

**Contracts II**  
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**Sample Exam Question #9 - Model Answer**

Jenny Beasley wants to sue her former employer, The Owl's Nest, for breaching its promise to award a new Mitsubishi to the winner of a March 2002 contest. Beasley claims that her manager, Jason Bond, told her and the other waitresses at the Paradise Road Owl's Nest that whoever sold the most margaritas at each participating Owl's Nest location during March 2002 would be entered in a drawing, and that the winner of the drawing would receive a new Mitsubishi. As the contest progressed, Bond told the waitresses that he did not know whether the winner would receive a Mitsubishi car, truck, or SUV, but that the winner would have to pay any registration fees on the vehicle. On or about April 8th, Bond informed Beasley that she had sold more margaritas during March than any other waitress at the Paradise Road Owl's Nest, and that he had submitted her name for the drawing. Two weeks ago, Bond informed Beasley that she had won the drawing. He proceeded to blindfold her and lead her to the parking lot outside the restaurant. Waiting for her there was not a Mitsubishi car, truck, or SUV, but a plastic model of a Mitsubishi Zero, a World War II Japanese fighter. Clever, eh? Bond was laughing. Beasley was not.

Waitresses at The Owl's Nest are paid \$5.00 per hour for each hour they work, and are allowed to keep 75% of their tips. The other 25% goes to the restaurant. Waitresses are scheduled to work between 35 and 40 hours per week. They can pick up extra shifts when another waitress wants or needs time off, but are not allowed to work more than 50 hours per week. In the three months prior to March 2002, Beasley worked an average of 40 hours per week, and earned an average of \$1,600 per month in tips (\$1,200 of which she kept). During March 2002, Beasley worked an average of 50 hours per week, and earned \$2,000 in tips (\$1,500 of which she kept). In order to work the extra hours during March, Beasley had to pay a babysitter \$5.00 per hour to stay with Beasley's three year old, Bobbi.

Waitresses at The Owl's Nest are at will employees, working without written employment contracts. The company's policy manual requires any employee to give two weeks notice prior to terminating their employment at The Owl's Nest and requires The Owl's Nest, likewise, to give any employee two weeks notice prior to terminating their employment, unless the employee is being terminated for cause. Every employee is given a copy of the policy manual when they are hired. Beasley received a copy of the policy manual when she began working at The Owl's Nest in January 2001.

Beasley has asked your firm to represent her in her lawsuit against The Owl's Nest. Your supervising partner, Janet Knowles, has asked you to answer the following questions.

**A. Does Beasley have a viable breach of contract claim against The Owl's Nest? If so, why? If not, why not?**

Beasley appears to have a viable breach of contract claim against The Owl's Nest (TON).

**Governing Law:** This was a contract for services, and so would be governed by common law – here the *Restatement (Second) of Contracts*.

**Contract Formation:** Bond, TON's agent, offered Beasley the chance at a prize if she sold the most margaritas during the contest. R2 § 24. Beasley accepted the offer by (1) continuing to work at TON for the duration of the contest, despite being free to leave at any time with two weeks notice, and (2) working more hours, selling more margaritas, and earning more tip income for TON than she typically did in the average month prior to the contest period. R2 § 30. Bond sought Beasley's continued employment and hard work in exchange for his promise to enter her name in the drawing if she sold the most margaritas during the contest, and Beasley gave the additional effort (and, perhaps, stayed on at TON longer than she would have) because of Bond's promise. R2 § 71(2).

**Statute of Frauds:** Beasley was to perform the services that were the subject of the contract over a period of one month, commencing shortly after Bond made the offer. Therefore, the contract was to be fully performed in less than one year, and did not have to be evidenced by a writing to be enforceable. R2 § 110(1)(e).

**Breach:** Beasley having sold the most margaritas at her location fully performed her part of the bargain. Thus, when Bond, on behalf of TON, failed to deliver the new Mitsubishi vehicle as promised, that failure was a total breach, entitling Beasley to sue for breach of contract. R2 §§ 235, 241 & 243.

**B. Does Beasley have one or more viable equitable claim(s) – i.e., promissory estoppel, promissory restitution, restitution, quasi-contract – against The Owl's Nest? If so, why? If not, why not?**

Beasley has colorable claims of promissory estoppel and quasi-contract, but will likely not prevail on either.

**Promissory Estoppel:** R2 § 90 requires proof of the following elements: 1) a promise, 2) that the promisor could reasonably foresee would induce action or forbearance by the promisee, 3) which does induce such action or forbearance, 4) and injustice can be avoided only by enforcement of the promise. (Some courts add another element, that the promisee's reliance must be "reasonable.") The first three elements are easy: Bond promised the chance to win a prize, Beasley worked harder in order to try to win the prize, and her extra effort was reasonably foreseeable to someone in Bond's position. The harder issue will be whether injustice can be avoided only by enforcing the promise. While it is true that Beasley worked harder in order to have a shot at winning the prize, it is also true that she made more money than she would have had she not worked harder. Beasley was not a salaried employee whose only "reward" for more effort would have been the prize, she was paid by the hour, plus she earned more tips the longer

and harder she worked. She will not suffer forfeiture if the promise goes unenforced. On the other hand, her reliance was definite, substantial, reasonable, and foreseeable, and she may have no other remedy if the promise is not enforced. As such, the factors in R2 § 139(2) – which does not apply, because there was no failure to satisfy the SOF, but which courts applying R2 § 90 may look to for guidance on the “injustice” prong – favor enforcement.

**Quasi-Contract:** *Commerce Partnership v. Equity Contracting* describes a cause of action for quasi-contract where (1) the plaintiff has conferred a benefit on the defendant; (2) the defendant has knowledge of the benefit; (3) the defendant has accepted or retained the benefit conferred; and (4) the circumstances are such that it would be inequitable for the defendant to retain the benefit conferred without paying fair value for it. As with promissory estoppel, Beasley’s claim satisfies the first three elements – 25% percent of every additional tip dollar Beasley earned went to TON, TON knows that, and TON retained the extra “tip tax” – but is likely to fail the fourth because *she has been compensated* for the benefit she conferred on TON by virtue of her continued employment and heightened effort.

Beasley has no claim of promissory restitution, under R2 § 86, because Bond made his promise before Beasley acted in reliance thereon. Beasley also has no claim for restitution under *Restatement of Restitution* §§ 116 or 117 because she did not act to save or preserve TON’s life, health, or property.

**C. What defense(s) should we anticipate The Owl’s Nest asserting to this/these claim(s), what is the legal and factual basis for each defense, and how can we overcome them? Please explain.**

In no particular order:

**Mutual Mistake:** TON will argue that Bond and Beasley understood “a new Mitsubishi” to mean different things, that both parties were mistaken about the other party’s meaning, and that the meaning of “a new Mitsubishi” was material to the agreed exchange of performances, thereby making the contract voidable by TON. R2 § 152.

**Vagueness:** Alternatively, TON will argue that “a new Mitsubishi” is too vague to enforce. Mitsubishi is one of the world’s largest manufacturing concerns, and it makes hundreds, if not thousands, of different products. What was Bond promising? Who can tell? Our answer to this is that Bond clarified the vagueness by later confining the promise to a new Mitsubishi car, truck, or SUV. There is no parol evidence rule problem here for two reasons: first, the contract was never in writing, therefore the PER doesn’t apply; second, even if it did, Bond’s subsequent statements would not be excluded by the parol evidence rule.

**Not an Offer:** TON will argue that Bond’s statement about the contest was not an offer, with respect to the Mitsubishi, because Beasley was unable to conclude a contract for the Mitsubishi by her assent. All she could accomplish by her assent was to make herself eligible for the drawing. However, just because the offer is conditional (*e.g.*, I will pay you \$500 if you win the race) does not prevent it from being an offer. The fact that winning the Mitsubishi required the occurrence of two conditions – Beasley winning the sales contest at her restaurant and then

winning the drawing – shouldn't make Bond's offer any less enforceable than if all she had to do was win the drawing or win the contest.

***Lack of Mutual Assent:*** TON will argue that Bond was joking when he made the "offer," and therefore did not intend to form a contract. For this argument to relieve TON of liability, either (1) Beasley must have also thought Bond was not serious or (2) a reasonable person in Beasley's position would have had to think that Bond was not serious. (The courts are split on whether to test this subjectively or objectively.) Employers hold sales contests all the time. There are no facts to suggest that either Beasley or a disinterested third party would have thought that Bond was not intending to make an offer.

***Lack of Consideration:*** TON will argue that Beasley was already contractually obligated to work as hard as she could while she was on duty; and, therefore, she did not give any consideration that was not already due. This argument fails for two reasons. First, because Beasley was an at will employee, she could have quit at any time with two weeks notice. Foregoing her right to quit in reliance on Bond's offer was consideration to support it. Second, Beasley worked more hours, earned more "tip tax" for TON, and sold more margaritas during the contest period than before the contest period. Her extra effort, not otherwise due, in reliance on Bond's offer was consideration to support it.

***Lack of Authority:*** TON will argue that Bond lacked the authority to make a contract or enforceable promise on behalf of TON to deliver a new Mitsubishi to Beasley. While Bond may, indeed, have been acting without authorization, and therefore beyond the scope of his actual authority, as the store manager Beasley could rely on Bond's apparent authority unless she had some particular reason not to do so.

**D. To what remedy or remedies is Beasley entitled if she prevails on one or more of the claim(s) available to her? Please explain.**

***Expectations Damages:*** Assuming that she can establish a breach of contract, Beasley can recover her expectations interest: namely, the price of a new Mitsubishi car, truck, or SUV. Because Bond's promise did not specify what model Mitsubishi the winner would receive, we cannot put a specific number on this measure of damages, but we can establish the baseline: the purchase price of the least expensive Mitsubishi on the market on or about May 1, 2002. Ultimately, it will be up to the trier of fact to decide whether to award that price or some greater amount up to, but not exceeding, the purchase price of the most expensive Mitsubishi on the market on or about May 1, 2002 (plus attorneys' fees and costs, if recoverable by statute).

***Reliance Damages:*** In the alternative, or in lieu of expectations damages in the event that Beasley (1) does not prevail on her breach of contract claim or (2) prevails on her breach of contract claim, but the court decides that her expectations damages are too uncertain, Beasley can recover her unreimbursed out-of-pocket expenses and the unreimbursed reasonable value of her efforts incurred in reliance on Bond's promise and/or the contract formed, in part, by Bond's promise. The facts tell us that Beasley worked 10 more hours per week during the contest period than usual. However, TON paid her \$5.00 per hour for each additional hour she worked, and she collected an additional \$300 in tips compared to her average month. Therefore, it is hard to

characterize her effort as unreimbursed. She did incur \$50 per week of babysitting expenses, which she might claim as unreimbursed. But, since paying that \$50 per week allowed her to earn an extra \$125 per week, she may have a hard time recovering that, too.

**Restitutionary Damages:** As an alternative to expectations or reliance damages for breach of contract, as an alternative to reliance damages for promissory estoppel, as the primary measure of relief for breach of quasi-contract, or as the only relief available to Beasley if TON can convince the court that any breach by TON was discharged by mistake or otherwise, Beasley may attempt to recover either (1) the reasonable value of the services she performed for TON, in terms of what it would have cost TON to pay someone else for those services, or (2) the extent to which TON's interests were advanced by Beasley's extra efforts. R2 § 371. Beasley will likely not be able to recover the first measure, because TON and its customers have paid her for the extra hours she worked. So, as long as she is earning market wages and tips, TON has not been unjustly enriched. As for the second measure, that will depend on whether she was providing extra or replacement services. TON's interests were advanced by its share of the extra tips Beasley earned. But if Beasley was merely replacing another waitress who could have earned those same tips, then it isn't clear that TON has been unjustly enriched. If, instead, she was working in addition to the normal wait staff, and her presence allowed TON to collect more "tip tax" than it would have had she not been there, then she should be able to recover TON's share of the additional tips she generated. Beasley does not run afoul of R2 § 373(2) because, while she has fully performed, TON's only remaining obligation is not to pay "a definite sum of money."

**Specific Performance:** The key here will be whether damages are adequate to protect Beasley's expectations interest, if any. If they are, she cannot recover specific performance. R2 § 359(1). If they are not, she can. (In reality, she would also have to prove a reasonably certain basis for awarding specific relief. R2 § 362. This might be a problem, because Bond did not say what kind of Mitsubishi, so what does the court specifically award? However, neither the text nor the supplement covered R2 § 362, so I didn't expect you to address this.) If Beasley can prove breach of contract and recover her expectations damages, then she should be foreclosed from recovering specific performance. If Beasley cannot recover her expectations damages, then specific performance may be appropriate, and would certainly be her preferred remedy.