Memo on Labor Day Hypo 2018
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The question does not have a prompt (a specific question you are invited to answer) and there are a number of issues raised by the description of the facts. But the central issue involves what remedies B is entitled to for C's breach of contract, as the question identifies a difference of opinion between B and C about this issue. B says C is obliged to pay the $40,000 contract price even if B is not doing the work. You have a limited amount of space for an answer and this should be your focus.

I think that this means that the issues about whether the contract between B and C includes the arbitration agreement and class action waiver (clearly raised by the facts) is not a priority for a one page analysis of the question. The garden design terms do not seem to contain any provisions directly relevant to the issue of damages for breach.

In addressing the remedies issue there is an initial question about what rules apply. The facts state that half of the value of the contract relates to the cost of plants and decorative stonework, so this is a mixed goods and services contract. We know that there are two tests here: the predominant purpose test and the gravamen of the action test. Because the breach is by the planned recipient of the goods and services and any action will be for the money she owes the gravamen of the action test doesn't help. As to predominant purpose, in terms of value neither goods nor services predominates (they are of equal value) so the question is whether the arrangement seems more like a service or more like a sale of moveable goods. I think that the service likely predominates here. If we think of the way in which the court in Bonebrake v Cox saw hiring an artist to paint a painting as a contract for services, this would seem to be similar. And in fact perhaps a better example as the end product of the work will be a garden, which wouldn't generally be a moveable good. (There's no indication it will be constructed on a moveable platform, for example).

But it might make sense to think about UCC damages with respect to the plants and stonework. The remedy with respect to the plants could be based on either resale price under UCC §2-706 or market price under §2-708 (we don't know anything about whether there are any incidental damages etc, The stonework may be hard for B to sell to someone else for anything other than junk value as it was specially designed for C (UCC §2-704(2), §2-708(2)). We can't carry out any calculations here as there is insufficient information. But any value of the plants and stonework should be taken into account in assessing damages for this part of the contract.

Contract damages should put the non-breaching party in the position they would have been in had the contract been performed. But the non-breaching party also has a duty to mitigate damages. In the situation here, when B demands that C pay the agreed contract price (in circumstances where the contract has no provision specifying that the money is to be paid even if the work is not done) B can expect that C will argue that B should mitigate damages (note that the argument above about bringing into account the value of the plants/stonework is a mitigation argument). If B is subject to a duty to mitigate we want to compare her situation to those of Shirley MacLaine and Michael Jordan. The question is what it would be reasonable to expect B to do to mitigate damages. One consideration would be how many potential customers there are for the timeframe in question. B typically books her clients a long time in advance, partly because she is so much in demand but it may be that it suits clients to book ahead of time. It may be hard to find a customer for the time period originally scheduled for C's work, and even if it were possible, looking for a last minute client might involve adverse reputational issues for B (it

might seem that her work is less valued than previously). We know from the facts given that B is focused on managing her reputation.

It is worth considering whether B is a lost volume seller. We know that service providers may be lost volume sellers (cf. Re Worldcom) and, unlike Michael Jordan B wants to do more garden work— she has the subjective intent necessary to e a lost volume seller. There is a question whether she has the sort of capacity to do more work that the lost volume seller idea involves. Unlike the parking lot example noted in footnote 41 on page 76 of the casebook it is not clear how easy it would be for B to expand her business— her ability to do so depends on how many qualified potential employees there are.

If you had time/space you might address the issue of whether B's terms and conditions becaome part of the contract, using the Uber cases we studied (Cullinane v Uber and Meyer v Kalanick and Uber). The test to apply is the one from Specht v Netscape: reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms. The 1st and 2nd Circuits in the two cases reached different conclusions as to the reasonably conspicuous notice issue. Here we could imagine a court taking either view. The reasonable smartphone user idea in Cullinane isn't applicable here as this is a contract entered into through a web page rather than an app.

The Question

Bee is a really successful garden designer based in Arcadia. She books design appointments months ahead of time, and the fact that customers have to book her services a long time in advance is part of what allows her to charge large fees. Bee's customers apply for her services through Bee's website, but Bee does not accept all requests for bookings. There are parts of the country she does not like to work in and she has other reasons for declining opportunities. She can afford to be picky because her work is so well regarded. And she thinks it is important to manage the projects she accepts to reinforce her reputation. Bee has a small team of gardeners who help her. She is very particular about who she hires—her gardeners all have to be highly trained and have significant experience. She pays them well.

Bee's website is designed to look attractive, and as an advertisement for Bee's work. So it has a lot of pictures and videos of Bee's designs, together with links to evaluations of her work by others. The home page has a link to an "application page," which has a large and noticeable link to information about Bee's fees and, right at the bottom of the page a very small link which states "Bee garden design terms." There is no language on the application page to suggest that it is important to click on the link before applying to become a customer. The garden design terms include an arbitration agreement with a class action waiver, and provides that any arbitration will be carried out by an arbitrator of Bee's choice. There is no indication what rules would apply to an arbitration.

At the beginning of October in 2017 Cee applied on Bee's website to become a customer for work on Cee's garden in Arcadia City. Bee accepted the application, and they arranged that the work would be done in August 2018 for a price of $40,000 including $20,000 of plants and decorative stonework to be installed in the garden. The stonework is specially designed according to Cee's instructions.

Cee told Bee in July 2018 that she could not have the work done in August because she would need to travel at that time for her own work. Bee said that Cee would still have to pay the $40,000. Cee disagrees. Bee's garden design terms do not contain any provisions about

cancellation.