most likely argue for the equitable remedy of specific performance. Specific performance is a court order which mandates that a party perform their duties and obligations under the contract. A plaintiff is entitled to specific performance if they can show the following elements:

1. There is a valid and enforceable contract between the parties with terms certain and definite;
2. The non-breaching party has fully performed on the contract, is ready, willing, and able to perform, or their performance has been excused.
3. The legal remedy is in adequate;
4. The remedy is feasible; and
4. There are no defenses to the contract.

### **Valid, Enforceable Contract with Terms Certain and Definite**

P can easily show there was a valid enforceable contract between P and D with terms certain and definite because the parties entered into a "valid written contract." The terms are certain and definite because P was to design and install landscaping for an exclusive housing development for an amount of \$15,000 which was to be payable upon completion. He estimated work would take approximately 100 hours a month over the course of three months. All the essential elements such as payment, performance, duration of the contract, and the parties are specified.

Conclusion: P will be able to show there was a valid, enforceable contract with terms certain and definite between the parties.

### **Fully Performed**

P can show he has performed two months' worth of work under the contract, and that he is ready willing and able to finish the project and continue performance if allowed by D. He has also taken other jobs which further indicate his abilities to perform landscaping work and his willingness to do so. Also P has said he ideally would like to finish the project.

Conclusion: P has fully performed.

### **Inadequate Legal Remedy**

An inadequate legal remedy is involved when the sale is for a piece of land since all land is unique or for goods that are unique because they are rare or one of a kind. Also goods may be unique when the circumstances make them so. When the item of the contract is unique then legal damages remedies are inadequate.

P likely will have a hard time arguing that he cannot be compensated by legal damages. Money would be able to make P whole again and compensate him for his losses that resulted from the breach. P may try and argue that he has lost out on a \$30,000 contract with Tammy and also much publicity from a proposal and article in magazine and that these damages may be considered too speculative and uncertain as consequential damages for him to prove in court, and thus he cannot be legally compensated by monetary damages for these losses. However, it seems likely this argument would fail.

Conclusion: Legal remedy is likely adequate.

### **Feasible Remedy**

Negative injunctions where a party is prohibited from doing something are easy for a court to enforce. Affirmative mandates are harder to monitor and supervise, thus they pose a problem for the feasibility of ordering specific performance. Also parties are not usually entitled to specific performance when the contract is for personal services.

Here, the contract is for personal services but P seeks to be able to do these services. Usually when the plaintiff seeks for the breaching party to perform services under the contract by specific performance the court will deny this remedy. Because P only has one month left to finish work on the landscaping there is the possibility that the court may make D allow P to finish his project since D only has to pay D.

Conclusion: There may be a feasibility issue.

## **No Defenses**

If there is a defense to the enforcement of a contract, the court will not award specific performance. Such defenses include statute of frauds, statute of limitations as well as equitable defense including unclean hands and laches.

The facts do not implicate any defenses to this contract. The contract was in writing thus there is no statute of frauds issue. Additionally the contract need not be in writing and signed by the party charged since it is not required to be under the Statute of Frauds.

Conclusion: There are likely no defenses to the contract.

Overall Conclusion on Specific Performance: P may be entitled to specific performance, but a court likely would find legal damages to be adequate and also for the remedy to be not feasible, and thus deny this remedy.

Overall Conclusion: As discussed above, P is entitled to the legal remedies of compensatory damages in the form of expectation damages and possibly consequential damages in addition to incidental damages. P could instead elect to recover reliance damages or restitutionary damages.