

February 1998
Question 1

In February 1997, Carrier, a trucking company, and Maker, a manufacturer, negotiated an agreement under which Carrier promised to provide for two years all the transportation services required by Maker in exchange for monthly payments based on the number of packages transported. In response to Carrier's concerns over proposed legislation that would restrict its ability to use more efficient "tripletrailer" trucks, the parties agreed that Carrier could terminate the contract if such legislation were enacted. No such law was ever passed.

Carrier drafted a document embodying the agreed terms and, on March 1, 1997, sent two signed copies to Maker with a request that Maker sign and return one copy. Although Maker did not sign the document, the parties immediately began doing business according to its terms. During the next six months, Maker paid all of Carrier's monthly invoices on time. During the same period, Carrier declined two potentially lucrative offers from other manufacturers because performance of the agreement with Maker required most of Carrier's capacity.

In September 1997, Maker began to have concerns about the cost of Carrier's service. Maker sent a letter to Transport, one of Carrier's competitors, describing Maker's needs, Maker's agreement with Carrier, and the amount charged by Carrier. Transport offered to provide comparable transportation services at a lower cost. On September 20, Maker sent a fax to Carrier stating that Maker would no longer use Carrier's services as of November 1. Carrier responded with a fax to Maker which stated that Maker had no right to terminate the contract. On September 21, Maker suspended all business with Carrier and began doing business with Transport. Maker also refused to pay an invoice submitted by Carrier for transportation services rendered in September.

What, if any, rights and remedies does Carrier have against:

1. Maker? Discuss.
2. Transport? Discuss.

ANSWER A TO QUESTION 1

I. Rights and Remedies Against Maker

Carrier will have rights and remedies against Maker based on breach of contract. First, Carrier must establish that Maker breached an enforceable contract (K).

A. Characterization

Because this was a K for services, and not for the sale of goods, it must be analyzed under the common law. AA2 of the UCC applies only to the sale of goods.

B. Formation

A valid K requires an offer, acceptance of the offer and consideration. In this case, Carrier's offer to provide two year's worth of transport services to Maker in exchange for Makers promise to use and pay Carrier for these services does establish a valid offer and acceptance.

(1) Requirements/Vagueness

Maker may argue that any offer was void for indefiniteness. An offer for services must be sufficiently definite as to the type of services required. In this case, because it can not be determined how many packages Maker will need to transport, the offer is too vague. However, in a requirement K, the granting of Maker's need will be based on Maker's good faith requirements. Thus, the K should be held to be sufficiently definite based on those parameters.

(2) Illusory Promise

Maker may also argue the K is unenforceable because it lacks consideration. Consideration is a bargained for legal detriment. Maker will say because it was under no duty to ship a certain amount of packages, its obligation was illusory, and thus did not constitute consideration. However, in a requirement contract, as in all contracts, a duty of good faith is implied and it will not fail for lack of consideration because Maker is under a good faith obligation to use Carrier's services as his needs require.

C. Defenses: Statute of Frauds

Maker will next argue the K is unenforceable for lack of a writing signed by the defendant. Ks for services that cannot by their terms be performed in under a year do require a writing. Here, the K was for two years. Carrier will claim its own reduction of the K to a signed writing satisfied the statute. But this is wrong, because it must be signed by Maker.

(1) Promissory Estoppel

However, Carrier can successfully argue that the writing requirement is obviated because it reasonably relied to its detriment on the existence of a

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valid agreement with Maker. Promissory estoppel (reasonable and justified release with detriment) will replace the writing requirement. Here, Carrier will show it let two valuable Ks go in the time it was performing.

(2) Performance,

Carrier will also successfully argue that performance of a service K will obviate the need for a writing under the statute of frauds. Here, despite lack of a writing, Carrier actually performed its duties under the K since March 1, 1997. Thus, the writing requirement is satisfied.

D. Terms

Because the K is enforceable Carrier will be able to prove its terms based on its agreement with Maker reached orally - terms that call for a two-year K where Maker ships with Carrier and Carrier charges per package.

(1) Reasonable Price

Maker will say the K did not set a price. However, where the parties leave price to be fixed at the time of performance - and where the parties fail to agree on a price - the court will set a reasonable price on the services.

(2) Indefiniteness

It is worth noting here too that Maker may wish to raise lack of a price term as rendering the offer fatally indefinite. However, again, K will not fail for lack of a price term where court can set a reasonable one.

E. Breach

(1) Conditions

Maker may argue that it had the right to cancel the K at anytime. However, as discussed, Carrier will be able to enforce it according to the terms originally agreed to. Thus, Carrier's carrying of the boxes of Maker each month satisfied a condition that gave rise to Maker's duty to pay under the K.

(2) Excuse of Condition:

Maker may argue that Carrier's failure to transport boxes as of November 1st constituted Carrier's own failure to satisfy a condition. However, a condition will be excused where a party breaches the K, or anticipates breaching the K. Here, Maker's September 20th fax to Carrier showed an absolute unwillingness to continue on the K terms. Thus, Carrier was justified in treating the K as in breach, or in urging performance. On September 20th Carrier urged performance, but on September 21 Maker stopped doing business within the 2-year K, and thus committed a breach.

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(3) Substantial Material Breach

Breach under common law must be material.

Here, Maker's absolute decision not to use carrier for its transport was highly substantial.

F. Remedies

Maker's breach gives rise to certain remedies for Carrier.

(1) Damages

Damages are appropriate where Carrier can show they are certain, and that consequences of breach were foreseeable, and that it did what it could to mitigate the damages.

(a) Expectation Interests

Here, Carrier will get his damages based on what he expected to get under the K Again, this will be based on a reasonable price of his service less his actual costs saved for the remainder of the K starting November 1.

(b) Consequential

Carrier is also eligible for consequential damages because it was reasonably foreseeable that he would give up certain other jobs in reliance on his two-year K with Maker. Thus, Carrier should get lost profits from the other two jobs he could have taken had he not been working with Maker.

(c) Punitives

Despite a willful breach by Maker, there is no evidence of a fiduciary relationship between the two parties. Thus, punitives are not appropriate.

(2) Restitution

Restitution is appropriate to prevent unjust enrichment. Here Maker got use of Carrier's services all through September. Thus, Maker will be unjustly enriched unless it pays Carrier in full for these services rendered.

2. Carrier's Rights and Remedies v. Transport

Carrier has tort remedies v. Transport if it can establish that Transport tortiously interfered with its K with Maker.

A. Elements

The elements of tortious interference with K are (1) existence of a valid K; (2) defendant's knowledge of the K; (3) defendant's intent to interfere; (4) harm to

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plaintiff; and (5) breach of a duty to Carrier.

(1) Valid K

As discussed, a valid K existed between Maker and Carrier.

(2) Knowledge

Since Maker sent a letter to Transport describing his K and terms with Carrier, Transport certainly knew of the K.

(3) Intentional Interference

Since Transport made an offer to do Carrier's job at a lower price, and was aware of the Carrier K, it also knew its act would potentially interfere with that of K.

(4) Damage

Because the interference led Maker to breach its K with Carrier, Carrier was certainly damaged by the interference.

(5) Privilege: No Fiduciary Duty

Transport will argue that it had a competitive privilege to interfere, just in the name of competition, and that it was under no fiduciary duty to watch out for Carrier. This argument will probably be successful, as the tort was designed to prevent willful and wrongful interference, not to stop competition.

However, assuming Carrier makes out a claim in tort he has certain remedies.

B. Remedies

(1) Damages

To get damages in tort, Carrier must show that Transport's act was the cause and proximate cause of his damage, that Carrier mitigated damage, and that damage is certain. All these requirements are met. Maker would not have breached had it not gotten a better deal from Transport. Transport's offer was reasonably likely to lead Maker to breach, given Maker's dissatisfaction with Carrier's price; there is no evidence that Carrier had other deals waiting for it to mitigate quickly -and Carrier did urge Maker to perform. The loss of profit arising from the November 1 breach is easy to calculate given Carrier's margins on its sales up till then.

(2) Punitive

Because Transport's breach was willful, punitive damages may be available. Punitives are appropriate where the breach was more than negligent, and the degree of harm caused is great or the breacher is very wealthy and will not be deterred by actual damages. Here, Transport is a big player, and paying some lost profit over 1-1/2 years of K remaining while substantial may not be enough to deter future conduct. Thus, given its willfulness, punitives are in order.

(3) Restitution

Restitution is available in tort to prevent unjust enrichment. If Transport actually made any money off its K with Carrier, Carrier should get those profits to prevent Transport from becoming unjustly enriched as a result of its unlawful conduct.

(4) Injunction

Finally, Carrier may be able to enjoin Transport from continuing to do business with Carrier under the new K. Injunction is called for if the following elements are met.

(a) Inadequacy

Injunction is appropriate where legal damages are not sufficient. Here, loss of profit is something legal damages can compensate. Thus, Carrier will lose this element.

(b) Feasibility

Injunction is okay where court can enforce it feasibly. Use of contempt citation

would make it easy to enforce in this case.

(c) Property

At common law, injunction is appropriate only where a property right is at issue. Here, money under K is property, thus this element is satisfied. But even if K's right is personal, modern courts will enforce injunction anyway.

(d) Balance Hardships

Here, party will not be hurt if K between Maker and Transport continues because Carrier will get compensated for its losses in money damages. However, Maker will not be able to take advantage of a good K at a good price. Thus, this element falls in favor of Transport.

(e) Defenses

There are no relevant defenses. (f)

Conclusion

Given that money is an adequate remedy, injunction is not available.

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ANSWER B TO QUESTION 1

The issue presented is what rights, if any, and does Carrier have against Maker. The answer to this question depends in part on whether the parties have a valid contract. This is a contract for services and is thus governed by the common law, not the UCC.

Requirements for a Valid Contract

To have an enforceable contract, Carrier must show that an offer was extended. An offer is a manifestation of an intent to be legally bound. Here, Maker offered its services to Carrier for a fixed term at a fixed price, based on the needs of Maker. This is a requirement and output contract. Such a contract exists where one party offers to supply all the goods or services the other party needs, or a party offers to buy all the goods or services the other party produces. This contract is a requirement contract because Carrier offered to provide all the transportation services Maker needed. Such contracts are sufficiently certain to be enforceable. In this case, a valid offer was extended by Carrier.

Carrier must also prove that Maker accepted the offer. Acceptance manifests a party's agreement to an outstanding offer. Acceptance can be manifested either by an express agreement or by the conduct of the parties. Here, Maker orally agreed and provided a promise to accept the services of Carrier. Thus, Maker manifested acceptance to the offer.

Carrier must also demonstrate that the offer and acceptance was supported by consideration. Consideration is defined as a bargained for exchange. This can consist of either a promise for a promise, or the exchange of services. Here, Maker promised to pay for the transportation services of Carrier, and Carrier promised to provide those services. Thus, the exchange of a promise to pay in exchange for a promise to provide services is sufficient

consideration. The law normally does inquire into the sufficiency of consideration.

Illusory Promise

Here, Maker may argue that it made an illusory promise since its offer to pay was conditioned upon no law being passed that limited triple-trailer trucks. A promise serving as consideration is evaluated at the time the contract is entered into and if it is illusory, it is not sufficient consideration. However, a promise to perform or the excuse of promised performance based upon the happening of some contingent event is not illusory and is sufficient consideration. Thus, the promise of Maker here to use Carrier's services was not illusory and is sufficient consideration.

Statute of Frauds

A contract for services which cannot be performed within one year from the date the contract is entered into must comply with the statute of frauds. This contract was one for services which was to be performed within a two-year period. Thus, it must comply with the statute of frauds. To comply with the statute of frauds, the contract must be in writing and signed by the party to be charged. Here, Carrier is seeking to enforce the contract against Carrier. Thus, to enforce the contract Maker must show a writing signed by Carrier. Although Maker sent a confirmatory writing, the contract which Maker signed, Carrier did not sign the contract. Thus, there is no writing satisfying the statute of frauds and the contract is unenforceable unless an exception can be proved.

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Doctrine of Part Performance

The doctrine of part performance can take a contract out of the statute of frauds. Where the parties have failed to execute a writing satisfying the statute of frauds, a party which can show part performance in some cases may nonetheless enforce the contract. However, a part may not rely upon the doctrine of part performance in the case of a services contract. To enforce a services contract which cannot be performed within one year, and which is not in writing, the party seeking enforcement must show full performance. In this case, the contract was not fully performed since more than one year remained on the contract term and both parties still had performance due. Thus, Carrier cannot enforce the contract under this doctrine.

Detrimental Reliance

A party may enforce a contract which fails to satisfy the statute of frauds by relying upon the doctrine of detrimental reliance or promissory estoppel. To satisfy the doctrine, the party must show that the other party made a promise, that he relied upon it in a way that was foreseeable, reasonable and detrimental, and that justice requires enforcement of the contract to avoid injustice. Here, Carrier can show that it relied reasonably upon the oral representation of Maker since it had no reason to expect that Maker would breach the contract. Maker actually used Carrier's services for some time, and made payments under the contract.

Carrier can also show foreseeable reliance. It can show successfully that Maker should have foreseen that it would provide the services, especially after Maker began making payments under the agreement. Finally, Carrier can show detrimental reliance. Maker gave up two lucrative contracts with other producers to fulfill its contract with Maker. It was

foreseeable by Maker that Carrier might lose other business to fulfill this contract. Carrier can also argue successfully that enforcement of the agreement is necessary to avoid injustice since it has now lost other business because of this agreement. Thus, Carrier can rely upon the doctrine of promissory estoppel to enforce the contract.

Damages

Damages must be certain and specific and not speculative. The issue presented is to what damages is Maker entitled? Maker will argue he should receive the benefit of his bargain, the standard measure of damages in a breach of contract situation. Maker will argue that the payments due under the contract are ascertainable by reference to Maker's production schedule and past production. Thus, he will argue that he should receive the full payments due under the contract.

Carrier will argue that Maker has a duty to mitigate his damages by seeking other business to fill the void left by Carrier's breach. Maker will likely lose this argument unless it can be shown that other work is readily available and Carrier made no reasonable attempts to locate such replacement business. Carrier will also argue that it is entitled to restitution, at least as to the services provided for which Maker has not yet paid. Restitution in a contract breach situation is measured by the reasonable value of the services to the breaching party. Here, Maker will argue that it is entitled to restitution for the unpaid services because without such recovery, Maker will be unjustly enriched. Carrier will prevail on this argument.

Specific Performance

Maker may also argue that it is entitled to specific performance of the contract. In a contract breach

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situation, specific performance may be permitted where remedies at law are inadequate. Here, Carrier will argue that damages are a sufficient remedy since they are readily ascertainable. For specific performance, Maker must also show that the contract is definite such that the court can enforce the agreement. Here, Maker will successfully argue that the services to be provided were clear and the court can enforce the agreement.

Maker must also show that enforcement is feasible, that the court can enforce performance against maker as well as Carrier and that no defenses to enforcement exist. Here, Maker will successfully argue that the court can condition performance of the parties on mutual performance by the other and thus, under the security of performance rule, can assure the mutuality of performance.

Here, the court will probably not specifically enforce the contract because specific performance is usually not granted in a services contract and damages at law are deemed adequate.

Anticipatory Repudiation

Carrier will also argue that Maker anticipatorily repudiated its contract by indicating it would not complete the contract, prior to its completion. Carrier will prevail on this argument. As

such, this entitles Carrier to suspend its performance, sue for damages immediately, or seek written assurance of future performance by Maker. Carrier did seek such assurance, Maker failed to provide it, and thus Carrier was free to sue for damages.

Maker v. Transport

Maker may also claim that Transport (T) committed the tort of interference with business relations. The tort of interference with business relations occurs when one party knows of the existence of a contract between plaintiff and another party, seeks to bring about breach of that contract, and the contract is then breached.

Here, Carrier will argue that T knew of its contract with Carrier because Maker sent a letter to T advising them of the contract. Carrier will also argue that T provided competing quotes, aware of the duration of the original contract, with the intent to bring about breach of that contract, and that Maker then breached the contract in reliance upon the new contract with T.

Carrier will have a successful claim against T for breach of contract if it can show T intended to bring about the breach of Carrier's contract with Maker. In light of the information provided by Maker to T, it is likely that Carrier will prevail on this claim.

Damages

In a tort situation, plaintiff may recover all the damages he can show were proximately caused. Damages must be specific and foreseeable. Thus, Carrier will argue that the loss of its contract with Maker was foreseeable, and that the loss of the other business it could have had but for the Maker contract was foreseeable. Carrier will likely prevail as to the lost profits from its contract with Maker, but not as to the other lost business since that would not be foreseeable to T at the time of its tort.

Carrier may also seek a negative injunction against T to prevent it from completing its contract with Maker. However, this will likely be denied since specific performance, mandatory or negative, is not usually granted in connection with services contracts.