

Question 1

On April 1, Pat, a computer software consultant, entered into a written services contract with Danco, Inc. to write four computer programs for use by Danco in controlling its automated manufacturing machines. The contract provided that Danco would pay Pat \$25,000 on completion of the work and that the programs were to be delivered to Danco no later than May 1. The contract stated, "This is the complete and entire contract between the parties, and no modification of this contract shall be valid unless it is in writing and signed by both parties."

Pat entered into the contract in anticipation that it would lead to significant work from Danco in the future, and he consequently turned away opportunities to take on more lucrative work.

On April 15, Pat called Chelsea, the President of Danco, who had executed the contract on behalf of Danco, and told her, "I'm having some problems with program number 3, and I won't have it ready to deliver to you until at least May 8 – maybe closer to May 15. Also, I have some doubt about whether I can even write program number 4 at all because your computer hardware is nearly obsolete. But I'll get programs numbers 1 and 2 to you by May 1."

Chelsea said in response, "I'm sorry to hear that. We really need all four programs. If you can't deliver until May 15, I guess I'll have to live with that."

On April 28, Pat called Chelsea and said, "I've worked out the problems with programs numbers 3 and 4. I'll deliver them to you on May 12."

Chelsea responded, "I've been meaning to call you. I'm going to start looking around for another consultant to do the work because I consider what you said in our April 15 telephone discussion to be a repudiation of our contract. My lawyer tells me that, because of the language in the contract, nothing I said to you in that conversation matters. You repudiated the contract, so we don't owe you anything."

Can Pat prevail in a suit against Danco for breach of contract, and, if so, what is the measure of his damages? Discuss.

Question 1

Contracts

On April 1, Pat, a computer software consultant, entered into a written services contract (The statute of frauds is satisfied) with Danco, Inc. to write four computer programs for use by Danco in controlling its automated manufacturing machines. (This service contract is governed by the common law) The contract provided that Danco would pay Pat \$25,000 on completion of the work (Time for payment) and that the programs were to be delivered to Danco no later than May 1. (The date of completion is likely important if the parties specifically mentioned it in the contract, but it doesn't state that time is of the essence) The contract stated, “This is the complete and entire contract between the parties, (Merger clause) and no modification of this contract shall be valid unless it is in writing and signed by both parties.” (All modifications of any express term must be in writing to be valid)

Pat entered into the contract in anticipation that it would lead to significant work from Danco in the future, and he consequently turned away opportunities to take on more lucrative work. (Pat may not recover speculative damages if Danco does not contract with him to do significant work in the future)

On April 15, (Two weeks later) Pat called Chelsea, (This is an “oral” agreement) the President of Danco, (Chelsea clearly has the authority to act on behalf of Danco) who had executed the contract on behalf of Danco, and told her, “I’m having some problems with program number 3, and I won’t have it ready to deliver to you until at least May 8 – maybe closer to May 15. (Pat’s anticipated delay is likely a breach of contract) Also, I have some doubt about whether I can even write program number 4 at all because your computer hardware is nearly obsolete. (Pat is not repudiating the contract but expressing doubt as to its completion date) But I’ll get programs numbers 1 and 2 to you by May 1.”

Chelsea said in response, “I’m sorry to hear that. We really need all four programs. If you can’t deliver until May 15, I guess I’ll have to live with that.” (Chelsea did not unambiguously object to the delay. Pat may reasonably rely on Chelsea’s representation that the delay won’t be considered a material breach. In essence, Chelsea has waived the written modification clause. Nevertheless, Pat shall be liable for any damages caused by the delay)

On April 28, Pat called Chelsea and said, “I’ve worked out the problems with programs numbers 3 and 4. I’ll deliver them to you on May 12.” (Pat has given Chelsea adequate assurances about completion)

Chelsea responded, “I’ve been meaning to call you. I’m going to start looking around (At this time, Chelsea has no one else in mind) for another consultant to do the work because I consider what you said in our April 15 telephone discussion to be a repudiation of our contract. (Pat’s call on April 15 was not a repudiation of their contract) My lawyer tells me that, because of the language in the contract, nothing I said to you in that conversation matters. (Chelsea’s lawyer is incorrect) You repudiated the contract, so we don’t owe you anything.” (Chelsea will be liable on the contract to some extent but not the full amount)

Can Pat prevail in a suit against Danco for breach of contract, and, if so, what is the measure of his damages? Discuss.

A Deeper Look Inside the Essay

This straight contracts question did not focus on formation but rather on performance issues and the conduct of both parties. It seems a factual discussion was important as most people spotted the main issues concerning Pat's reliance on Danco's waiver. Conclusions rarely matter. Therefore, if an applicant found a material breach based on the May 1 due date, it is likely the examiners would give full credit. As always, there is more than one way a student may answer an essay. This is the significance of the written portion of the California bar exam.

Model Answer by One-Timers ©

Can Pat prevail in a suit against Danco for breach of contract

Yes, Pat will prevail in a suit against Danco for breach of contract because Pat relied on Chelsea's response whereby Danco waived the due date of May 1.

April 1

A valid contract was formed between Pat and Danco on April 1 which included express terms.

Applicable Law

The common law of contracts governs service contracts. Article 2 of the Uniform Commercial Code is the applicable law for contracts of the sale of goods. On April 1, Pat and Danco entered into a written "services" contract. Thus, this breach of contract action is clearly governed by the common law.

Formation of Contracts

Every contract needs an offer that is accepted and supported by valid consideration. Here, formation is not in issue. The facts state Pat and Danco entered into a contract for Pat to write four computer programs for the consideration of \$25,000. Hence, there is a valid agreement.

Statute of Frauds

Certain types of agreements must satisfy the statute of frauds, which requires the contract to be in writing and signed by the party who denies its existence. This contract does not fall under the statute of frauds, but in any event, it is in writing so this is a moot point.

Terms of the Contract

According to the express terms of the contract, the programs were to be delivered to Danco no later than May 1. However, Danco did not expressly state that time was of the essence. No facts show why any importance was attached to that date.

Merger Clause

A merger clause establishes that the writing is intended to be the complete expression of the agreement between the parties. It essentially states that all prior negotiations were "merged" into the written contract and it contains all the terms of the agreement. Such clauses are generally conclusive on the issue of integration and will be enforced.

Here, the contract stated, “This is the complete and entire contract between the parties, and no modification of this contract shall be valid unless it is in writing and signed by both parties.” This means a court will not likely enforce any modifications unless it is in writing and supported by new consideration.

April 15

On April 15, Pat called Chelsea and told her that he was having some problems with some of the programs. In addition, Pat clearly stated that he could not meet the May 1 due date for programs numbers 3 and 4. The issue is whether this is a breach of contract.

Anticipatory Repudiation

Anticipatory repudiation is a clear and unambiguous statement of intent, made prior to the time that performance is due, that the repudiating party will not perform. When either party repudiates the contract, the aggrieved party may await performance or suspend its own performance. The mere assertion that a party is encountering difficulties in performing, or is uncertain whether performance will be rendered when due, is insufficient to constitute a repudiation.

Here, Pat told Chelsea that programs numbers 1 and 2 would be ready on time, but program number 3 would be late. Pat also expressed doubt about program number 4 but did not clearly and unequivocally state that he would not perform his contractual obligation. Pat only encountered some difficulties in writing program number 4 due to Danco’s nearly obsolete computer hardware. Pat’s delay is not an anticipatory repudiation. However, Pat’s delay is a breach of contract and Danco will be entitled damages. This brings up the issue of whether it was a major breach or a minor breach.

Material or Minor Breach

Pat’s delay was not a material breach. In determining whether a breach is material, courts will look at the extent to which the injured party will be deprived of the benefit of its bargain. This is a question of fact. A material breach excuses the non-breaching party from performance.

Here, the contract expressly stated that the programs were to be delivered no later than May 1. However, Danco did not specify a reason as to why this date attaches any significance. Also, the contract did not include a “time of the essence” clause. In fact, when Pat called Chelsea, she was more concerned with getting all four programs rather than the time they would be delivered. Chelsea stated, “If you can’t deliver until May 15, I guess I’ll have to live with that.” Furthermore, on April 28, Chelsea later stated that she was going to “start” looking around for another consultant to do the work. This indicates time was not of the essence and she didn’t relay to Pat any suggestion that the May 1 date was critical.

To further support this reasoning, Pat continued working on the programs after this conversation. The programs are likely useless to Pat and if he doesn’t get paid he would have to forfeit over a month of work. Pat also guaranteed that programs 1 and 2 would be delivered on time and gave reasonable assurances that program 3 would be tardy by about two weeks. Pat’s behavior was unintentional and also comports with the standards of good faith and fair dealing.

Therefore, it is likely the delay was trivial and Pat has substantially performed on the contract. The breach will not be interpreted as a condition of the contract but rather a promise by Pat to perform in a timely manner. The failure to perform by May 1 was not a material breach.

Assuming the May 1 date was a material term to the contract, the court will likely find that Danco “waived” such condition.

Waiver (Estoppel)

A signed agreement which excludes modification except by a signed writing cannot be modified unless separately signed by the parties. An attempt at modification which does not satisfy this requirement can still operate as a waiver.

A waiver is the relinquishment of a right or privilege. The party holding the benefit of a condition may indicate, by words or actions, that she will not insist on it. A party who has made a waiver affecting an executory (unperformed) portion of the contract may retract the waiver by notifying the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

Here, the agreement on April 1 expressly stated that no modification shall be valid unless it is in writing and signed by both parties. However, this term, as well as the completion date has been waived.

Chelsea indicated orally that she would not insist on the completion date of May 1. Chelsea has intentionally relinquished her ability to strictly enforce that express term of the contract. She did not insist on timely completion as she allowed Pat to continue to work on the programs. Pat detrimentally relied on her words and Chelsea will be estopped to enforce the due date. The court will hold this as a binding waiver and not a total breach of contract. But, Chelsea may still recover damages caused by the delay.

April 28

Chelsea's attempt to retract the waiver on April 28 would be unjust and her lawyer has not given her sound advice.

Equitable Estoppel

Equitable estoppel may bar enforcement of a contract where one party reasonably and justifiably relies to his detriment on the other party's representation. The *rationale* behind this rule is to prevent injustice.

Here, Pat called Chelsea on April 28 and stated that he worked out the problems for the final two programs and delivery would be on May 12. In response, Chelsea attempted to retract her waiver from April 15 based on unsound legal advice. Two reasons support this conclusion. First, what Chelsea said in that conversation does matter and second, Pat did not repudiate the contract.

At this time, any retraction would be unjust. Pat reasonably and justifiably continued to work on programs 3 and 4 based on Chelsea's actions on April 15. Pat has materially changed his position in reliance on that waiver. To allow Danco out of the contract at this point would work an injustice to Pat.

What is the measure of Pat's damages

Pat will receive the contract price of \$25,000, minus the cost of the delay.

Pat has substantially performed his contractual obligations, albeit a bit late. While Danco did waive the due date, it did not waive its ability to recover damages by the delay. Therefore, Pat's measure of damages is the contract price subtracted by any harm caused by the twelve day delay. It is also worthy to note, the fact that Pat entered into the contract in anticipation that it would lead to significant work from Danco in the future will not entitle him to any additional recovery. Danco has no obligation to continue to hire Pat in the future. This was a one-time contract. It was unreasonable for Pat to turn away opportunities to take on more lucrative work. His reliance will not be compensated. **Topics Tested: IV.**

Organization and structure: Answering the calls of the question according to how the examiners furnish it. Answering each call specifically and addressing each issue within it by IRAC'ing. Making logical, lucid, coherent arguments supported by the law and facts **6%**

Can Pat prevail in a suit against Danco for breach of contract

April 1 **14%**

Applicable Law

Formation of Contracts

Statute of Frauds

Terms of the Contract

Merger Clause

April 15 **55%**

Anticipatory Repudiation

Material or Minor Breach

Waiver (Estoppel)

April 28 **15%**

Equitable Estoppel

What is the measure of Pat's damages **10%**

Contract price minus delay

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