

CALIFORNIA BAR PAST EXAMS

カリフォルニア州司法試験過去問

⑥ **REMEDIES**

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Remedies

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2003 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2003 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors and may not be reprinted.

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Question 2

In 1993, Polly and Donald orally agreed to jointly purchase a house on Willow Avenue. They each contributed \$20,000 toward the down payment and jointly borrowed the balance of the purchase price from a bank, which took a first deed of trust on the property as security for the loan. Polly paid her \$20,000 share of the down payment in cash. Donald paid his \$20,000 with money he embezzled from his employer, Acme Co (Acme).

Polly and Donald orally agreed that the house would be put in Donald's name alone. Polly had creditors seeking to enforce debt judgments against her, and she did not want them to levy on her interest in the house. Polly and Donald further orally agreed that Donald alone would occupy the property and that, in lieu of rent, he would make the monthly loan payments and take care of minor maintenance. They also orally agreed that if and when Donald vacated the property, they would sell it and divide the net proceeds equally.

Donald lived in the house, made the monthly loan payments, and performed routine maintenance.

In 1997, Acme discovered Donald's embezzlement and fired him.

In 1998, Donald vacated the house and rented it to tenants for three years, using the rental payments to cover the loan payments and the maintenance costs.

In 2003, Donald sold the house, paid the bank loan in full, and realized \$100,000 in net proceeds. Donald has offered to repay Polly only her \$20,000 down payment, but Polly claims she is entitled to \$50,000.

Having made no prior effort to pursue Donald for his embezzlement, Acme now claims it is entitled to recover an amount up to the \$100,000 net proceeds from the sale of the property, but, in any case, at least the \$20,000 Donald embezzled. Donald has no assets apart from the house sale proceeds.

What remedies, based on trust theories, might Polly and Acme seek against Donald as to the house sale proceeds, what defenses might Donald reasonably assert against Polly and Acme, and what is the likely result as to each remedy? Discuss.

Answer A to Question 2

Polly's Remedies Against Donald

Constructive Trust

A constructive trust, an equitable remedy, is a court-ordered obligation for one party who has been unjustly enriched at the expense of another to return the relevant property or assets to the injured party. To be entitled to an equitable remedy, a plaintiff must show that all legal remedies are inadequate. One of the situations in which a constructive trust has been used as a remedy by courts is that of an invalid oral agreement (i.e., one unenforceable at law) that is induced by fraud. Here, Polly and Donald entered into an oral agreement concerning the house they purchased together. Any agreement concerning the land must comply with the Statute of Frauds. Because the agreement between Polly and Donald was oral, it violated the Statute of Frauds [and] is therefore unenforceable at law. However, Polly can successfully argue that the agreement was induced by Donald's fraud. It appears from the facts that Donald made the oral promise to equally split proceeds from the sale of the house in order to get Polly to put up \$20,000 for the down payment and that he never planned to abide by this agreement. When Donald ultimately sold the house for \$100,000, he reneged on the agreement he had made with Polly, offering Polly her initial investment of \$20,000. This resulted in unjust enrichment to Donald. Finally, Donald has no assets apart from the house sale proceeds. Where a defendant is insolvent, damages are not available and a court will look to equitable remedies such as a constructive trust. Because of Donald's fraud, unjust enrichment at Polly's expense, and insolvency, a court could feasibly impose a constructive trust on half of the proceeds from the sale of the house in favor of Polly.

Purchase Money Resulting Trust

Where one party has provided all or part of the consideration for purchase of property, but title to the property is taken in another party's name, a resulting trust will be imposed in favor of the party that has provided the consideration. Where the title holding party sells the property to a third party, the party providing consideration may impose a resulting trust on the consideration the title-holder received in exchange for the property. Here, Polly supplied half of the downpayment for purchase of the house, but title was taken in Donald's name only. Therefore, half of the house was held in a purchase money resulting trust for Polly. When Donald sold the house, half of the consideration he received for it (\$100,000) would be subject to a resulting trust of which Polly is beneficiary. Polly would therefore be able to prevail on a purchase money resulting trust theory as well.

Donald's Defenses

Donald could assert a number of equitable defenses to the equitable remedy of constructive trust.

Unclean Hands

The unclean hands defense asserts that the plaintiff should not be entitled to equity because she herself has engaged in a wrong in the transaction for which she claims injury. Here, Donald could claim that Polly's having creditors seeking to enforce debt judgments against her, and thereby asking Donald to put the house entirely in his name, constituted unclean hands. However, Polly's debt issues are unrelated to Donald's fraudulent conduct. There is no suggestion that Polly engaged in any wrongful conduct in her dealings with Donald. Therefore, this defense will likely fail.

Laches

The laches defense asserts that a plaintiff cannot bring an action once an unreasonable amount of time has passed after the injury and the delay has somehow prejudiced the defendant. Here, Donald will argue that he and Polly had agreed that, upon Donald's vacating the house, the property would be sold and the net proceeds divided equally. Donald vacated the house in 1998. However, at that time, Polly did not insist on the house being sold. After renting the house for five years, Donald finally sold it in 2003. Donald will argue that Polly's claim was actionable in 1998, but that she waited five years before bringing it. Donald will argue that five years is an unreasonable amount of time to wait before bringing the lawsuit and that he will be prejudiced by the delay. However, Polly can argue that the substantial part of the injury to her was sustained not in 1998, when Donald vacated the house and did not immediately sell it, but in 2003, when Donald sold the house and withheld Polly's rightful half share of the proceeds. This agreement will be successful, as Polly did not sustain a sustainable financial injury until Donald's 2003 withholding of the sale proceeds. Therefore, Donald is unlikely to prevail in establishing the laches defense.

Acme's Remedies Against Donald

Constructive Trust

Acme could seek the imposition of a constructive trust on Donald's proceeds from the sale of the house. Where a party has obtained property through fraudulent conduct, courts will impose a constructive trust on the defrauding party's property to prevent unjust enrichment. Here, Donald used funds he had embezzled from Acme to purchase the house and was thereby unjustly enriched. Aside from the proceeds from the sale of the house, Donald is insolvent. Therefore, a court could rightfully impose a constructive trust on Donald's half of the proceeds from the sale of the house.

One issue is whether the constructive trust would be imposed only to the extent of the \$20,000 Donald embezzled from Acme or to the extent that Donald benefitted from the embezzlement, i.e., the full amount (or at least his half share) of the proceeds from the sale. Where a party is unjustly enriched at another's expense, restitution will be in the amount of the benefit to the unjustly enriched party. Because Donald benefitted at least \$50,000 from the sale of the house, and because this benefit would not have been possible

without the \$20,000 Donald initially embezzled from Acme, Acme will be entitled to Donald's half share in the net proceeds from the sale of the house. Acme is not entitled to the full \$100,000, however, since this would lead to an inequitable result for Polly, who put up half of the downpayment and entered into an agreement with Donald for half of the proceeds.

Purchase Money Resulting Trust

Acme could also assert the remedy of purchase money resulting trust. Here, Acme unknowingly provided the consideration for Donald's purchase of the house. Title to the house was taken in Donald's name only. Donald therefore held his interest in the house in resulting trust with Acme as the beneficiary. When Donald sold the house, one half of the consideration Donald received would likewise be held in a resulting trust with Acme as the beneficiary. A court would likely award this remedy to Acme.

Donald's Defenses

Unclean Hands

There is no plausible basis on which to assert that Acme had unclean hands. To the contrary, Donald embezzled funds from Acme. Acme was a victim of Donald's fraud and perpetrated no fraud of its own.

Laches

Donald will assert that, because Acme discovered Donald's embezzlement in 1997 but did not bring the action until 2003, that the laches defense applies. Laches applies when an unreasonable time elapsed between the injury and the action and where this delay would result in prejudice to the defendant. Here, Acme let six years elapse between its discovery of the injury and its action against Donald. A court would likely conclude that six years is an unreasonable length of time which prejudiced Donald, since Donald likely proceeded on the reasonable belief that Acme did not plan to press charges for the embezzlement. Therefore, Donald's laches defense against Acme will likely be successful.

Answer B to Question 2

Polly:

Polly will assert a theory based on resulting trust. A resulting trust arises when one person takes title in his or her name for the benefit of the person who paid for the property. The presumption is that the one who paid for the property could not have meant to make a gift of the property to the one who takes title. The presumption does not apply when the parties are closely related; however, there is no evidence here that Polly and Donald are related, married, or otherwise within that presumption.

Here, both Polly and Donald contributed to the purchase price, yet title was taken in Donald's name alone. From that point on, Polly made no more payments on the property. However, she and Donald did have an oral agreement that in lieu of paying rent, he would make the monthly loan payments to the bank on their deed of trust. So she contributed to the purchase price, while title was taken in Donald's name alone. Therefore, equity should consider title to be in the name of both Polly and Donald.

Therefore, when Donald sold the property, Polly had a right to her portion of the proceeds. Their other oral agreement about vacating the property, selling and splitting the net proceeds, would not even be a factor. Polly is entitled to her share on the basis of the resulting trust.

Donald's Defenses:

First, Donald may argue for application of the "unclean hands" doctrine. This is an available defense to any equitable action. It states that someone may not avail himself of equity where the person's behavior was wrongful in that particular transaction on which the person is seeking relief.

Here, Polly and Donald made their original agreement in order to defraud creditors of their right to enforce their judgments against her. That is why they took title in Donald's name alone. So Polly should not be allowed to now seek an interest in the property due to her "unclean hands."

But the unclean hands doctrine is not available as a defense where the defendant profited from the plaintiff's wrongful behavior. Here, Donald did profit—he got title to the property, and it was not levied by Polly's creditors. Since Donald received a benefit, he will not be allowed to assert unclean hands, despite Polly's wrongful behavior.

Donald will also assert the statute of frauds as a defense. The statute of frauds requires that any contract for the sale of an interest in land must be in writing. Here, the oral agreement that Polly and Donald initially made was not in writing. However, that contract was not a contract relating to the sale of an interest in land—it was only a contract about how they would jointly purchase the house. Therefore, the statute of frauds is no bar to the

action.

Polly:

Polly can also assert a constructive trust theory. A constructive trust is imposed on a person to prevent unjust enrichment by that person where, for example, the property is obtained or held wrongfully.

Polly would seek to impose a constructive trust on the proceeds of the sale, which should have been split between them on the basis of their agreement to sell and divide the proceeds whenever Donald should move out.

Donald vacated the property in 1998 and the property should have been sold then and the proceeds divided. That did not happen. Therefore, when it was sold (in 2003) the proceeds should still have been divided. Donald is wrongfully holding Polly's half of the proceeds, and so a constructive trust should be implied on Donald to hold those proceeds and convey them to Polly.

Donald's Defenses:

Donald may assert a defense of laches. Laches is an equitable remedy, available in all cases where the plaintiff is seeking equitable relief. It bars an action where the plaintiff has unduly delayed seeking relief, causing prejudice to the defendant.

Donald will argue that he breached their oral contract in 1998, when he moved out and began renting to tenants. It was not until 2003 that Polly sought relief for the breach.

However, the unjust attachment stems from the 2003 sale of the property, not the initial breach by not selling the house in 1998. Polly could have (and likely did) waive any right to immediate sale of the property upon vacating. But she still remained entitled to her share of the proceeds, at whatever time the sale occurred. So Donald's laches defense will probably fail.

The same outcome is likely for any statute of limitations defense Donald might raise, based on the same analysis.

Donald may also argue for the statute of frauds as a defense. This was a contract for the sale of an interest in land. Therefore, it needs to be in writing.

But again, this contract was collateral to the sale of an interest in land. It did not involve the actual sale, only an agreement of what to do with the property and the proceeds of that property at a certain time upon the happening of a certain condition. The statute of frauds will probably not work as a defense for Donald either.

The bottom line is that Donald has the title in the property and/or its proceeds as a result

of his own wrongful behavior. In all likelihood, a court will not allow him to profit from his own wrongdoing, and so Polly will be successful. She will get \$50,000, not just \$20,000.

Acme:

Donald wrongfully converted the \$20,000 of Acme when he embezzled it and used it to purchase the Willow Avenue home. Therefore, Acme could seek a constructive trust on the premises, and therefore the proceeds of the sale of the home.

Since Donald wrongfully used Acme's funds to acquire title to the property, Acme will argue that those funds should be traced to the property itself. Therefore, a constructive trust should be imposed in its favor on the entire property. This is not a case where Donald used the embezzled funds to benefit property he already owned—he acquired his interest in the property due to the embezzled funds.

But a court in equity would probably not allow Acme to impose a constructive trust on the entire property. What is more likely is that (due to Polly's interest) the court would impose a constructive trust on only Donald's portion of the ownership interest. Therefore, if Donald owns one-half of the house, the constructive trust would be on one-half of the proceeds, or \$50,000.

It is also possible that instead of a constructive trust, the court might impose an equitable lien on the property (and consequently the proceeds). Since Donald (and Polly) both contributed other funds to the purchase of the home, Acme's equitable lien would only give it an interest in the property to secure the repayment of the funds Donald misappropriated—\$20,000. If an equitable lien is imposed, then Acme would get that amount from the proceeds: \$20,000.

Donald's defenses:

The two biggest defenses available to Donald against Acme are laches and any applicable statute of limitations.

Laches (as indicated previously) is about unreasonable delay causing harm or prejudice to the defendant. Laches begins to run from when the plaintiff has reason to know of the injury. Here, the embezzlement occurred in 1993, but Acme is only now suing in 2003. If laches begins to run from 1993, there is probably prejudice to Donald; he has purchased the property and made additional payments and maintenance on it. Therefore, laches would likely bar the suit.

But Acme only discovered the embezzlement in 1997, at which time it fired Donald from its employ. If laches begins to run from this date (as is more probable), then there is less reason to apply the defense. Donald has not really been prejudiced from that time until the present. The most likely outcome is that laches will not prevent the relief being sought by Acme.

An applicable statute of limitations also could run from either date, 1993 or 1997. There is no requirement of harm to defendant, so if the applicable statutory period has expired, that would be a complete defense for Donald.

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Question 5

Stan and Barb entered into a valid written contract whereby (1) Stan agreed to convey to Barb 100 acres of agricultural land and water rights in an adjacent stream, and (2) Barb agreed to pay Stan \$100,000. When Stan and Barb were negotiating the deal, Stan said, "You know I want to make sure that this property will still be used for farming and not developed." Barb replied simply, "Well, I can certainly understand your feelings." In fact, Barb intended to develop the land as a resort.

The conveyance was to take place on June 1. On May 15, Stan called Barb and told her the deal was off. Stan said that a third party, Tom, had offered him \$130,000 for the land. Stan also said that he had discovered that Barb intended to develop the land.

On May 16, Barb discovered that Stan has title to only 90 of the 100 acres specified, and that he does not have water rights in the adjacent stream.

Barb still wishes to purchase the property. However, it will cost her \$15,000 to purchase the water rights from the true owner of those rights.

What equitable and contractual remedies, if any, may Barb seek, what defenses, if any, may Stan assert, and what is the likely outcome on each? Discuss.

Answer A to Question 5

5)

Barb v. Stan

Barb's Equitable and Contractual Remedies

Contractual Rights - - Land-Sale Contract

Barb can sue Stan under contract rights for breach of the land-sale contract, for failing to deliver marketable title and for breach of a general warranty deed. She should assert that she is entitled to the remedy of specific performance, or alternately, damages under contract.

Specific Performance

Specific performance is an equitable remedy that is available when: 1) there is a valid contract, 2) the terms of the contract are clear and definite and were performed, 3) there is [sic] inadequate legal damages, 4) there [sic] mutuality, and 5) there are no valid defenses.

Valid Contract

A valid contract in a land-sale agreement requires a writing with all essential terms.

The contract between Barb and Stan was a valid written agreement, for the sale and purchase of 100 acres of agricultural land and water rights to a stream, to close on June 1st. Barb agreed to pay \$100,000 for the purchase of the land.

Clear and Definite Terms

Terms are clear and definite when a court is able to enforce the terms. For a land-sale contract, the contract must contain: 1) parties, 2) property defined, 3) time for performance, and 4) purchase price.

Here, the court can enforce the sale of land, since it defines 1) the parties are Barb and Stan, 2) the land to be sold is 100 acres of agricultural land and water rights, 3) the time for performance as June 1st, and 4) the purchase price of \$100,000. Therefore, this element is met.

Inadequate Legal Damages

Legal damages are inadequate when there is a contract for a subject matter that is unique. Land has been held as a unique subject matter, since no two lots of land are the same, even if they appear to be.

Since the contract between Barb and Stan is for 100 acres of land, the contract is for a unique subject matter and legal damages are inadequate. Therefore, this element is met.

Mutuality

At common law, mutuality required that both parties be entitled to specific performance. However, modernly, mutuality only requires that the person seeking specific performance be ready and able to perform.

Here, as long as Barb, the person seeking the specific performance of the contract, is able to pay the purchase price, she should be entitled to specific performance.

Abatement of Purchase Price

In a land-sale contract, a purchase price can be abated, or reduced when the title rendered is defective due to an encumbrance or unmarketable title, or a conveyance of less than promised.

If Barb succeeds on specific performance, subject to Stan's defenses (discussed below) then she should be entitled to abate the purchase price. Bob contracted for 100 acres of land and water right[s] to an adjacent stream. Barb later discovered that Stan only owned 90 acres and did not own the water rights he claimed to own. Since Barb contracted to pay \$100,000, she should be entitled to a reduction of the purchase price to reflect the value of the land, minus the 10 acres and the stream.

Stream

The stream was not owned by Stan, but owned by another person who is willing to sell the stream to Barb for \$15,000. Therefore, the purchase price should be first reduced by the amount, to a total of \$85,000. This is fair since it would cost Barb that amount to correct the contract as agreed.

10 Acres

Stan agreed to sell Barb 100 acres, but only owned 90 acres of the land. The ten acres of land should be subtracted from the remaining \$85,000. One method of doing this would be to divide \$85,000 by 100 and value each acre at \$850. Then multiply \$850 x 10 acres for a reduction of \$8,500 credited to Barb.

Legal Damages

If Barb is unsuccessful in her attempt to obtain specific performance, she could sue Stan for breach of contract and obtain legal damages.

Breach of the Contract—Anticipatory Repudiation

Anticipatory repudiation is a clear and unambiguous statement that a party will not perform before performance comes due under the contract.

Since Stan called off the sale of the land on May 15, which was two weeks before the closing date of June 1st, Stan anticipatorily repudiated the contract, which is a major breach. This entitles Barb to suspend her performance and sue for breach of contract.

Expectancy Damages

A major breach entitles the aggrieved party to damages to make them whole. These are called expectancy damages. In these contracts, the appropriate measure of damages is the fair market value of the land - - the contract price.

Here, Barb contracted for the sale of land for \$100,000. Stan was later offered \$130,000 for the land by a third party. If indeed this contract reflects fair market value and if the contract was also for the 100 acres and the water rights, then Barb should be granted \$30,000. Otherwise, Barb should get \$30,000 plus \$15,000 for the water rights plus \$8,500 to reflect the additional 10 acres.

2) Stan's Defenses

Stan should assert defenses that Barb is not entitled to an equitable remedy and that specific performance was inappropriate since there was not a valid contract which Barb had performed.

Laches

Laches bars equitable remedies when a party unreasonably delays and this causes prejudice.

Here, there is no indication that Barb delayed in filing her suit. Therefore, this defense will fail.

Unclean Hands

Under the Clean Hands Doctrine, equity will not come to the aid of a person with unclean hands. The Clean Hands Doctrine bars equitable relief to a person who engages in wrongful, fraudulent or unconscionable conduct with regard to the subject matter at hand.

Here, Stan could argue that Barb knew of Stan's firm desire to keep the land as agricultural land to be used for farming and prevent its development. In fact, Barb said, "I can certainly understand your feelings," but in reality had intended all along to develop the agricultural land as a resort. Barb did not disclose this information to Stan, which is material omission and one that probably would have terminated the contract. On the other hand, Stan did not include this statement in the contract, and if it were truly a deal-breaker, he probably should have. Since courts tend to favor the free alienation of property and prefer that material agreements be in the writing, if there is one, the court will likely side with Barb, unless they find that she committed fraud against Stan. Therefore, this defense, although a close call, will not likely bar Barb's relief in equity.

Contract Invalid

Stan can also claim the contract is invalid, which would refute one of the elements necessary to enforce an agreement with specific performance.

Unconscionability

Stan should argue that the contract was unconscionable since there was unfair surprise in Barb's intent to develop the land.

However, this argument will likely fail as Barb and Stan appear to be at arm's length and Stan should have included his restriction on the land.

Terms of the Contract Not Met

Stan can also argue that the contract terms were not met and Barb breached the contract by having the intent to develop the land although there was a condition that Barb use the land with the restriction on the land for agricultural purposes. However, the parole evidence rule will bar this argument.

Parol Evidence

Parol evidence bars introduction of oral or written agreements made [sic] before or contemporaneously with a completely integrated writing.

Therefore, Barb will argue that the oral statements by Stan that he preferred the property be used for farming and not be developed is barred.

Stan's Bad Faith/Unclean Hands

Since Stan also acted in bad faith and with unclean hands by accepting an offer from another purchaser for more money, he will probably lose on his defense arguments.

Answer B to Question 5

5)

Barb (B) v. Seller (S)

Breach of the Land Sale Contract

Valid, Enforceable Contract

The facts tell us that B and S entered into a valid written contract for the sale of 100 acres of agricultural land and water rights in exchange for \$100K.

Anticipatory Repudiation

B will argue that S breached the agreement when he anticipatorily repudiated the agreement on May 15. In order to have an anticipatory repudiation, the breaching party must unequivocally indicate an intent not to perform. In this case, S called B and told her the deal was off. This qualifies as an unequivocal repudiation and S would be free to pursue all remedies available to her for the breach.

B has four options available to her after S's repudiation. She is free to: (1) treat the contract as repudiated and sue for damages, (2) treat the contract as discharged; (3) await the time for performance (June 1) and sue when performance does not occur; or (4) urge S to perform. In this case, we know that B still wishes to purchase the property; thus, her best option is to treat the contract as repudiated and sue immediately for all contractual remedies available to her.

Unmarketable Title

B will also argue that S breached the land sale contract by being unable to provide marketable title. This is because she discovered on May 16 that S only had title to 90 of the 100 acres he was purporting to sell B and because he did not have any water rights in the adjacent stream.

Although S might try to argue that his inability to provide marketable title discharges him from the contract, this will not be a successful defense because only the buyer to a land sale contract has a right to terminate the contract if the seller cannot provide marketable title. If the buyer still wants to purchase the property, the seller must perform under the contract. In addition, the buyer has a right to sue for damages incurred under the contract. This could include abatement of the purchase price.

Remedies

Compensatory Damages

Expectancy Damages

In order to be awarded damages, B must prove that they are foreseeable and certain to result. The usual measure of damages in a contract action is for B's expectancy; that is, B is entitled to recover the amount that she would need to purchase a replacement. In this case, it would be very difficult for B to establish how much it would cost her to purchase comparable property since she specifically wants S's property. Thus, there does not appear to be any way to provide B with an amount that would allow her to buy an adequate substitute. If, however, there were other comparable nearby [sic] for sale, and if S could not obtain specific performance, then she might be able to prove expectancy damages by establishing how much it would cost to purchase that other property. If she could do that, she would be entitled to the difference between what it cost to purchase the replacement property and the contract price (\$100K).

Consequential Damages

In addition to expectancy damages, consequential damages are sometimes available in contract actions. These are damages that are unusual, but that were foreseeable to both parties at the time the contract was formed. B will try to argue that S should be liable to her for any lost profits she will suffer as a result of the delay in developing the land for a resort. She'll argue that the substantial delay that will occur because she has to either bring suit to obtain S's land or because she'll have to go find an alternative property will result in significant lost profit damages. Moreover, she will argue that S knew on May 15, before the June 1 performance date, that she intended to develop the land as a resort and that he thus should be liable for all lost profits that she will incur as a result of his breach.

S will successfully argue that B is not entitled to consequential damages for two reasons. First, he will prove that he was not aware of B's plans at the time the contract was formed. The contract was formed at the time the parties signed the agreement, and at that time, S was under the impression B would be using the land for farming. This is evidenced by his statement that he wanted the property to remain undeveloped and to be used for farming and B's response of "Well, I can certainly understand your feelings." S will argue that this did not put him on any kind of notice as to B's intentions and thus he isn't liable for her lost development profits. Second, S will successfully argue that the lost development profits can't be proven with certainty since it is a new business with no prior history of profits. Since courts are loathe to award lost profits to new businesses, S will also succeed in this argument.

Accordingly, B is entitled to receive the amount it would take to allow her to purchase a new piece of replacement property. However, since land is unique, this is inadequate compensation for B. B will not be able to prove that she is entitled to consequential

damages since they are uncertain and since S was unaware of B's plans at the time the contract was formed.

Incidental Damages

B is always entitled to recover for incidental damages suffered as a result of the breach. In this case, to the extent she can prove what it cost her to search for new property, etc[.], she can recover from S.

Restitutionary Damages

Restitution is an alternative remedy to compensatory damages when the defendant received a benefit and compensatory damages are not the best measure of damages. In this case, S has not actually received any benefit yet. However, B may be able to succeed in her argument that if B is allowed to sell his property to Tom because the court refuses to grant specific performance, then she should be entitled to receive the \$30K S was receiving from Tom that was in excess of the amount S was entitled to receive under the contract with B. She can argue that allowing S to retain the additional sum would result in unjust enrichment.

Specific Performance

Specific performance is available only if B can establish that: (1) damages are inadequate; (2) the terms of the contract are definite and certain; (3) it is feasible to enforce the contract; (4) there is mutuality of remedy/performance; and (5) there are not equitable defenses.

Inadequacy

As discussed above, since land is unique and since B can't prove her damages with certainty, damages are an inadequate remedy in this case.

Definite and Certain Terms

Courts do not award specific performance unless the terms are very definite and certain. Here, B will argue the terms are quite certain since she was entitled to receive 100 acres of land and water rights in exchange for \$100K. She will succeed in her argument.

Feasibility of Enforcement

A court will not award specific performance unless it is feasible to enforce the injunction. Here, a court presumably has jurisdiction over the land and S. In addition, the court would be able to use its contempt power to force S to convey the land to B. Thus, the injunction is feasible to enforce.

Mutuality of Remedy/Performance

In the past, courts would not award specific performance if there was no mutuality of remedy (if the party asking for specific performance could not be made to specifically perform in the event of her breach). Courts today have modified this requirement so that they grant specific performance if it is possible to ensure mutuality of performance. In this case, mutuality of performance is possible since the court can require S to convey the deed to the property at the same time B tenders \$100K to S.

No Equitable Defenses

Laches

B has not waited an unreasonable length of time to bring suit such that S can argue that he detrimentally relied on B's failure to bring suit. Accordingly, this is no defense.

Unclean Hands

S will assert that B has acted with unclean hands with regard to this particular transaction. He will point to B's statement in response to his request that he would like the property to remain undeveloped. S will claim the statement, while not explicitly false, was deceptive since it induced S into believing that B would not develop the property when, in fact, B planned all along to develop it as a resort. S will argue it was a misstatement by omission since B knew at the time the contract was formed that she would develop the property despite S's desire for her not to, yet she did not volunteer this information to S.

B may counter that her evasion was not an actual false statement and that she cannot be held responsible for whatever S may have interpreted her statement to mean beyond its actual literal meaning – that she did, in fact, understand that he'd like the property to remain undeveloped. B will argue that since there was no actual false statement, she does not have unclean hands and[,] thus, is fully entitled to specific performance.

If S is successful in making his argument, the court will deny B specific performance, and award her damages only.

Conclusion

A court will not award B specific performance of the contract since she had unclean hands with respect to the contract. Accordingly, it will grant her whatever damages can be proven would be certain to occur. In this case, B will likely be entitled to the \$30K that S will get from Tom that is in excess of the contract price they had agreed on. In addition, she can receive incidental damages and, in the unlikely event she can prove how much it would cost to obtain replacement property, she can receive any amount in excess of the contract price from S as well.

If, however, the court did award specific performance, it would require that S convey the 90 acres of land S actually owns to B. B would only have to pay \$90K for the 90 acres. In addition, since it would cost B \$15K to purchase the water rights from the true owner, B is also entitled to deduct this from the purchase price. Accordingly, if a court does award B specific performance, it will only require B to tender \$75K to S in exchange for S's 90 acres of property.

S's Defense - Contract was Subject to a Condition

S will argue in his defense that he did not actually breach the contract because the contract was subject to a condition (an agreement not to develop the land). He'll argue this condition was not satisfied because he discovered that B fully intended to develop the land. Thus, he will argue, he was discharged from his own duty to perform under the contract by B's failure to abide by the condition and was free to terminate the contract.

B will successfully defend against this argument by proving that there was no explicit agreement to create a condition to the contract. The parol evidence rule doesn't apply to extrinsic evidence used to demonstrate the existence of a condition precedent to the contract. B will introduce the statement S made: "You know I want to make sure this property will still be used for farming and not developed." Next, she'll introduce her response: "Well, I certainly understand your feelings." Her response did not state that she would agree not to develop the property; thus, there is no condition precedent and B's argument that his duty to perform was discharged will not succeed.

ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2006 CALIFORNIA BAR EXAMINATION

This web publication contains the six essay questions from the February 2006 California Bar Examination and two selected answers to each question.

The answers received high grades and were written by applicants who passed the examination. Minor corrections were made for ease in reading. The answers are reproduced here with the consent of their authors.

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Conclusion

Since offensive collateral estoppel is allowed under these circumstances, the court incorrectly denied Pat's motion for summary judgment on her contract claim.

Tort claim

Res judicata

For the same reasons as the breach of contract claim, res judicata will not apply to the tort claim.

Collateral estoppel

The issue of Busco's tort liability for the accident when the bus hit a tree was not actually litigated in Ed's action, which was solely for breach of contract because Ed was not hurt. Accordingly, collateral estoppel will not apply to Pat's tort action.

Conclusion

The court correctly denied Pat's motion for summary judgment on the tort claim.

Question 5

Marla is a manufacturer of widgets. Larry is a lawyer who regularly represents Marla in legal matters relating to her manufacturing business. Larry is also the sole owner and

operator of a business called Supply Source (“SS”), in which he acts as an independent broker of surplus goods. SS is operated independently from Larry’s law practice and from a separate office.

At a time when the market for widgets was suffering from over-supply, Marla called Larry at his SS office. During their telephone conversation, Marla told Larry that, if he could find a buyer for her excess inventory of 100,000 widgets, Larry could keep anything he obtained over \$1.00 per widget. Although Marla thought it unlikely that Larry would be able to sell them for more than \$1.25 per widget, she said, “. . . and, if you get more than \$1.25 each, we’ll talk about how to split the excess.” Larry replied, “Okay,” and undertook to market the widgets.

During a brief period when market demand for widgets increased, Larry found a buyer, Ben. In a written agreement with Larry, Ben agreed to purchase all 100,000 widgets for \$2.50 each. Ben paid Larry \$250,000. Larry then sent Marla a check for \$100,000 with a cover letter stating, “I have sold all of the 100,000 widgets to Ben. Here is your \$100,000 as we agreed.”

When Marla learned that Ben had paid \$2.50 per widget, she called Larry and said, “You lied to me about what you got for the widgets. I don’t think the deal we made over the telephone is enforceable. I want you to send me the other \$150,000 you received from Ben, and then we’ll talk about a reasonable commission for you. But right now, we don’t have a deal.” Larry refused to remit any part of the \$150,000 to Marla.

1. To what extent, if any, is the agreement between Larry and Marla enforceable? Discuss.
2. In his conduct toward Marla, what ethical violations, if any, has Larry committed? Discuss.

Answer A to Question 5

5)

The Agreement Between Larry and Marla is enforceable because it was a unilateral contract fully performed by Larry and it was not subject to the Statute of Frauds[.]

Offer, Acceptance and Consideration:

The agreement between Larry and Marla is a unilateral contract. In order for there to be a unilateral contract there must be mutual assent (and offer and acceptance) and bargained for exchange (consideration). An offer is a communication between two persons or entities, and it is made where reasonable people would believe that acceptance of the offer would lead the participants to be bound by its terms. The terms of the offer must also be sufficiently definite. In our case, an offer was made by Marla to Larry to find a buyer for her widgets. As a finder, Larry would be entitled to the portion of the proceeds between \$1.00 per widget and \$1.25, and then a portion of the proceeds above \$1.25. In this case the terms of the contract were sufficiently definite even though the portion of proceeds above [\$]1.25 had not been definitively determined. Given their preexisting, ongoing relationship, and that both are merchants it is fair to assume that they could finalize the contract terms at a later date, after the sale of the widgets. A reasonable person would believe that Marla was inviting acceptance and wanted to be bound by the terms of her offer.

In this case, Larry accepted Marla's contract by performing. Marla's offer was for a unilateral contract. A unilateral contract is a contract that can be accepted only by full performance. It is clear from its terms that Larry could only accept Marla's offer by actual performance because her offer was conditional. He would only get a percentage of the proceeds "IF" he found a buyer. In this case, Larry accepted the contract when Ben agreed to purchase all 100,000 widgets for \$2.50 each and the widgets were actually sold.

Consideration is present in a contract where the promisee incurs a detriment. That is, he does something that he does not have to do, or refrains from doing something that he does not have to do, or refrains from doing something that he is entitled to do. In this case, there is consideration because Larry, the promisee[,] incurs a detriment when he enters the market to look for a buyer. He is not required to look for a buyer in this case, but does so anyway. He incurs a detriment because it takes time away f[ro]m his other business pursuits (including his law practice).

Because there has been a definite offer made by Marla, Larry fully accepted through his performance, and consideration is present, a contract has been formed so long as no defenses can be raised.

Defenses

The agreement between Larry and Marla is enforceable because no defenses to formation can be raised. The Statute [of] Frauds is a requirement that certain contracts be in writing.

The writing must include the material terms of the contract and be signed. Contracts that are subject to the statute of frauds are contracts in consideration of marriage, surety contracts, contracts that cannot be formed in one year, and land sale contracts. None of these are relevant here. In addition, contracts for goods in amount greater than \$500 are also subject to the statute of frauds. If a contract for goods in an amount greater than \$500 is not in a signed writing, it generally is not enforceable.

In this case, the contract between Larry and Marla was not subject to the “goods prong” of the statute of frauds because Larry did not purchase the goods directly from Marla. Larry’s role was that of a finder or marketer whose responsibility it was to find a buyer for Marla’s widgets. He was incented [sic] to find a high price because he was entitled to keep anything over \$1.00 per widget, and then a portion of the proceeds above \$1.25 per widget. The arrangement would also benefit Marla because a high price for the widgets would benefit her as well, and she could rely on Larry’s expertise as a broker. Marla would also not have to worry about the hassle of setting [sic] the goods and could concentrate on the core aspect of her business, manufacturing. One could argue that Larry purchased the goods from Mary because he received the purchase price from Ben directly and his business was as a broker of surplus goods. In this case he did not act as a broker, because he did not buy the goods from Marla directly. There is no indication that the goods were ever in his possession. Further, in a typical sales contract, a manufactu[r]er is not entitled to a percentage of the middleman’s purchase price. Thus, the contract is more akin to that of finder who never “owned” the goods.

Ethical Violations

Operating a Business:

Larry did not commit an ethical violation when he formed and operated a business called Supply Source. A lawyer may own and operate a business that is separate and apart from the practice of law. For example, a lawyer may own a restaurant or a gas station. Lawyers may also operate a law firm that offers services related and incidental to the practice of law, but that are no[t] actually the practice of law. For example, a law firm may offer services relating to money management and accounting. In this case, we know that Larry was the sole owner and operator of a business called Supply Source, and that it operated independently from Larry’s law practice and from a separate office. Because the business was run separately and apart from his legal practice, and it did not involve anything remotely related to the practice of law, it is permissible for Larry to own and operate the business. However, a lawyer who runs a business must be careful not to engage in business that would pose conflicts of interests with its clients. We will see below that Larry did not operate his business in a way to minimize conflicts.

Entering into a Business Relationship:

Larry committed an ethical violation when he did not follow proper procedures when he entered into a business arrangement. When a lawyer enters into a business arrangement

with a non-lawyer (and especially a client!), the lawyer must abide by a set of procedures. First, the lawyer should advise the other party to consult another lawyer and give him or her time to do so. Second, the lawyer must disclose and explain all the relevant terms of the contract in a way that the other party can understand. Last, the terms of the contract must be fair and not one-sided to the lawyer's benefit. In this case the terms of the contract seem to be fair. We can presume that they are fair because Marla set the terms of the contract and the contract was not negotiated by Larry. Second[,] there was no need for Larry to explain the relevant terms of the contract because they were self-explanatory and a lay person could understand them. However, Larry did not give Marla an opportunity to consult with a lawyer before entering into the contract. While Marla could have waived the right to consult a lawyer, Larry must still advise [sic] her that it may be beneficial. In this case, a lawyer may have been helpful. He may have advised Marla not to enter into a contract with Larry where all the terms have not been finalized. The fact that the terms have not been finalized is what caused the problem in the first place.

Duty to be an honest, upright member of the community

Larry should have been honest in his dealings with Marla. A lawyer had a duty to act in upright, honest manner in all aspects of his or her life. In this case, Larry should have disclosed to Marla the amount of money he received from Ben and made a good faith attempt to resolve the open issue in their contract. By ignoring that aspect of the contract and no[t] disclosing the amount he received, he seems to be acting in a deceitful manner. Not only [should] a lawyer abide by ethical considerations in the course of his practice, he must also abide by them in other aspects of his or [her] life.

Answer B to Question 5

5)

(1) Enforceability of the contract between Larry and Marla

Applicable Law: If this case involves the sale of goods (tangible personal property), widgets, Article 2 of the Uniform Commercial Code applies to the transaction. However, while the case does involve the sale of widgets, the contract is really for Larry's service in selling the widgets, therefore common law would likely apply. Indeed, the payment to Larry was for the sale of the widgets. He never purchased the widgets himself, but merely acted as a broker to Ben.

The issue is whether the agreement between Larry and Marla is legally enforceable, and therefore a contract exists. In order to form a contract there must have been an offer by Marla, acceptance by Larry, and some form of consideration for the agreement.

Offer: The first issue is whether Marla ever made an offer to Larry. An offer is made when a party manifests an intent to enter into contract and communicates such intent to an offeree. Here, Marla did call Larry at his Supply Source ("SS") office and stated that she wanted Larry to sell her excess inventory. Under common law, an offer must state a price term and the material terms of the contract. The material terms, the sale of widgets up to 100,000, were certainly state[d].

The issue is thus whether there was a price term. Marla did agree to give Larry all profits over \$1.00, up to \$1.25. However, there was no certain price term since Marla stated that any excess over \$1.25 would have to be negotiated as to the amount Larry would receive. Therefore, the lack of a certain price term negates the enforceability of the contract. The parties did not have a meeting of the minds as to what Larry would be paid for the profits he received on the widgets over \$1.25. Thus, the facts probably indicate that Marla intended to contract and not to continue to negotiate.

Under the UCC, however, the court only looks at the intention of the parties to determine if there has been an offer. The UCC does not require a price term and will imply a reasonable price term if one is not stated. However, if the parties are negotiating the price term there is no intention to contract under the UCC. There was likely an intend [sic] by Marla to enter into contract since she believed it unlikely that Larry could sell the widgets for more than \$1.25 per widget. Although the price term is not certain, the court could infer a "reasonable" price term for any sale over \$1.25.

If there is not offer[sic], the agreement would not be enforceable under contract law. However, if there was an offer, all the other elements for a valid contract (as discussed below) were satisfied and therefore there was an enforceable agreement.

Acceptance: Marla's offer to Larry was probably a unilateral contract, that is, one

that states a specific (and only) form of acceptance. Here, Larry could only accept Marla's offer by selling the widgets for at least \$1.00 per widget and giving Marla \$1.00 for each widget sold. His acceptance was only upon completion of his performance.

If the contract was a bilateral contract, Larry would have promised Marla he would sell the widgets. Failure to sell the widgets would have meant Larry could have incurred liability for breach of contract for failure to perform. There is no such liability under a unilateral contract, since there is only acceptance upon completed performance.

Consideration: Consideration is a bargained for legal detriment. The only issue as to consideration in this case is whether Larry's promise was illusory. However, this was not a bilateral contract, but a unilateral contract in which Larry could only accept by performance. His performance therefore would be consideration.

Statute of Frauds: The statute of frauds requires that some contracts be in the form of a signed writing (statute of frauds may be satisfied in other ways). The statute of frauds does not apply to this case however because it is for a service, Larry's sale of widgets, which can be completed within 1 year.

If this was a contract for a sale of goods of at least \$500, the statute of frauds would apply. There was no writing. However, the statute of frauds can also be satisfied by full performance, which Larry did provide, by selling the widgets and turning payment over to Marla.

Again, as discussed above, this is a services contract, not a sale of goods contract and therefore not under the statute of frauds.

Quasi-Contract

Larry could still recover damages from Marla even if there was no contract, under quasi-contract principles. Quasi-contract is a principle used in contract law to prevent the unjust enrichment of a party. Here, Marla would be unjustly enriched if there was no formal contract and Larry expended his time and energy to find a purchaser for the widgets and was not compensated for his efforts. Therefore, the courts will allow Larry to recover for the fair market value of the services he rendered to Marla. The likely determination of the amount Marla benefited would likely be \$25,000, but could include a reasonable amount for the remaining \$125,000 over the agreement terms.

Conclusion:

There probably is an enforceable contract under which Larry can keep \$25,000 and a reasonable amount of the additional \$125,000 he received from the widget sales. Even if Larry cannot recover under contract, he can still recover under quasi-contract principles.

(2) Possible ethical violations committed by Larry

Attorneys owe several duties to many different parties, including their clients, adversaries, the court, and the public at large. Here, Larry regularly represents Marla in legal matters relating to her manufacturing business. Although Larry was not representing Marla in a deal for the sale of widgets, he still may have violated some of his duties to the profession.

Duty of Loyalty - business transactions with clients:

A lawyer owes his or her clients a duty of loyalty. The lawyer must act in a way they believe is for the best interest of the clients at all times (unless other ethical rules prohibit such, like placing a client on the stand who intends to perjur[e] herself.) Included in the duty of loyalty is fair dealing in business transactions with a client.

Both California and the ABA have rules regulating business transactions between lawyers and their clients. These rules require that for any transaction between a lawyer and a client, the lawyer should make sure the deal is fair to the client, express the deal in an understandable writing, allow the client to meet with independent counsel, and the client should consent to the deal in writing. Here, there is no evidence the deal entered into between Larry and Marla was not fair. The great increase in widget price occurred after the deal between the two was struck[.] However, there was no writing or opportunity for Marla (or suggestion by Larry) to consult independent counsel.

This rule may not apply here because Larry was not representing Marla at the time of the business transaction, at least as far as the limited facts [are] known. Furthermore, Larry did properly separate his law practice and his SS business. It is in a separate office and [there is] no indication the two endeavors are mixed in any manner by Larry.

However, since Larry has a regular and ongoing (at least prior to this incident) relationship with Marla, he should have satisfied the elements stated above and in failing to do so violated his duty of loyalty to his client Marla.

Duty to act honestly, without deceit or misrepresentation: A lawyer owes a duty to the public at large in all of his or her dealings to act honestly, without deceit or fraud and not to misrepresent. Violations of this rule harm the integrity of the profession. Here, it is unknown whether Larry truly believed he simply owed Martha the \$100,000 dollars [sic] for the transaction for the widgets or if he attempted to deceive her as to the price he received in an attempt to keep the additional profits to himself. If Larry violated the agreement knowingly, he would have also violated his duty to the profession by acting in a dishonest manner. This is a clear violation and compounded by the fact that Larry represents Marla on a regular basis in legal matters.

Conclusion:

Larry likely violated his duty of loyalty and his duty to act honestly to the public at large in his dealing with Marla. Although he was not acting as her attorney at the time of the deal to sell the widgets and Marla was likely aware of such since she contacted him at his SS office, Larry still violated his professional duties. However, Larry probably did not violate his duties of confidentiality or loyalty if he revealed any information received during his representation of Marla in finding Ben, the buyer of the widgets.



California
Bar
Examination

Essay Questions
and
Selected Answers

July 2006

Question 3

On Monday, Resi-Clean (RC) advertised its house cleaning services by hanging paper handbills on doorknobs in residential areas. The handbills listed the services available, gave RC's address and phone number, and contained a coupon that stated, "This coupon is worth \$20 off the price if you call within 24 hours and order a top-to-bottom house-cleaning for \$500."

Maria, a homeowner, responding to the handbill, phoned RC on the same day, spoke to a manager, and said she wanted a top-to-bottom house cleaning as described in the handbill. Maria said, "I assume that means \$480 because of your \$20-off coupon, right?" The RC manager said, "That's right. We can be at your house on Friday." Maria said, "Great! Just give me a call before your crew comes so I can be sure to have someone let you in."

Within minutes after the phone conversation ended, the RC manager deposited in the mail a "Confirmation of Order" form to Maria. The form stated, "We hereby confirm your top-to-bottom house cleaning for \$500. Our crew will arrive at your house before noon on Friday. You agree to give at least 48 hours advance notice of any cancellation. If you fail to give 48 hours notice, you agree to pay the full contract price of \$500."

About an hour later, Maria sent RC an e-mail, which RC received, stating, "I just want to explain that it's important that your cleaning crew do a good job because my house is up for sale and I want it to look exceptionally good."

On Thursday evening before RC's cleaning crew was to show up, Maria accepted an offer for the sale of her house. The next morning, Friday, at 10:00 a.m., Maria sent RC another e-mail stating, "No need to send your crew. I sold my house last night, and I no longer need your services." By that time, however, RC's crew was en route to Maria's house.

At 10:30 a.m. on Friday, Maria received RC's Confirmation of Order form in the mail. At 11:00 a.m., RC's crew arrived, prepared to clean Maria's house. Maria explained that she no longer needed to have the house cleaned and sent the crew away.

RC's loss of profit was \$100, but RC billed Maria for \$500.

Maria refused to pay.

Has Maria breached a contract with RC, and, if so, how much, if anything, does Maria owe RC? Discuss.

Answer A to Question 3

3)

Applicable Law

The common law applies to all sales of service contracts and the UCC applies to sale of goods. Here, the contract is for cleaning services (a service) so that it clearly falls within the ambit of the common law. As such, none of the rules under the UCC will be applicable.

Valid Contract Formed

Before addressing whether Maria breached her contract with Resi-Clean ("RC"), it must first be determined whether she had a valid contract to begin with. A valid contract requires: (1) an offer; (2) an acceptance of the aforementioned offer; (3) consideration from each party; and (4) no defenses to formation. Each will be discussed below.

Offer

For an offer to be valid there must be an intent to be bound, communicated to the offeree, with sufficient and definite material terms. Here, there are several points at which the parties may argue an offer was made. Whether or not a valid offer is made (i.e. whether above factors are met) is determined by looking at whether a reasonable person receiving the communication would feel that their acceptance of the offer would create a binding obligation.

First, it may be argued that the handbills placed on the doorknobs of the houses created an offer from RC to all of the houses. However, this argument is likely to fail. An advertisement that merely states the cost of services, a phone number, and possible coupons would not be construed by a reasonable person to evidence the intent of advertising to be bound to a contract upon acceptance.

Thus, this would not likely be construed as a valid offer. However, a court may accept an argument by Maria that the coupon attached that specified that the party would get \$20 off if they called within 24 hours and ordered a top-to-bottom cleaning was a valid offer because it was specific with the terms of how it could be accepted, when it had to be accepted by, and a reasonable person would feel that the party giving the coupon would be bound by the offer. The effect of the binding effect of the coupon will be discussed further with respect to the damages that Maria receives below.

A second possibility for the offer could be the phone call that Maria made to RC to order to the top-to-bottom cleaning service. She requested that they come and clean her house, as described on the handbill, and specified the \$480 price (\$500 less the \$20 coupon). This would be construed by a reasonable person in RC's shoes to be [an] offer than [sic]

they could accept to form a binding contract so that it likely would be deemed to be an offer. Moreover, even if this offer was deemed rejected by RC's manager indicating that "they would be there Friday" because this was an additional term, that statement would be an [sic] counteroffer to Maria on the same terms but including the Friday cleaning provision.

If, for some reason, the court determines that the above was not an offer, then the confirmation order may also be deemed to be an offer to Maria. Thus, Maria would be free to accept that order at any point after receiving it. This is very unlikely to be the case, however, as Maria's phone call would almost certainly be construed to be the offer in this case.

Acceptance

A valid acceptance requires that a party who is able to accept the contract unequivocally accepts the offer and communicates that acceptance to the offeror. Of course, if and when a valid acceptance occurred would depend on when the offer occurred. Because the advertisement described above was not an offer (except to the extent of the coupon which was incorporated into Maria's offer) it will not be discussed here with respect to acceptance.

Assuming that Maria's phone call is deemed to be the offer then RC likely accepted the offer when its manager stated "[t]hat's right. We can be at your house on Friday." While Maria may argue that the statement "we can be at your house on Friday" was an additional term that did not create a valid contract but, rather, was a rejection and counteroffer, this argument would have little effect given that Maria promptly said "Great[,] " thereby accepting the counteroffer with the additional Friday term. Maria may also argue that by telling them to call her before they come [sic] so that someone is there to let them in she did not unequivocally accept their offer. However, this statement was not intended to modify the terms of the contract but, rather, just told [sic] them that they should call in advance to ensure someone would be home. Whether or not this amounted to a condition precedent will be discussed below. Thus, Maria's offer was accepted by RC (or Maria accepted RC's counteroffer on the same terms with the Friday provision) upon their phone call and a binding contract was completed at the time.

If the phone call was not deemed to be a valid offer so that the offer was the confirmatory memo, then Maria did not accept it and there would be no valid contract. Maria only received the memo on Friday morning and from that point on tried to send RC away. Thus, there would be no acceptance. However, this argument would be unlikely given that they almost certainly formed a valid contract during the phone call as described above.

Consideration

Here, Maria agreed to pay RC \$480 and they agreed to clean her house from top-to-

bottom. This exchange of promises provides the required bargained[-]for exchange and legal detriment to each party for there to be valid consideration.

Thus, this element is met.

Defenses

Statute of Frauds

The Statute of Frauds does not apply to services contracts that will be completed in less than one year. Here, the contract was to be completed in its entirety by Friday so that the statute of frauds was inapplicable.

As no other defenses are applicable, a valid contract was likely formed at the time of the phone conversation between Maria and the manager of RC.

Terms of the Contract Formed

Once it is determined that a valid contract was formed between the parties, the next step is determin[ing] the terms of that contract. In this case, Maria called RC and stated that she wanted a “top-to-bottom” house cleaning “as described in the handbill.” Moreover, she indicated (and the manager of RC agreed) that the price would be \$480 once the coupon from the handbill was taken into consideration. The contract likely also contains the provision that RC will complete the work on Friday as that was agreed upon by the parties during the course of the phone conversation. Thus, the contract will certainly be for a top-to-bottom house cleaning at Maria’s house on Friday for \$480.

A question exists as to whether Maria’s statement that they had to call her before their crew comes in order to be sure that someone was there to let them in. It is unlikely that this would become part of the contract given that the parties had already agreed on the contract before Maria made that statement. Moreover, the statement does not affect the performance of the obligation but was merely intended to ensure that the contract would move forward with no hassles. Thus, this is not likely to be considered part of the contract.

The provision in the “Confirmation of Order” memo sent by RC also does not likely become part of the contract. The contract was completed over the telephone and RC may not unilaterally make modifications to that contract (i.e. the 48 hour notice provision) without additional consideration provided by the other party. Here, RC gave no additional consideration to Maria for requiring the 48 hour notice provision). This does not mean, however, that Maria was free to cancel the contract at will[;] because the contract became enforceable over the phone, she is bound by the contract unless she has some excuse or defense to its enforcement or unless she is for some reason relieved of her duties under the contract.

Finally, for the same reasons as the 48-hour provision above, Maria's subsequent e-mail regarding the "exceptionally good job" would not become part of the contract. There was no additional consideration for the this [sic] provision and to require RC to do an "exceptionally good job" would deprive them of the benefit of the bargain their [sic] received when they negotiated for the \$480 price. Thus, this would not become part of the bargain and RC would be required to do a reasonable job in good faith.

Thus, the contract was for a full house cleaning on Friday for \$480 and it did not include the 48-hour notification provision or the "exception[al] job" provision.

Did Maria Breach or Does She Have Any Excuses/Defenses For Her Breach?

Because a valid and enforceable contract existed, Maria is liable to RC if she breached the contracted [sic] as [she] is not excused from performance.

Maria's Breach

Under the terms of the contract, Maria was required to pay RC \$480 and allow them into her house in order to complete the cleaning to which she agreed. Here, rather than allowing RC to come and clean her house, she sent them an e-mail at 10 a.m. on the morning of performance indicating that she was repudiating the contract and, when they showed up to perform, she turned their workers away. Thus, Maria anticipatorily repudiated the contract which would allow RC to: (1) treat it as an offer to rescind the contract and rescind; (2) treat the contract as materially breached and sue for damages immediately; (3) suspend their performance and sue once the contract becomes due; or (4) do nothing and encourage performance.

Here, Maria breached the contract the morning of performance so that suspending their performance or encouraging Maria's performance would be infeasible. Moreover, RC would not want to rescind the contract because that is exactly what Maria wanted to do and it would cost them \$100 in lost profits. Thus, RC would treat the contract as materially breached and Maria would be liable for damages unless she had a valid excuse for her breach.

Possible Defense/Excuses of Performance

Condition Precedent Not Met

Maria may argue that she had a valid excuse for not performing because in the course of their telephone call she indicated that the crew should call her before they come so that someone may be there. However, this argument would fail for a few reasons. First, as I indicated above, the provision that they call on Friday before they come was not likely part of the contract because they had already agreed on the terms of the agreement at that point and Maria's statement was only intended to make sure she could make arrangement

to let them into her house. Second, the purpose of the covenant was not breached because they showed up to clean her house when she was there (because she turned them away). Third, she repudiated the contract before they could make the phone call by sending them her repudiating e-mail that morning so that they could treat the contract as breached immediately without adhering to the condition precedent. Thus, this argument would fail to excuse Maria's material breach.

House sold (Impossibility, Impracticability, Frustration of Purpose)

Maria may also argue that the fact that she no longer owned the house at the time the contract came due excused her performance by way of: (1) impossibility; (2) impracticability; or (3) frustration of purpose. As will be shown below, all of these arguments would fail.

Impossibility - For performance to be excused by way of impossibility an unforeseeable and supervening event must render performance impossible for any person to perform. Here, Maria's sale of her house was not unforeseeable because she knew that [she] was trying to sell her house and it was not a supervening outside factor because it was entirely within Maria's control. Moreover, it was still possible for RC to complete performance – it just would not be as valuable to Maria now that she no longer owned the home that she contracted with them to clean. Thus, this argument would fail.

Impracticability - For performance to be excused by way of impracticability an unforeseeable and supervening event must render performance by one party inordinately difficult so as to create an injustice if the contract was enforced. Here, as noted immediately above, Maria controlled the event and it was foreseeable so this did not excuse her performance. Moreover, paying \$480 to have a house that you have just sold cleaned does not seem unduly difficult on Maria. Thus, this defense would fail as well.

Frustration of Purpose - For performance to be excused by way of frustration of purpose an unforeseeable and supervening event must intervene to render the entire purpose of the contract – known by both parties to the contract at the time the contract was formed – a nullity. Like the two arguments above, this would fail because the supervening event was in Maria's control and was entirely foreseeable so that Maria assumed the risk that her house would be sold by Friday. Moreover, at the time the contract was formed RC had no idea that she was selling her house so that the purpose was to fix the house up for its sale. Thus, the fact that this purpose was frustrated would not excuse Maria's performance because RC had no idea of that purpose at the time the the [sic] contract was formed.

Potential Damages that Maria Owes RC For Her Breach

In a contracts case where one party materially breaches the other party is entitled to damages to compensate them for their expectancy under the contract. They may also receive consequential and incidental damages as appropriate. However punitive damages

are typically unavailable in contract actions.

Expectancy Damages

For expectancy damages to be provided to a party they must be causal, foreseeable, certain, and unavoidable. In this case, providing RC with the full \$500 for Maria's breach as is claimed in their bill to Maria would unjustly enrich them given that they only lost \$100 in profit as a result of her breach. Their expectancy under the contract was to make \$100 in profit so they should be entitled to the \$100 from Maria. Note, however, that the "loss of profit" provided in the facts does not indicate whether this includes the \$20 coupon or not[;] it it[sic] does not then [sic] they should only get \$80 because their expectancy was only \$80 profit but if it does then they should get the full \$100. This \$100 is causal because they lost the money as a result of her breach, certain because they clean places like this all the time and can likely show what they typically make, and foreseeable because Maria knew that by breaching they would not be able to find another customer right away. So long as RC made reasonable efforts to find another house to clean to make up for the lost profits so as to mitigate their damages the damages would also be unavoidable. Thus, RC would be able to recover their \$100 (or \$80) of expectancy damages.

Consequential Damages

Consequential damages are those damages that are causal, foreseeable, certain, and unavoidable but that do not stem directly from the breach. There is no evidence of such damages in this question.

Incidental Damages

In the course of finding a new customer to mitigate their damages if RC was forced to expend resources, they would be entitled to those reasonable costs as incidental damages. There is no evidence of such damages here.

Specific Performance

Here, because the \$100 (or \$80) lost profit damages are adequate to compensate RC for its losses, specific performance (i.e. by forcing Maria to allow them to complete the contract) would be unavailable.

Thus, RC would be entitled to \$100 (or \$80 if the \$100 lost profit does not take the coupon into account because the coupon was enforceable as described above) for their lost profits as a result of the contract so long as they took adequate reasonable steps to mitigate their

losses.

Answer B to Question 3

Maria v. Resi Clean

1. Applicable Law: The transaction between Maria and RC involved the purchase and sale of services. Accordingly, even though RC may have used tangible items (detergent, etc.) while performing services, the predominant aspect of the transaction involved services. Thus the common law (not the U.C.C.) controls.

2. The handbill constitutes an Offer: Many advertisements are merely invitations to negotiate. Here, under the objective theory of contract formation, the handbill would induce a reasonable person to conclude that RC had manifested an intention to perform the services at the stated price if Maria called “within 24 hours.” By giving Maria the power to accept the offer with[in] 24 hours by calling, the handbill was not merely an invitation to negotiate – at least not with respect to a “top-to-bottom housecleaning.” If someone had called with respect to some other service or bundle of services, the handbill might not be deemed an offer. Here, RC gave Maria the power of acceptance.

3. Maria’s acceptance was a mirror image of the offer. First, Maria noted that she wanted a top-to-bottom cleaning as offered in the coupon. Accordingly, the subject matter of the offer and the acceptance was the same. Second, Maria did not attempt to negotiate or make a counterproposal that would have served as a rejection. Her request for clarification did not reject the offer. Having received clarification, her utterance “Great!” was an objective manifestation of her willingness to be bound to the terms of the offer, including the time for performance.

4. The Offer and Acceptance Created a Contract:

4.A. Consideration

Upon Maria’s acceptance, both Maria and RC suffered a legal detriment. Both had exchanged promises to do something they were not otherwise legally obligated to do.

4.B. Essential Terms

Maria and RC agreed to all essential terms. RC agreed to perform a top-to-bottom cleaning consistent with the standards in its handbill. Maria agreed to pay \$480 upon completion of the service. Although performance of the services within a reasonable time would have been a concurrent condition, RC agreed to perform the services on Friday and Maria agreed. RC’s obligation to perform the services prior to payment would be a concurrent condition, filling in any gap concerning order of performance. All essential terms were established even though the term “top-to-bottom housecleaning” was not defined with specificity.

4.C. No writing required: A contract to perform \$480 of services on Friday is not covered by any aspect of the statute of frauds. The oral agreement is enforceable without a writing.

5. There were no valid modifications to the Contract[.]

5.A. RC's confirmatory memorandum stated one inconsistent term and one additional term. Neither would be incorporated into the contract; both would be a unilateral attempt to modify the contract. Maria did not agree to the higher price, and she did not agree to the cancellation terms. Because the UCC does not apply, the consistent additional term between a merchant and consumer does not become part of the contract. Likewise, the inconsistent term regarding price is merely an offer for a modification that Maria did not accept. Maria had no duty to make a reasonable objection to the letter. She may have, but was not required to, request assurances of performances.

5.B. Maria's e[-]mail did not modify the contract. Maria's statement of the importance to her of RC's crew doing a good job does not alter, or purport to alter, RC's obligation to perform or her obligation to pay. Had RC performed, Maria would not have been justified in refusing to pay unless she was satisfied that RC did an exceptionally good job. Nor did it create an agreement about a basic assumption of the K.

6. Maria's cancellation was not excused: Maria will argue that the sale of her house on Thursday gave rise to a frustration of purpose. That "purpose", however, was not known to RC when the contract was formed. (Nor was it expressed as a condition: "I will pay you to clean my house if services are rendered before I sell it".) Maria's undisclosed purpose was not a basic assumption of the contract known to both parties. Further, a clean house between sale and closing is still valuable. Although under the UETA, Maria's e[-]mail is a proper mode of communication, it occurred after formation and does not relate back to formation.

7. Maria cancelled the contract after RC commenced performance. Although, as stated above, Maria did not accept RC's cancellation clause, Maria would still have the power, although not the right, to cancel before RC tendered performance. By dispatching the crew in accordance with the contract (i.e., before noon), RC commenced performance. [That would be a form of acceptance, were that needed.] Accordingly, Maria sent the crew away after RC partially performed.

8. Maria's cancellation excused RC's performance. Maria cannot defend her refusal to pay on the grounds that RC never performed. RC's performance was discharged by her breach.

9. Maria is liable to RC for damages caused by her breach: Given the late cancellation RC had no opportunity to mitigate and thus sustained \$100 in lost profits due to the breach.

RC would not be able to recover \$480, the contract price[,], because it did not perform (although excused). It could only recover \$100 plus incidental damages (cost of fuel, wages paid to the crew, supplies, etc.).

RC could not recover \$500 because (a) Maria never agreed to the cancellation clause and

(b) \$500 would be either an improper penalty or unjustified liquidated damages (in that the damages for lost profit would not be difficult to determine and \$500 is not a reasonable amount).

Maria owes \$100 plus incidental damages[.]

THURSDAY MORNING
JULY 27, 2006

California Bar Examination

Answer all three questions.
Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal

principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2007 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2007 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

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Question 5

Paula, a recent art-school graduate, was trying to establish a reputation as an art acquisition agent, i.e., one who finds works of art for collectors interested in buying particular works. It is a business where reliability and confidentiality are critical.

Paula's first commission was to find for City Museum ("Museum") any one of the three originals in a series of paintings by Monay, titled "The Pond." Museum agreed to pay as much as \$300,000 for it and to pay Paula \$15,000 upon acquisition. The works of Monay are rare and held by private collectors, and none had been on the market in recent years.

Paula eventually tracked down Sally, a private collector who owned the three originals of Monay's "The Pond." After some negotiations, in which Sally expressed offhandedly how proud she was that she only sold to private collectors, Sally orally agreed to sell to Paula for \$200,000 whichever of the three paintings she selected. Paula agreed that, as soon as she could make the selection, she would transfer the purchase money into Sally's bank account. Paula immediately called the curator at Museum, who told her to select the first of the three in the series, and the curator immediately caused Museum's bank to wire-transfer \$200,000 into Sally's account to cover the purchase.

The next day, when Paula went to tell Sally which painting she had selected and to pick it up, Sally declined to go through with the sale. Sally accused Paula of deceit, saying it was only when she learned that the money for the purchase had come from Museum, that she realized the painting would no longer be held privately. Sally tendered to Paula a certified check, which she had signed and drawn from her bank account, refunding the \$200,000. In the notation line of the check, Sally had written, "Refund on 1st of Monay Pond series."

Paula refused to accept the check and insisted on getting the painting. She explained that she had not disclosed her principal's identity because she was bound by confidentiality and that, unless she could deliver the painting to Museum, her budding career as an art acquisition agent was over. Sally told Paula, "That's too bad. Our contract wasn't in writing, so you can't force me to sell the painting. Besides, you deceived me about why you wanted to buy it."

Can Paula obtain specific performance of Sally's agreement to sell Paula the painting? Discuss.

Answer A to Question 5

Applicable Law

The common law governs contracts for the services and the sale of real property. The Uniform Commercial Code (UCC) governs contracts for the sale of goods. Because this contract was for the sale of a painting, it is governed by the UCC. The UCC also has provisions that apply only to merchants. Merchants are those who regularly deal in the goods that are the subject of the contract. Here, Sally is not a merchant because she is a private collector who does not appear to regularly sell her paintings; however, Paula is likely becoming a merchant (she just started).

Specific performance is an equitable remedy and for the court to award it, which requires that (1) The Contract is Valid; (2) The Terms are Certain and Definite; (3) Any Conditions are Satisfied; (4) A Remedy at Law is Inadequate; (5) There is Mutuality in Enforcement; and (6) There are no Defenses.

(1) The Contract is Valid

A contract requires a valid offer, a valid acceptance, consideration, and certain and definite terms, which are discussed below. Assuming the terms are sufficient, a valid contract was formed between Sally and Paula when Sally agreed to sell Paula whichever of the three paintings for \$200,000.

Statute of Frauds

The statute of frauds requires that a contract for the sale of goods of \$500 or more must be in writing. Here, the contract between the parties was only oral, thus the SOF is not satisfied. Thus, Sally will assert the SOF as a defense to the enforcement of the contract.

Exceptions to the SOF

Full Performance

Full performance by one party can also serve as an exception to the SOF. Here, Paula would argue that she performed by selecting the painting she wanted and transferring the money into Sally's account.

However, the UCC has tended to apply full payment when the performance is the delivery of the goods, not just mere payment. The rationale is that if payment alone could satisfy the SOF, then most parties could likely get out of the requirement by making a payment; whereas, delivery of goods is more indicative that a contract actually existed between the parties. Thus, the court would likely not find that full payment by Paula was sufficient to waive the writing requirement.

Judicial Admission

The UCC also recognizes a SOF exception when one party admits the contract in a judicial proceeding or writing. While P may attempt to argue that Sally recognized the contract by writing “Refund on 1st of Monay Pond series,” this writing was merely on a check, not in any judicial proceeding.

Estoppel

Some courts allow estoppel as a valid defense to SOF, which requires that the party detrimentally rely on the other party’s promise. Here, Paula would argue that she relied on Sally’s promise to sell the painting and the reliance was detrimental because she told the museum she could get the painting. More specifically, the reliance was detrimental to Paula because reliability is critical in her line of work; thus Paula would argue that by telling her client that she obtained the painting, then informing them that she no longer could get it, her reliability and career would be damaged.

As Paula is seeking an equitable remedy, a court might be more willing to apply estoppel; however, the contract clearly does not satisfy the SOF and the detriment to Paula requires a series of inferences; thus a court may also decline to apply it.

Merchant’s Confirmatory Memo

The UCC also recognizes an exception to the SOF when one party sends a confirmatory memorandum that is signed. However, this provision only applies to merchants. Thus, because Sally is not a merchant, P could not argue that her writing on the check suffices as a confirmatory memorandum.

(2) The Terms are Certain and Definite

Even more so than with regular contracts, the remedy of specific performance requires that the contract terms be definite and certain. Under the UCC, the contract must specify the quantity. Here, this term is satisfied, because the parties agreed that Paula could select one painting.

Sally would argue that the terms are not definite and certain because the parties did not agree on the actual painting that would be sold and Paula had complete discretion in selecting the painting. However, if the parties have agreed to the price, the UCC allows other terms to be agreed upon and the parties will be expected to do so in good faith. Moreover, because the paintings are part of a series and appear to be equal in value, it does not appear that the lack of specificity as to which painting would be purchased negated the parties from reaching a meeting of the minds.

(3) Any Conditions are Satisfied

A condition is an event, the occurrence or non-occurrence of which must occur, if it occurs at all, for a performance to be done. Conditions are strictly construed and a failure

of a condition does not result in breach, but merely excuses performance. A condition precedent is one which must occur before performance from another party is due.

Here, Paula selecting the painting she wanted was a condition precedent to having to pay. Moreover, Paula's payment of the \$200,000 is a concurrent condition, as the payment and exchange of the painting each would give rise to the other performing.

Paula will argue that she satisfied all of the conditions because she made the payment and she decided which painting she wanted and went to tell Sally. Sally, however, will argue that Sally declined to go through with the sale before Paula told her which painting she wanted because the facts are unambiguous as to whether Paula in fact told Sally (it merely states that "she went to tell Sally which painting she wanted"). However, even if this was the case, Sally cannot assert her own preventing of a condition to assert failure of a condition. Moreover, it appears that Paula did tell Sally because Sally wrote "Refund on 1st of Monay Pond series" on the check. Thus, all of the conditions were satisfied.

(4) A Remedy at Law is Inadequate

Because specific performance is an equitable remedy, the courts require that a remedy at law must be inadequate.

Unique Goods

Normally, a remedy at law is adequate with breach of contract because the parties can seek expectancy damages. However, the courts have held that specific performance is available when it is a contract for real estate or unique goods.

Here, the Monay painting would clearly be considered a unique good because Monay's works are "rare," "held by private collectors," and "none had been on the market in recent years." Thus, specific performance would be proper under these circumstances.

Uncertainty of Damages

Moreover, a remedy at law would be inadequate because, to recover legal damages, a party must prove: 1) foreseeability; 2) certainty; 3) unavailability; and 4) causation. If Paula sought legal damages, she would have an extremely hard time proving certainty because she had just started in the business. Thus, while her failure to perform on a contract after informing her client that she could would invariably affect her future business and relationship with that client, the damages she would suffer are extremely speculative. In this sense, Paula's business is a new business and courts have traditionally held that a new business cannot recover future lost earnings because they are too speculative. For example, Paula might have turned out to be the best acquisition agent or the worst and, while some courts will now allow use of comparable businesses to prove lost future profits, a court would likely be more hesitant when it is a business such as art acquisition, where the success is heavily dependent with the individual agent.

Feasibility of Enforcement

Additionally, the courts will not specifically enforce contracts when the judgment would not be feasible to enforce, such as in personal services contracts. Here, this contract would be simply to enforce and does not require continued oversight because the judgment would require: 1) Sally to deliver the painting to Paula; and 2) Paula to ensure the \$200,000 was delivered or return the refund check if she eventually accepted it.

(5) There is Mutuality in Enforcement

Courts traditionally require that, for a party to seek specific performance, the party they are seeking it against must also be entitled to specific performance. Here, it is less likely that Sally would be able to seek specific performance because her damages would have been her lost profits on the sale. Still, a court will award specific performance despite the mutuality requirement if it is confident the plaintiff will perform. Here, Paula wants to perform, thus the court would likely be confident she will and the court could also require her performance in the judgment.

(5) There are no Defenses

Sally will assert several defenses to enforcement of the contract:

Unclean Hands (UH)

Unclean hands is an equitable defense that applies to equitable remedies when the plaintiff has acted unjustly with regard to the specific transaction, thus resulting in the maxim that the court will not use equity to aid a person with “unclean hands.” Here, Sally will argue that by making Sally believe that Paula was a private buyer when Paula knew Sally did not want to sell to a private buyer, Paula acted unjustly.

Paula will claim that she owed a Duty of Confidentiality to her principal because confidentiality is critical to the business. Whether a court would agree with Paula on this issue is debatable because, unlike lawyers, art agents do not automatically owe a Duty of Confidentiality to their principals. However, agents do owe a Duty of Loyalty to their principals and also must follow the directions of the principal, thus if the museum had made clear that it wanted its identity confidential, then the court would likely determine that Paula was not acting unjustly in following her duty as an agent.

Misrepresentation

A misrepresentation is a negligent statement of material fact or a fraudulent statement of fact that is said to induce an action in the other party, which the other party does actually rely on and suffers damages because of reliance. While Sally will argue that Paula’s silence amounted to a misrepresentation, nondisclosure does not amount to a misrepresentation unless there is a duty to disclose facts. Thus, Paula did not have a duty to correct Sally’s misunderstanding and, therefore, misrepresentation would not be an

adequate defense.

Unilateral Mistake

Unilateral mistake, where one party is materially mistaken about a term of the contract, is usually not a defense; however, it can be a defense when one party is mistaken and the other party knew or had reason to know of that party's mistake. Here, Sally could successfully assert unilateral mistake because Paula knew that Sally only wanted to sell to a private buyer and Paula knew that Sally thought she was selling to a private buyer because Sally expressed "how proud she was that she only sold to private collectors." Paula, however, will argue that this statement was only "offhandedly" and never referred to the actual transaction. Still, especially because Paula is seeking equity, a court would likely find that this means that Paula should have known that Sally thought she was selling to a private buyer because Sally said she only sold to private buyers.

Frustration of Purpose

Lastly, frustration of purpose is a defense where both parties know of the purpose of the contract at the time of the contract and the purpose is frustrated by an unforeseeable event. Sally could assert this, however she did not make it clear that her purpose was to sell to a buyer, thus her better defense is under unilateral mistake because, under that defense, she can argue that Paula "should have known" of her mistake; whereas she cannot argue that Paula "should have known" of her purpose to assert frustration of purpose.

Answer B to Question 5

Specific Performance for Paula

Type of Contract

The UCC applies to the sale of goods, whereas the common law applies to all other contracts. Here, the contract between Sally and Paula was for the sale of a painting, which is an item of tangible or intangible personal property. In other words, a painting is a good. Therefore, the UCC applies.

Standard for Specific Performance

In order for a plaintiff to receive specific performance under a contract, the following elements have to be met: there must be a valid contract, the plaintiff must have performed or be ready to perform any required performance under the contract, the remedy at law must be inadequate, there used to be a requirement of mutuality but it is no longer required, and there must be no valid defenses to enforcement of the contract of specific performance.

Valid Contract – Offer, Acceptance, Consideration

In order to form a valid contract, there must be an offer, an acceptance, and consideration. An offer requires that the offeror communicate to the offeree, the terms of the offer are clear and definite, and a reasonable person in the offeree's position would believe that the offeror intends to be bound if the offeree accepts. Acceptance is a manifestation on the part of the offeree to accept the offer. Under the common law, this required the offeree to accept the offer exactly as is. Under the UCC, additional terms can be mentioned in the acceptance, although where there is at least one non-merchant, the additional terms must be separately accepted.

Here, Sally orally agreed to sell to Paula the first of the three Monay paintings for \$200,000. Sally agreed to sell and Paula agreed to buy, which illustrates an intent by both to be bound. The terms are clear because they agreed that Paula could pick one of the three paintings for the amount of \$200,000. Although the painting was not already picked out, it was Paula's choice when the time came, and Sally will be bound to that provision. Therefore, there has been a valid offer and acceptance between the parties.

There is also valid consideration. Consideration requires bargained-for legal detriment, which can involve both performance and forbearance. Here, both parties are promising to perform. Sally's legal detriment being suffered is giving up the painting, and Paula's legal detriment being suffered is the payment of money. Therefore, there is a valid contract, unless one of the defenses to formation discussed below applies.

All Conditions of Performance Satisfied

Paula must have satisfied any performance that she is required to perform. Or, if she

cannot yet perform or the other party refuses to perform, she must be ready and willing to perform.

Here, Paula has already performed her end of the contract because she transferred \$200,000 to Sally. Sally has tried to return the money, but Paula did not take the money and stated that she wants the picture. This illustrates that Paula wants to continue with the contract and has the money to do so, even if the money is returned to her.

Therefore, this requirement has been met.

Inadequate Remedy at Law

A remedy at law may be inadequate if the item at issue is unique, the damages are too speculative, or there will be a multiplicity of suits. In addition to evaluating the inadequacy of the remedy at law, the courts are also concerned with the feasibility of enforcing the contract. Generally, specific performance is not granted very often in contracts unless it's real estate. In the sale of goods, specific performance will often only be granted if the item is unique or custom made.

Here, the item is a one-of-a-kind Monay painting. The museum informed Paula that most Monay paintings are held by private collectors and are extremely rare. In this case, Paula was looking for one of three paintings that were all held by the same person, which means Paula could not go elsewhere to find them. This is also evidenced by the fact that one of the paintings has been on the market for years. Because the painting is so unique and the original will not be found anywhere else, the court will be willing to grant specific performance. Using its contempt power, it can force Sally to give up the painting.

Since the contract could be feasibly enforced by the court and the item is unique, there is an inadequate remedy at law and Paula could recover by specific performance.

Mutuality

The common law used to require mutuality of performance to ensure that the court could make everyone perform. However, this requirement is no longer needed. Therefore, Paula could recover through specific performance regardless of mutuality.

Defenses

Statute of Frauds

The Statute of Frauds requires any contract for the sale of goods that is \$500 or more to be in writing and signed by the party against whom it is being enforced.

Here, Sally will argue that the contract is not enforceable because it is for the sale of goods worth \$200,000 and there is no writing. Paula would argue that either part performance has satisfied the statute of frauds or that estoppel applies.

In the sale of goods, full performance will always satisfy the Statute of Frauds. However, part performance will usually only satisfy the Statute of Frauds to the extent of the performance. This generally means that there will be an enforceable contract to the extent of any goods delivered. Here, Paula will argue that she transferred \$200,000 to Sally, which means that she has fully performed her portion of the contract. Paula also arrived at Sally's house where she was supposed to pick up the painting. Paula could argue that Sally had satisfied her end of the bargain because once the money was transferred, Sally's delivery obligation had been performed since Paula had to come and pick it up. This is a weak argument, however, because there is no evidence that Sally wanted to give the painting or that the parties had agreed, which is why part performance through delivery of goods generally works. The seller would not have sent the goods if a contract did not exist. Most likely, Paula's part performance argument would not work.

Paula would also argue that estoppel applies and satisfies the Statute of Frauds requirements. Estoppel is the reasonable, foreseeable and detrimental reliance of the representation of the other party. Paula had already informed the Museum that she had obtained the picture and had transferred the money to Sally. If she had known she could not get the picture, she would not have told the Museum. Due to Sally's retraction, Paula's reputation will be tarnished and the Museum will most likely not want her services any longer. The business of art acquisition requires reliability and confidentiality. Specifically, the requirement of reliability will be negated if Paula is not able to enforce the contract, which puts her in a much worse position than if the contract had not been made. Sally would argue that Paula has not changed her position in reliance on the contract in any way because Paula still has the same amount of money that she had before and has not made any preparations for the painting that would amount to detrimental reliance.

Due to Paula's transfer of the money and her representations to the Museum that she had bought the piece, Paula's estoppel argument will most likely be upheld and Paula will be able to overcome the Statute of Frauds.

Misrepresentation

A misrepresentation is any false assertion or intentional concealment of material information. The assertion can be made knowingly or not.

Here, Sally expressed a desire during negotiations only to sell to private collectors. Paula made no reply to this comment and continued with the negotiations. Sally would argue that since Sally had made it clear that she only wanted to sell to private collectors, Paula was knowingly concealing a material assertion underlying the negotiations. On the other hand, Paula would argue that Sally never asked Paula if she was a private collector nor did she make it a term of the contract. Paula did not conceal any information from Sally,

but the parties simply negotiated without ever discussing Sally's desire to only sell to private collectors.

Paula's argument will most likely win and Sally will be unable to void the contract on the grounds of misrepresentation.

Unilateral Mistake

Generally, unilateral mistake by one party does not make a contract unenforceable. However, if the other party knew or should have known of the mistake, the contract is void.

Here, Sally will argue that Paula knew that Sally wanted only a private collector to buy the painting. Because Paula knew Sally's intent, Paula knew that Sally had the mistaken belief that Paula was a private collector. One of the material underlying assumptions of the contract in Sally's mind was that Paula was a private collector. Paula will argue that the mistake was not material to the contract because Sally never made it a part of the contract. In addition, Sally made the comment offhand, which means that Paula did not know that Sally had mistaken Paula for a private collector.

Under the circumstances, the court would most likely find that there was a unilateral mistake that was known by the other party. Therefore, the contract is not enforceable and therefore not specifically enforceable.

Unclean Hands

Sally will also argue that Paula has unclean hands, and therefore, cannot get specific performance. Unclean hands applies when the plaintiff has acted unlawfully or in bad faith in retaliation to the same contract.

Here, Sally would argue that by not asserting that she was there on behalf of the Museum, Paula had acted in bad faith before Sally repudiated the contract. By failing to tell Sally that she was only acting as an agent, Paula misrepresented who she was and the purpose of the contract.

This argument will most likely not win, since once the contract was formed, Paula did nothing to impede the contract. Parties are free to contract for the terms and Sally did not require that Paula be a private collector.

Overall, Paula will be able to get specific performance as long as unilateral mistake does not apply.

**ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2008
CALIFORNIA BAR EXAMINATION**

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Question 4

Barry is the publisher of *Auto Designer's Digest*, a magazine that appeals to classic car enthusiasts. For years, Barry has been trying to win a first place award in the annual Columbia Concours d'Elegance ("Concours"), one of the most prestigious auto shows in the country. He was sure that winning such an award would vastly increase the circulation of his magazine and attract lucrative advertising revenues. This year's Concours was scheduled to begin on June 1, with applications for entry to be submitted by May 1.

Sally owned a 1932 Phaeton, one of only two surviving cars of that make and model. The car was in such pristine condition that it stood a very good chance of winning the first place prize.

On April 1, Barry and Sally entered into a valid written contract by which Barry agreed to buy, and Sally agreed to sell, the Phaeton for \$200,000 for delivery on May 25. In anticipation of acquiring the Phaeton, Barry completed the application and paid the nonrefundable \$5,000 entry fee for the Concours.

On May 10, Sally told Barry that she had just accepted \$300,000 in cash for the Phaeton from a wealthy Italian car collector, stating "That's what it's really worth," and added that she would deliver the car to a shipping company for transport to Italy within a week.

1. Can Barry sue Sally before May 25? Discuss.
2. What provisional remedies might Barry seek to prevent Sally from delivering the Phaeton to the shipping company pending resolution of his dispute with Sally, and would the court be likely to grant them? Discuss.
3. Can Barry obtain the Phaeton by specific performance or replevin? Discuss.
4. If Barry decides instead to seek damages for breach of contract, can he recover damages for: (a) the nondelivery of the Phaeton; (b) the loss of the expected increase in circulation and advertising revenues; and (c) the loss of the \$5,000 nonrefundable entry fee? Discuss.

Answer A to Question 4

1) Can Barry Sue Sally Before May 25?

Contract

A contract is a promise or set of promises, for the breach of which the law provides a remedy. A valid contract requires an offer, acceptance, and consideration. Here, the facts provide that Sally (S) and Barry (B) entered into a valid written contract on April 1. Thus, it is stipulated that there was a valid offer and acceptance. The consideration requirement is also met, because B promised to pay money and S promised to convey the Phaeton to B. However, the fact that B promised only to pay \$200,000 when S thinks the car's "real value" is \$300,000 will not invalidate the consideration element; the court will not inquire as to the adequacy of consideration. What has really happened here is that S learned that another buyer was willing to pay more and, as a result, she has willfully breached her contract with B. Finally, the statute of frauds is triggered because the car is a movable good valued at greater than \$500. However, it will be satisfied because the contract is in a writing (assuming it is signed by the party to be charged, or Seller).

Thus, a valid contract existed between the parties as of April 1.

Anticipatory Repudiation

An anticipatory repudiation is a definite and certain expression of intent not to perform a contract before the time for performance is due. Under the parties' contract, S was to deliver the car on May 25. However, on May 10, S told B that she had accepted \$300,000 cash for the vehicle from an Italian collector. The fact that she sold the car to another party and then told B about it is a definite and certain expression of intent not to perform the contract; she already sold the car to someone else and there are only two 1932 Phaetons that exist.

Wrongful Prevention

A party may also prevent a contract by conduct that wrongfully prevents the occurrence of a condition. A condition is a requirement that must be met or excused before the duty to perform becomes absolute. All contracts contain at least one condition; that is, that the other party will perform. Here, S was obligated to convey the Phaeton ("the car") to B as a result of their contract. By selling the car to someone else, S has wrongfully prevented the occurrence of the condition that she actually transfer title of the car to B.

Effect of Anticipatory Repudiation / Wrongful Prevention

When a party anticipatorily repudiates or prevents the occurrence of a condition, the aggrieved party may 1) encourage performance, 2) treat the repudiation as final and sue for breach, or 3) await performance and sue for breach. The repudiating party may also retract her repudiation unless the aggrieved party has indicated that he considers the repudiation final or detrimentally relied thereon.

Here, S has already accepted \$300,000 from a wealthy Italian collector for the car that she promised to sell to B. Moreover, she added that she will deliver the car to a shipping company for transport to Italy within a week. B has not communicated intent to treat the repudiation as final. He may, however, do so, and then sue for breach prior to May 25 because S's conduct indicates that she has certainly repudiated the contract.

Conclusion:

B may sue S before May 25 because she has repudiated and/or wrongfully prevented performance of the contract.

2) Provisional Remedies / Likelihood Court Would Grant

Injunction

An injunction is a device that a party may use to stop another party from acting or, in some circumstances, force another party to act in a certain manner. An injunction requires the following elements:

Inadequate Legal Remedy

Because an injunction is an equitable remedy, the court must first determine that the legal remedies available to the plaintiff are inadequate. Here, the parties bargained for the transfer of a rare vehicle that B intended to use to attempt to win a first place award in the Concours. B specifically wanted a rare vehicle such as this because he thought that winning the Concours would help him increase his subscriptions and advertising revenues. It is true that B could procure another rare car that may have a similar chance of winning the car show, however. Nevertheless, B contracted for a rare good and the fact remains that the breaching party will be delivering the car to the shipping company for transport to Italy within a week.

No amount of damages will prevent the car from being shipped to Italy. Thus, the legal remedy is inadequate.

Property Right

Historically, the court would only award injunctions with respect to property rights: namely, real property rights. Modernly, however, the court will award injunctions to enforce personal rights. While a car is personal property, the contract is better viewed as giving B the personal right to purchase the car. Thus, though the contract involves personal rights, the court will still enforce it.

Feasibility of Enforcement

The court must be able to issue an enforceable decree. An injunction is either mandatory, in that it requires a party to act, or prohibitory/negative, in that it prevents a party from doing certain acts. Prohibitory injunctions are easier for the court to enforce since the defendant will be required only to stop acting in a certain manner as opposed to doing something in an affirmative manner. Finally, the court will use its powers of contempt to enforce the injunction (either civil or criminal). Civil contempt coerces a defendant to act while criminal contempt punishes a defendant from failing to act. The

court here could use its powers of civil contempt to coerce S to stop transfer of the vehicle to Italy by issuing a negative decree.

Therefore, the feasibility requirement will be met.

Balancing of the Hardships

The type of balancing that the court will do depends on the type of injunction that [it] will issue.

Temporary Restraining Order

A temporary restraining order (TRO) is a temporary decree issued to preserve the status quo for the period leading up to the Hearing on the preliminary injunction. The court typically will not balance the hardships under a TRO. The plaintiff must be faced with imminent, irreparable harm and the issuance of a TRO must be necessary to preserve the status quo, typically lasting no longer than 10 days. It is obtained by going in Ex Parte and making a showing of proof of the aforementioned requirements. In most jurisdictions, the plaintiff must also post a bond proportionate to the possible amount of damages the defendant could suffer from a wrongful issuance of the TRO.

Here, B would request that the court issue a TRO preventing her from transporting the car to Italy within the week. Once the vehicle is in Italy, the court will no longer have jurisdiction over it. Depending on how long it may take for the court to hold a hearing on his preliminary injunction, the court may issue a TRO to enjoin S from shipping the car.

Preliminary Injunction

A Preliminary Injunction is an injunction that lasts during the pendency of the action, up and until trial on the permanent injunction is complete. In determining whether to issue the injunction the court will factor 1) the likelihood of Plaintiff's success, 2) Balance the Harms – the harm to plaintiff if the injunction is wrongfully denied versus the harm to the defendant if wrongfully granted, 3) The plaintiff must post a bond if he has not done so under a TRO, and 4) issuance is necessary to preserve the status quo.

Likelihood of Success

S has willfully breached the contract, which was stipulated as valid. In the face of such a breach, B enjoys a strong likelihood of success on the merits in a claim for either damages or specific performance since the parties were bargaining for a unique good (there are only two cars in existence). Thus, B has a strong likelihood of success on the merits.

Balancing the Harms

If the injunction is wrongfully denied, B will be deprived of perhaps his only opportunity to own a Phaeton. His motivations for purchasing the car are irrelevant. Most collectors of high end vehicles view the purchases of such as not only a hobby, but also as an investment. Thus, the fact that B wished to use the car to win the Concours, one of the most prestigious auto shows in the country, for profit motives, will not lessen the harm he suffers as a result of the breach. If anything, it means that he will suffer pecuniary

harm, as opposed to mere emotional harm from not purchasing a car he wanted to have, as a result of S's breach.

On the other hand, if the injunction is wrongfully issued, S will likely lose the opportunity to sell the vehicle to an Italian purchaser willing to pay \$300,000. However, as S now claims, if the true value is \$300,000 and she is selling it to someone for the same amount, she will not be damaged by not being able to sell it to this particular purchaser. Therefore, S's harms are comparatively slight.

Thus, the harms balance in favor of Barry.

Post a Bond

If B has not obtained a TRO and posted a bond, he will be required to do so upon the issuance of a preliminary injunction.

Necessary to Preserve the Status Quo

There are only two cars like this in existence. Keeping the car within the court's jurisdiction is necessary to maintain the status quo because otherwise B may not be able to obtain what he is entitled to under his contractual rights.

Therefore, the court will likely issue a preliminary injunction.

Permanent Injunction

A permanent injunction is not a provisional remedy; it is awarded after a full trial on the merits. The court will not typically balance the hardships unless the injunction pertains to a nuisance. Therefore, B's best recourse prior to trial on the merits is through one of the above-given preliminary methods considering he will likely pursue a claim for specific performance (thus making the issuance of a permanent injunction improper).

Conclusion:

The court may issue a TRO to prevent B's imminent harm if it is not possible to obtain a hearing on the preliminary injunction prior to S's shipment of the car to Italy.

3) Specific Performance/Replevin

Specific Performance

Specific performance is an equitable remedy that the court may utilize to enforce the terms of a valid contract. As discussed above, the contract between B and S is valid notwithstanding the fact that B may have got a "good bargain" by contracting for the car for \$200,000. To issue a decree of specific performance, the plaintiff must demonstrate.

Inadequate Legal Remedy

The legal remedy is inadequate when the parties are contracting for unique or specially manufactured goods. Here, the car is one of only two in existence. Thus, there is a small possibility that B could purchase another Phaeton. Moreover, B wished to have the car because it appeals to classic car enthusiasts; that is not to say, however, that it

is the only car that would win the award. Nevertheless, S's car was in "pristine condition." The condition, nor location, of the other vehicle is unknown. Thus, the legal remedy of damages will be inadequate if B is unable to recover the replevin, which, discussed below, is a legal remedy. However, even under replevin, if the defendant posts a bond then the legal remedy may be rendered inadequate because the court will not order the sheriff to seize the goods.

Definite and Certain Terms

The terms of the contract must be such that the court knows what type of order to issue. Here, the parties contract in which B agreed to buy and S agreed to sell "the Phaeton" for a price of \$200,000. The contract identified the subject matter of the contract, the parties, and stated a price and time for performance. The court could simply enforce the contract by requiring S to perform by delivering the car on May 25.

Mutuality

Historically, for a specific performance decree to be issued, the remedy had to be available for both parties. This requirement has since been relaxed under the security of performance test. Thus, as long as the court can secure performance of both parties to its satisfaction, the decree may be issued. Here, the court could force B to pay the contracted for price of \$200,000 while forcing S to deliver the car to B.

Feasibility of Enforcement

The court must be able to enforce the specific performance decree; personal service contracts will not be subject to specific performance. The facts do not provide where S or B live, but it is likely that both live in Columbia. Nevertheless, they entered into a contract in Columbia. S sought to place her goods into the Columbia stream of commerce. Therefore, the court very likely has jurisdiction over the parties and may enforce the decree using its powers of contempt, as discussed above.

Conclusion:

The court will issue a decree of specific performance if the legal remedy is inadequate.

Replevin

In the contract sense, replevin is the recovery of contracted-for goods by the plaintiff. Replevin is a legal remedy, in that the sheriff will seize the property; the defendant is not ordered to do anything. To obtain an order of replevin, the plaintiff must show 1) the goods are specifically identified in the contract, and 2) the plaintiff is unable to cover despite reasonable attempts to do so.

Specifically Identified

As discussed, the car was specifically identified in the contract because the contract specified S was to convey "the Phaeton," of which only two exist, to B. Therefore, the goods are specifically identified.

Plaintiff Unable to Cover

The facts do not provide that B has exerted efforts to cover. However, there are only two Phaetons in existence. It is not clear where the other one is located and what

condition it is in. Therefore, assuming B made reasonable efforts to do so, it is not likely he could cover.

Conclusion:

The court will issue an order of replevin as long as the defendant does not post a bond to stop collection of vehicle by the sheriff.

4) Damages for Breach of Contract

All damages must be causal, foreseeable, definite and certain, and unavoidable; that is, the plaintiff has a duty to take reasonable steps to mitigate his losses.

a) Damages for Nondelivery

This contract is for the sale of goods (the car); thus, the UCC applies. When the seller breaches under the UCC, the buyer is entitled to cover or market damages. Here, B would be entitled to damages in the difference between the \$200,000 contract price and the price of the other Phaeton in existence, if he was able to actually cover. Alternatively, B may seek damages of \$100,000 if the market price of the car is really \$300,000 as S has indicated.

b) Loss of increased circulation and advertising revenues

The buyer may also be entitled to consequential damages when their possibility is known at the time of contract or specifically communicated to the defendant. If S knew of the Concours, which she may have since it was one of the most prestigious shows in the country and she owned a vehicle that stood a good chance of winning it, then the fact that B would enter the car in the show is foreseeable. It is not clear that B indicated his intent to enter it in the show, or that C knew that he was motivated to increase circulation and advertising revenues thereby.

However, Barry has been operating Auto Designer's Digest for years, trying to win a first place award. Nevertheless, future increases in circulation and ad revenue as a result of winning a car show are speculative, and uncertain. Therefore, B will not obtain damages here.

c) Loss of \$5,000 entry fee

In some contexts, the plaintiff may recover reliance damages. Here, B paid the \$5,000 entry fee after contracting with S to purchase the car. He had no reason to suspect that S would breach the contract with him. Therefore, his reliance was foreseeable and B would be entitled to \$5,000 in reliance damages.

Conclusion:

B has a number of strong claims against S for her willful breach and will likely obtain a preliminary injunction and prevail under a suit for specific performance.

Answer B to Question 4

Applicable Law

1) This contract involves the sale of goods. As a result, the applicable law will be UCC Article 2. Because the goods being sold are over \$500, the UCC Article 2 Statute of Frauds provision requires the contract to be in writing, and contain all material terms and be signed by the party against whom enforcement is sought. The facts state that the requirements have been met.

Anticipatory Repudiation

Generally, a party cannot sue on a contract for breach until the time for performance has come due. Anticipatory repudiation is an exception to that general rule. Anticipatory repudiation applies when one of the parties to a contract makes a statement or an act that unequivocally and clearly shows that party will not perform on the contract. That is the case here. There is a valid contract between Barry (B) and Sally (S) supported by adequate consideration (B's promise to pay \$200,000 and S's promise to deliver the car) which is in writing.

There appears to be no defenses to the formation and enforceability of the contract. S may claim that the contract is unenforceable because the price provision is unconscionable. This would require her to show procedural and substantive unconscionability. There are no facts to support procedural unconscionability and the price (though \$100,000 less than what S claims the car to be worth) does not seem substantively unconscionable. The value of rare and antique items is very speculative and S, knowing her car to be rare and valuable, should look into its value before selling. Also, mistake as to the value of an item is generally not a defense to a contract, even if the other party knew or should have known the item was worth more. As a result, the court will likely find the contract enforceable.

S anticipatorily repudiated the contract when she said she had sold the car to an Italian buyer and was not going to sell it to B. Because of this repudiation, B is free to halt or suspend his performance on the contract and immediately sue for breach, assuming he has not yet paid the \$200,000 in full to S. If he has, he will have to wait until May 25, to sue. However, the facts do not state that he has fully performed at this point so he will be able to sue as of the date of the repudiation – May 10.

2) By the time B is able to fully have his case heard and decided, S may have already sold the car and he will have suffered substantial losses and will likely be unable to ever find another Phaeton for purchase. Thus, B should seek a Temporary Restraining Order and then a preliminary injunction immediately pending the outcome of his case. These will enjoin S from selling the car pending the outcome of the case, thereby preserving the "status quo".

A TRO can be obtained ex-parte in emergency situations. The TRO, if granted, will last for 10-15 days, depending on the applicable procedural rules. A hearing on a motion for

preliminary injunction, with both parties, must then be held, whereupon the court will determine whether to keep the injunctive relief in place.

To obtain a TRO/preliminary injunction, B must show a threat of immediate and irreparable harm, inadequacy of the remedy at law, a likelihood of success on the merits, and a balance of equities in his favor and a lack of defenses to his claim. Mutuality is not required.

B will argue that he is threatened with immediate and irreparable harm because S intends to ship the vehicle to the other buyer within a week. This harm will be irreparable because the Phaeton is an extremely rare car, he will not be able to find another one and it is unlikely that he will be able to find a comparable car in time for the Concours.

B will also argue that remedies at law – money damages, will be inadequate because the uniqueness of the car and the fact that, once the car is sold, he will not be able to find a comparable car for the Concours and he will have lost his purpose for buying the car. Due to the extreme rarity of the vehicle, the court is likely to find that B's remedies at law are inadequate.

Balancing the hardships of an injunction on B and S, a court will likely find that there will be substantially greater hardship to B if the contract is not performed than to S, since S can always sell the car later if she prevails in the case.

B has a likelihood of success on the merits, if he can show he is able to pay the \$200,000, perhaps by putting the sum into escrow and because the facts state he has a valid contract in writing.

S's defenses – unclear hands, laches, unconscionability, will fail as previously discussed.

B will receive a preliminary injunction and will be required to post bond to cover damages to S if it is found she was wrongfully enjoined.

3) Specific Performance

Specific performance is a remedy by which courts force parties to a contract to perform as promised in the contract. It is an equitable remedy, and all equitable defenses are available. In contracts for the sale of goods, Specific Performance is generally only granted in cases where the subject goods are extremely unique, custom, or rare. In this case, the car, being extremely old and rare and in apparently good enough condition to compete in a prestigious show will likely satisfy the requirement for uniqueness.

Valid Contract

B must show that he has a valid contract in order to get Specific Performance. Here, the facts state the written agreement is valid.

Feasibility

B must show that the contract terms are definite enough so that the court can feasibly enforce them. Here, the price, subject matter and the delivery date are definite, and the contract is fairly simple so a court will feasibly be enabled to order Specific Performance.

Mutuality

Mutuality of remedies is no longer required for Specific Performance.

Full Performance

B must show that he has fully performed on the contract or will definitely fully perform. Though he has not yet paid, he can put the \$200,000 in escrow to show this.

Damages Inadequate

B will have to show that damages - his at-law remedy will be inadequate. As previously discussed, he will be able to show this.

Defenses

S's defenses of unconscionability/unilateral mistake will fail as previously discussed. The facts do not support the defenses of unclean hands or laches being available to her. Specific Performance will be granted.

Replevin

Replevin is a remedy by which a rightful owner of personal property seeks to have that property returned to him by order of the court.

If the car is sold to the Italian buyer, B will have to seek its return by replevin. The facts do not indicate whether the Italian buyer knew of the existing obligation for S to sell the car to B. If he did, he would not be able to claim that [he] is a bona fide purchaser, who purchased in good faith and for value. If the Italian is not a bona fide purchaser B will be able to seek replevin. If the Italian had no knowledge of B's contract with S, he would be a bona fide purchaser for value and B would not be able to seek replevin of the car from him.

4) Non-delivery of the Phaeton

Generally, damages are designed to protect the parties' expectations – to put them in as good of a position as they would have been had the contract been fully performed. Damages must not be too speculative. Here, B expected to own a Phaeton for \$200,000 and S expected to receive that amount.

In a contract for the sale of goods where the seller breaches and keeps the goods, the buyer can recover the difference between the contract price and the market value of the goods at the time of breach, or the buyer can cover, by buying the same goods and receive the difference between the cost of cover and the contract price.

Here, the apparent market value of the Phaeton is \$300,000 at the time of breach. The K price was \$200,000. B can recover, as his expectation damages [are] \$100,000 or if he is able to buy another '32 Phaeton (unlikely) he could seek the differences between what he pays for the other Phaeton and the K price.

B can also recover all incidental damages incurred in dealing with S's breach.

Loss of Circulation /Revenues

Consequential damages are only recoverable to the extent they are reasonably foreseeable by the breaching party and not so speculative.

The facts do not indicate that S knew of B's purpose for purchasing the car or that he owned a car enthusiast magazine. Thus, the loss of circulation and revenue to B is likely not foreseeable to a reasonable person in S's position.

Even if S was aware of B's purpose, these damages are probably too speculative. First B would have to prove he would have won and that winning would have increased his circulation and revenue in some definite amount. This is likely not possible.

\$5,000 Entry Fee

B can recover the \$5,000 entry fee as reliance damages – money he spent on reliance on the K if this reliance was foreseeable to S.

If he told S he was going to enter it in the Concours or S should have known he was buying it to show, he will recover.



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**ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2009
CALIFORNIA BAR EXAMINATION**

This publication contains the six essay questions from the July 2009 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

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Question 5

Diane owns a large country estate to which she plans to invite economically-disadvantaged children for free summer day camp. In order to provide the children with the opportunity to engage in water sports, Diane started construction to dam a stream on the property to create a pond. Neighbors downstream, who rely on the stream to irrigate their crops and to fill their wells, immediately demanded that Diane stop construction. Diane refused. Six months into the construction, when the dam was almost complete, the neighbors filed an application in state court for a permanent injunction ordering Diane to stop construction and to remove the dam. They asserted causes of action for nuisance and for a taking under the United States Constitution. After a hearing, the state court denied the application on the merits. The neighbors did not appeal the ruling.

Thereafter, Paul, one of the neighbors and a plaintiff in the state court case, separately retained Lawyer and filed an application for a permanent injunction against Diane in federal court asserting the same causes of action and requesting the same relief as in the state court case. Personal jurisdiction, subject matter jurisdiction, and venue were proper. The federal court granted Diane's motion to dismiss Paul's federal court application on the basis of preclusion.

Infuriated with the ruling, Paul told Lawyer, "If the court can't give me the relief I am looking for, I will take care of Diane in my own way and that dam, too." Unable to dissuade Paul and after telling him she would report his threatening comments to criminal authorities, Lawyer called 911 and, without identifying herself, told a dispatcher that "someone is on his way to hurt Diane."

1. Was the state court's denial of Diane's neighbors' application for a permanent injunction correct? Discuss. Do not address substantive property or riparian rights.
2. Was the federal court's denial of Paul's application for a permanent injunction correct? Discuss. Do not address substantive property or riparian rights.
3. Did Lawyer commit any ethical violation when she called 911? Discuss. Answer according to both California and ABA authorities.

Answer A to Question 5

I. Was the State court's denial of Diane's neighbors' application for a permanent injunction correct?

A permanent injunction is an equitable remedy which is appropriate where there is an inadequate remedy at law, the plaintiff has a protectable property interest, enforcement of the injunction is feasible, balancing of the hardships, and there are no applicable equitable defenses to enforcement of the injunction.

Inadequate remedy at law – A remedy at law is inadequate where monetary damages are insufficient to compensate the plaintiff, or where they are unlikely to be recovered because the plaintiff is insolvent. Furthermore, a legal remedy may be inadequate. In this case, the neighbors are going to argue that an award of monetary damages will be inadequate because they rely on the stream that Diane is diverting to irrigate their crops and fill their wells. While an award of damages would give them money, it would in no way help them in dealing with this problem. Furthermore, they will also argue that because the use and enjoyment of their real property is involved, this is a situation where their land is unique and legal damages will be inadequate because of the irreparable harm that will occur to the neighbors if they lose access to the water.

Protectable Property interest – A plaintiff may only seek a permanent injunction where they have a property interest that a court in equity will protect. While the traditional rule was very strict, the modern rule provides that an interest in property will suffice. The plaintiffs will argue that as landowners living downstream, they have a protectable property interest in the water. The court is likely going to accept this argument because they had been using the water before Diane came into the area and likely have at least some rights to continue using some of the water.

Feasibility of enforcement – Enforcement problems arise in the context of mandatory injunctions which requires the defendant to do something. Negative injunctions which

prohibit the defendant from performing certain actions create no enforcement problems. In the enforcement area, courts are concerned about the feasibility of ensuring compliance with a mandatory injunction and also with the problem of continuing supervision.

Under these facts, Diane's neighbors initially asked for a partial mandatory injunction and partial negative injunction, ordering Diane to stop construction and remove the dam. With regard to the mandatory part (removing the dam), Diane has to affirmatively take this action, rather than being required simply to stop building the dam. Because this is a mandatory injunction, this creates an enforcement problem for the court. It will have the problem of continually supervising Diane to make sure that she in fact takes the dam down. The part of the injunction regarding stopping construction is a negative injunction because all that is required is that Diane stop construction. As such it creates no enforcement problems. While the part of the injunction that requires Diane to take down the dam creates some enforcement problems, the court could solve this problem by couching it as a negative injunction.

Balancing of the hardships – In balancing the hardships, the courts will always balance the hardships if the permanent injunction is granted on the defendant with the hardship to the plaintiff if the injunction does not issue. The only time that courts will not balance the hardships is where the defendant's conduct is willful. Finally, in balancing the hardships, the court can take the public interest into account.

Was the plaintiff's conduct willful so as to prohibit balancing of the hardships – In this case, while Diane willfully continued the construction and used the dam to divert the water, there is no indication that when she was doing this that she knew that her conduct was wrong or was intentionally violating the rights of the plaintiffs. While the neighbors demanded that she stop, there is no indication that she believed that she was not entitled to continue. Consequently, the hardships should be balanced because the defendant's conduct was not willfully in violation of the plaintiffs' rights.

Balancing the hardships – The plaintiffs are going to argue that they will suffer great harm if an injunction does not issue. Under these facts, the plaintiffs need the water from the stream for their crops' irrigation and to fill their wells. Thus if a permanent injunction does not issue their crops are likely to die and they will not have a water supply in their wells. This is a great showing of hardship. The defendant is going to counter that she is trying to construct a free summer day camp for poor kids and that she cannot do so if she is forced to halt construction and if she cannot use the water diverted by the dam for her pond. However, in this case, these hardships do not seem so great compared to the hardships faced by the plaintiffs. There is no indication that she cannot get the water from her pond from somewhere else; furthermore, it seems likely that she could continue constructing her property in a way that does not interfere with the rights of the plaintiffs. The direct balancing of the hardships thus favors the plaintiffs.

Consideration of the public interest in balancing the hardships – Courts may also consider the public interest in balancing the hardships. Diane is going to argue that the public interest favors her because she is doing this project to create a free summer day camp for children who do not have a lot of money. This certainly indicates that her action is in the public interest. However, the neighbors can also make a public interest argument. Assuming that they sell their crops for consumption by the general public, they also have public interest factors on their side. Thus this factor does not seem to favor either side very strongly.

On balance, thus, it seems that the balancing of the hardships favors the plaintiffs when taking the direct hardships and the public interest into account.

Equitable Defenses – Courts in equity will not issue an injunction in favor of plaintiffs where they have unclean hands, where laches applies, or where the claim is barred by estoppel.

Unclean hands – is a defense in equity where the plaintiffs have committed acts of bad faith with regard to the subject matter before the court. In this case, there is no indication that the plaintiffs have unclean hands, so this argument by Diane will be unsuccessful as a defense.

Laches – Laches applies where a plaintiff or group of plaintiffs unreasonably delay in instituting a cause of action or claim against a defendant and this delay prejudices the defendant. In this case, Diane is going to argue that the plaintiffs' delay in this case was unreasonable. When Diane refused the neighbors' initial request to stop construction, they waited six months before filing an application with the state court for an injunction. Furthermore, she is going to argue that she was harmed by this delay because she continued construction and expended substantial funds during this delay. While Diane can make a pretty compelling argument, it does not seem that a delay of six months is enough time that the plaintiffs' claim should be barred by laches.

Estoppel – applies as a defense in equity where plaintiffs take a course of action that is communicated to the defendant and inconsistent with a claim later asserted, and the defendant relies on this to their detriment. In this case, estoppel will not bar the claim by the plaintiffs because once they became aware of the construction, they immediately indicated that they did not approve. They commanded Diane to stop so the plaintiffs' claim is not barred by estoppel.

Conclusion – The state court was incorrect in denying the permanent injunction because it appears that the permanent injunction should have issued because of the factors discussed above.

II. Was the federal court's denial of the permanent injunction correct?

Claim Preclusion (Res Judicata) – The equitable doctrine of res judicata stands for the proposition that a plaintiff should only have one chance to pursue a claim against the same defendant. This doctrine applies and bars relitigating of a claim where (1) the

claim is asserted by the same claimant against the same defendant in case #2 as in case #1, (2) where the first case ended in a valid final judgment on the merits, and (3) where the same claims are being asserted in case #2 as in case #1. In federal court these claims arise from the same conduct, transaction or occurrence.

Same Claimant Against Same Defendant in Case #2 as in Case #1 – In this case, second case, Paul is suing Diane in federal court. The facts indicate that he was one of the neighbors and a plaintiff in the first case in state court. Consequently this element is met, because Paul was also a claimant against Diane in the first case.

Case #1 ended in a valid final judgment on the merits – The facts indicate that in the first case, the court denied the application for a permanent injunction on the merits. The facts also indicate that the neighbors did not appeal. A judgment on the merits is clearly a valid judgment and because no appeal was made, this judgment is also final. Consequently, this element of res judicata is also met. The one issue that Paul may raise on this point is that if the time for appeal has not run in state court, he may argue that he could file a notice of appeal in state court. However, taking up this suit in federal court is improper because absent an appeal in state court, there has been a valid final judgment on the merits that the federal court should adhere to.

Are the same claims asserted in case #2 as were asserted in case #1? Under federal law there is a theory of merger whereby a plaintiff is deemed to have asserted all claims pertaining to a prior claim that arise from the same conduct, transaction, or occurrence. In this case, the facts indicate that Paul asserted the same causes of action and requested the same relief in the second case as in the first case. Consequently, this element is met. California follows the primary rights theory which gives the plaintiff a cause of action for each right that this invaded. However, in this case, because there is no indication that any of the causes of action are different than the ones in the first case, the result in California would not be different.

Conclusion – The court was correct to dismiss Paul's application for permanent injunction because the doctrine of claim preclusion (res judicata) precluded relitigating claims that had already been asserted in a prior case.

III. Ethical Violations of Lawyer in reporting Paul's communications to the 911 Dispatcher

Duty of Confidentiality – Under the ABA Model Rules, a lawyer has a duty of confidentiality to a client which precludes disclosing any information obtained during the representation. Under the California rules, while there is no express duty of confidentiality, a lawyer is required to keep his client's confidences and this is a strict duty.

In this case, Paul is going to argue that lawyer violated this duty when he revealed the information that he was told after the ruling to the 911 dispatcher. While he is correct that this raises an issue with regard to the duty of confidentiality, he may be incorrect that Paul has violated this duty because both the ABA Rules and the CA Code recognize that there are certain situations whereby the duty of confidentiality is overridden by other concerns.

Exceptions to the Duty of Confidentiality – Under the ABA Model Rules, a lawyer may reveal client confidences where he believes necessary to prevent reasonably certain death or serious bodily injury. The California Code has the same requirements but also requires that where reasonable a lawyer should first try to talk the client out of committing the act and then tell them that they will reveal confidences if they are not assured that the client will not commit the act. Under both the ABA and California rules, this type of disclosure of client confidences is permissive; it is not mandatory. Under the federal rules, there is also an exception to the duty of confidentiality where the client has used or is using the client's services to commit a crime or fraud which will result in substantial financial loss. California has no such exception, but this exception will not be applicable anyway because there is no indication that Paul will be using Lawyer's services if he acts against Diane or the dam.

Federal Rules – Under the federal rules, the main issue is whether Lawyer reasonably believed that his disclosure was necessary to prevent reasonably certain death or substantial bodily injury to Diane. If this is the case then he was entitled to reveal client confidences and will not have breached his duty of loyalty. The facts indicate that Paul

was infuriated with the ruling that the federal court had made in dismissing his claim and that he said “If the court can’t give me the relief I am looking for, I will take care of Diane in my own way and that dam too.” The question is whether the belief that he was going to get Diane made it reasonable to believe that she was threatened with death or serious bodily injury. Based on the facts of this case, this may not be met here because Paul had just lost his case and was upset. People often say things when they are upset, but don’t necessarily act on them. Lawyer will argue that he tried to talk Paul out of hurting Diane and that he only reported the comments then. However, under these circumstances, it seems like this disclosure may have been unreasonable and violated Lawyer’s duty of confidentiality, particularly because such a disclosure is permissive.

California Code – In addition to the federal requirements discussed above, before revealing any client confidences based on a reasonable belief of a reasonable threat of death or substantial bodily injury, Lawyer was required to first try to talk Paul out of committing the violent act against Diane and inform client of his intention to reveal the confidential communications. In this case, the facts indicate that Lawyer did this by trying to dissuade Paul and telling him that she would report his threatening comments to criminal authorities. However, as discussed above, given all of the circumstances this disclosure may not have been reasonable.

Attorney/Client Privilege – Under the attorney-client privilege, a lawyer may not reveal information intended by the client to be confidential which is given in order to get legal advice. However, in both California and under the ABA Model Rules, there is an exception where disclosure of confidential information obtained during the course of the attorney-client privilege is permitted to prevent death or serious bodily injury. This analysis while similar to the analysis above and the question is whether the statements made by Paul were for the purpose of legal advice; it seems like he was just telling Lawyer what he was planning to do so. The statements may not even be covered by the Attorney/Client privilege. Furthermore, these statements may fall within the exception for threats of death or serious bodily injury if the threat that Paul made against Diane was credible.

Duty to uphold justice – Under their duty to uphold justice under both the ABA Model Rules and the California Code, a lawyer is permitted to disclose client confidences where necessary to prevent reasonably certain death or substantial bodily harm. Lawyer will argue that this is why the disclosure was made. However, if this disclosure was unreasonable, this duty will not protect Lawyer from breaching her duty of confidentiality and potentially the Attorney-Client privilege.

Conclusion – Lawyer may have violated her duty of confidentiality and the attorney-client privilege under both ABA Model Rules and the CA Code if it is found that the threat made by Paul against Diane was not a credible one and just made in the heat of the moment without any reasonable chance of actually carrying it through. However, in her defense, Lawyer may argue that she did not disclose the identity of who was on their way to hurt Diane because she just told the dispatcher that “someone was on the way.” However, this will not be dispositive on this issue of whether she breached ethical duties.

Answer B to Question 5

1. Denial of Diane's neighbors' application for permanent injunction

Permanent injunction

A permanent injunction is a court order mandating a person to either perform or refrain from performing a specific act. A permanent injunction is granted after a full trial on the merits. In order to obtain a permanent injunction, a claimant must establish the following elements.

a. Inadequate legal remedy alternative

A claimant must first establish that any legal remedy alternative is inadequate. In this case, the neighbors will argue that a money damages remedy would be inadequate because it would necessitate the filing of multiple suits. The harm that Diane is inflicting by constructing the dam -- i.e., stopping the flow of the water to neighbors downstream who rely on the stream to irrigate their crops and fill their wells -- affects multiple parties and is ongoing, therefore giving rise to multiple suits. Moreover, the neighbors will argue that a money damages remedy would be inadequate because it would be difficult to assess damages. It may be difficult, for instance, to establish how much damages they will sustain as a result of not being able to irrigate their crops. It may also be difficult to determine how much it would cost to obtain such water from other sources. Finally, the dam may be the neighbors' only source of water, and, therefore, the award of any amount of money damages may be inadequate (i.e., the stream is unique). Therefore, the neighbors will likely satisfy this element.

b. Property right/protectable interest

Traditionally, permanent injunctions only protected property rights. However, the modern view holds that any protectable interest is sufficient. In this case, the neighbors likely have a property right in the stream to the extent that the stream flows through their respective properties. Even if they do not have a property right, however, they still have

a protectable interest stemming from their right to use water from a stream that runs through their property. Thus, this element is likely satisfied.

c. Feasibility of enforcement

There is usually no enforcement problem in the case of negative injunctions (i.e., court orders mandating that a person refrain from performing a specific act). Mandatory injunctions (i.e., court orders mandating that a person perform a specific act) present greater enforcement problems. For instance, a court may be unwilling to grant a mandatory injunction if: (a) the mandated act requires the application of taste, skill or judgment; (b) the injunction requires the defendant to perform a series of acts over a period of time; or (c) the injunction requires the performance of an out-of-state act.

In this case, the neighbors seek both a negative injunction (i.e., order requiring Diane to immediately stop construction of the dam) and mandatory injunction (i.e., order requiring Diane to remove the dam). There will be little enforcement problem in ordering Diane to immediately stop construction of the dam. There will likewise be little enforcement problem in ordering Diane to remove the dam since both Diane and the dam are within the court's territorial jurisdiction, and the injunction does not require Diane to perform an out-of-state act. Therefore, the neighbors will satisfy this element.

d. Balancing of hardships

The court will balance the hardship to the neighbors if a permanent injunction is not granted against the hardship to Diane if a permanent injunction is granted. Unless the hardship to Diane greatly outweighs the hardship to the neighbors, a court will likely not grant a permanent injunction. In this case, Diane will suffer little hardship if the permanent injunction is granted because the pond was intended to be used for a free summer day camp. Therefore, the only economic harm she will suffer as a result of this injunction is the money she has already expended in constructing the dam and any additional amount she will incur in removing the dam if the injunction is granted.

However, the neighbors will suffer substantial harm if the injunction is not granted and the dam is completed. They rely on the stream to irrigate their crops and to fill their wells and will likely suffer substantial damage if they either cannot obtain substitute water from another source or must pay significant amounts to obtain any substitute. Thus, the hardship to the neighbors if a permanent injunction is not granted greatly outweighs the hardship to Diane if a permanent injunction is granted, and a court is more likely to grant the injunction.

e. Defenses

Diane may raise the defense of laches and argue that the neighbors delayed in bringing the permanent injunction action, thereby prejudicing her. The laches period begins the moment the neighbors know that one of their rights is being infringed upon. In this case, the neighbors knew six months before they filed an application in state court for a permanent injunction that Diane was constructing a dam and that such construction infringed on their right to obtain water from the stream. By waiting these six months to bring suit, Diane incurred substantial construction expenses in building the dam that could have been avoided if the neighbors had brought the suit sooner.

Thus, Diane will likely be able to successfully assert this laches defense.

In the end, a court may still grant the neighbors the injunction and order Diane to remove the dam. However, the court may require the neighbors to compensate Diane for any construction expenses that could have been averted if the neighbors brought the suit sooner.

2. Denial of Paul's application for permanent injunction

Claim preclusion

Once a court renders a final judgment on the merits with respect to a particular cause of action, the plaintiff is barred by res judicata (i.e., claim preclusion) from trying that same cause of action in a later suit. I will examine each element of claim preclusion, in turn, below:

a. Final judgment on the merits

The court must have rendered a final judgment on the merits in the prior action. For federal court purposes, a judgment is final when rendered. For CA state court purposes, a judgment is not final until the conclusion of all possible appeals. In this case, Paul is filing his case in federal court. Since judgment was rendered by the state court in the prior action, the judgment is considered final.

A judgment is "on the merits" unless the basis for the decision rested on: (a) jurisdiction; (b) venue; or (c) indispensable parties. In this case, the state court's decision did not rest on any of these grounds. Therefore, the judgment was on the merits.

b. Same parties

The cause of action in the later suit must be brought by the same plaintiff against the same defendant. In this case, Paul was one of the plaintiffs in the prior state court case, and the suit is brought against Diane, who was the same defendant in that prior case. Therefore, this requirement is also met.

c. Same cause of action

The cause of action in the later suit must be the same cause of action asserted in the prior suit. In general, if causes of action arise from the same transaction or occurrence, a claimant must assert all such causes of action in the same suit. However, under CA's "primary rights doctrine," a claimant may separate the causes of action into separate suits so long as each suit involves a different primary right (e.g., personal injury vs. property damage).

In this case, Paul is asserting the same permanent injunction claim based on nuisance and taking grounds that he asserted in the prior state court action. He is also requesting the same relief as in the state court case. He is not asserting a different primary right, and, thus, the "primary rights doctrine" is inapplicable. Therefore, this requirement is likewise met.

d. Actually litigated or could have been litigated

The same cause of action must have either actually been litigated or could have been litigated in the prior action. This requirement is met because the permanent injunction cause of action based on nuisance and taking grounds was actually litigated in the prior action.

In the end, Paul will [be] barred by res judicata (i.e., claim preclusion) from trying the permanent injunction cause of action against Diane in federal court, and the court was correct in granting Diane's motion to dismiss.

3. Lawyer's ethical violations

Confidentiality

Under both ABA and California rules, a lawyer has a duty not to reveal any information related to the representation of a client. However, several exceptions may nonetheless permit a lawyer to reveal such confidential information. First, a lawyer can reveal confidential client communications if the client gives the lawyer informed consent to do so. In this case, Paul has not given Lawyer such informed consent, and, therefore, this exception does not apply. Second, a lawyer can reveal confidential client communications if he is impliedly authorized to do so in order to carry out the representation. Again, this exception does not apply here.

Third, under the ABA rules, a lawyer can disclose confidential client communications if he reasonably believes it is necessary to prevent a person's reasonably certain death or serious bodily injury. Under the CA rules, however, a lawyer can disclose such information only to prevent a criminal act that is likely to lead to death or serious bodily injury. The lawyer must first make a good faith effort to convince the client not to commit the criminal act and, if the client refuses, then the lawyer must inform the client of his intention to reveal the client's confidences.

In this case, Paul told Lawyer that he "will take care of Diane in my own way" after becoming infuriated with the court's ruling on his permanent injunction application. On the one hand, Paul's statement is too unclear and ambiguous to provide any indication of what specific harm he intended to inflict on Diane. On the other hand, Lawyer will argue that he reasonably believed that Paul intended to inflict serious bodily harm on Diane, as evidenced by his infuriation after the ruling. Lawyer was so convinced that Paul intended serious harm to Diane that he told the 911 dispatcher that Paul was "on his way to hurt Diane." In the end, a disciplining body would likely hold that Lawyer was reasonable in his belief that Paul intended to cause death or serious bodily injury to Diane and, therefore, his disclosure of Paul's confidential communications was permissible. The killing or injuring of a person also constitutes a criminal act, and since

Lawyer first made a good faith effort to dissuade Paul from committing any harm against Diane, Lawyer's revelation of this confidential information would also not subject Lawyer to discipline in CA.

Fourth, under the ABA rules only (i.e., CA has no equivalent rule), a lawyer may disclose confidential client communications to prevent a crime of fraud that is likely to produce substantial financial loss to a person, so long as the client was using the lawyer's services to perpetrate the crime or fraud. In this case, Paul threatened to "take care... of that dam." While this threat may result in substantial financial loss to Diane, the threatened act did not involve the use of Lawyer's services. Therefore, this exception does not apply. Nonetheless, as discussed above, Lawyer should escape discipline for his revelation of client's confidential communications under the "death or serious bodily injury" exception.



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**ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2010
CALIFORNIA BAR EXAMINATION**

This publication contains the six essay questions from the February 2010 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

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Question 4

In 2001, Lou was the managing partner of Law Firm in State X and Chris was his paralegal. Realizing that Chris intended to go to law school, Lou invited Chris and his father to dinner to discuss Chris's legal career. Aware of Chris's naive understanding of such matters, Lou, with the authority of Law Firm, made the following written offer, which Chris accepted orally:

- 1) After graduation from law school and admission to the Bar, Law Firm will reimburse Chris for his law school expenses;
- 2) Chris will work exclusively for Law Firm for four years at his paralegal rate of pay, commencing immediately upon his graduation and admission to the Bar;
- 3) Chris will be offered a junior partnership at the end of his fourth year if his performance reviews are superior.

In 2005, Chris graduated from law school and was admitted to the Bar, at which time Law Firm reimbursed him \$120,000 for his law school expenses. Chris and his father invited Lou to dinner to thank him and Law Firm for their support. During dinner, however, Chris advised Lou that it was his decision to accept employment with a nonprofit victims' rights advocacy center. Lou responded that, although Law Firm would miss his contributions, he and Law Firm would nonetheless support his choice of employment, stating that such a choice reflected well on his integrity and social consciousness. Nothing was said about Law Firm's payment of \$120,000 for Chris's law school expenses.

In 2008, Chris's father died. Chris then completed his third year of employment at the advocacy center. Not long thereafter, Law Firm filed a breach-of-contract action against Chris seeking specific performance of the agreement or, alternatively, recovery of the \$120,000. In State X, the statute of limitations for breach-of-contract actions is five years from breach of the contract in question.

What legal and equitable defenses can Chris reasonably present to defeat the relief sought by Law Firm, and are they likely to prevail? Discuss.

Answer A to Question 4

I. Controlling Law

The Uniform Commercial Code governs the sale of goods.

Here, the contract is one for services, mainly an employment contract. No goods are involved.

Therefore, the contract is governed by the common law of contracts.

II. Valid Contract?

Chris may defend by claiming that there was no valid contract. For there to be a valid contract, there must be an offer, acceptance, and consideration.

Offer

An offer invites the offeree to enter into a contract and creates the power of acceptance in the offeree.

Here, Lou made a written offer to Chris on behalf of Law Firm, which is probably an LLP or general partnership. As stated, Lou as managing partner has the authority to bind the firm.

Therefore, a valid offer has been made by the Law Firm.

Acceptance

An acceptance is the manifestation of assent to be bound by the terms of the contract.

Here, Chris accepted the offer because he “accepted orally.”

Therefore, there was an acceptance, subject to Statute of Frauds considerations discussed below.

Consideration

A contract will fail for lack of consideration if there is no bargained-for exchange of legal detriment. Each party must be bound to do something he is not otherwise obligated to do, or to refrain from doing something he otherwise has a legal right to do.

Here, Law Firm is to reimburse Chris for his law school expenses if Chris graduates from law school and is admitted to the Bar. Law Firm is also to hire Chris thereafter for four years and pay Chris his paralegal rate of pay, while Chris is to work for Law Firm at such rate immediately upon admission to the Bar.

Further, Chris is to be offered a junior partnership at the end of his fourth year if his performance reviews are superior. This may be an illusory promise. Analysis follows.

Illusory Promise?

A promise is illusory even if there appears to be legal detriment if one party is not bound to do anything at all. An illusory promise included in a contract containing other legal detriment will not void the contract, and can become part of the contract.

Here, Law Firm can control Chris's performance reviews, and appears to give Law Firm complete discretion. However, performance at law firms can be objectively evaluated with client reviews, revenues raised, cases handled, successful litigation, and other factors. The court is likely to read in a reasonableness requirement on the part of Law Firm in making the review.

Therefore, item 3 on the contract is not illusory, and, in either case, the contract appears to be valid on its face.

III. Statute of Frauds

Under the Statute of Frauds, certain contracts must be in writing, contain a description of the parties thereto and subject matter thereof, and be signed by both parties. A contract must satisfy the Statute of Frauds if it is one in contemplation of marriage, one which cannot be completed in one year, a contract relating to land or executors, or for the sale of goods of \$500 or more.

Here, the contract calls for at least 4 years of work at the paralegal rate of pay. There is no way this contract can be completed in one year; it would not be deemed “completed” if Chris dies or Law Firm goes under. Therefore, the Statute of Frauds applies.

Law Firm’s offer was in writing, but Chris accepted orally. There is no indication that the agreement was memorialized or signed by Chris. Therefore, Chris may assert that the contract fails due to the Statute of Frauds.

Part Performance

Law Firm will counter, saying it has partly performed on the contract. The Statute of Frauds can also be satisfied by part performance.

Here, Law Firm already reimbursed Christ \$120,000 for his law school expenses. Therefore, Chris cannot void the contract for failure to meet the Statute of Frauds.

IV. Minor?

Contracts entered into by minors are voidable upon reaching majority. I will assume that Chris is not a minor as of 2001, as he graduated from law school in 2005. I assume he graduated from college in 2002 at the latest, and that he is not a prodigy who graduated from college while still a minor.

V. Undue Influence?

Chris may attempt to void and contract for undue influence. Although not rising [to] the level of duress, undue influence arises when someone with a confidential relationship exerts pressure and steers one into the influencer's desired course of action.

Here, Lou was already Chris's boss at the time of the offer. There was a vast difference in knowledge concerning employment practices between the two. Lou was also aware of "Chris's naïve understanding of such matters" when he made the offer. However, Lou did invite Chris's father to dinner with Chris, and the partner-paralegal relationship probably does not rise to a level which can be considered a confidential relationship for purposes of undue influence.

Therefore, Chris is not likely to succeed on this theory.

VI. Unconscionable?

Chris may also raise unconscionability as a defense to the contract. A contract may be unconscionable when a party with superior bargaining power imposes a contract of adhesion or otherwise imposes terms which cannot reasonably be seen as fair.

Here, hiring a lawyer at the price of a paralegal appears unconscionable. However, Lou can logically argue that Law Firm has "prepaid" some of Chris's compensation by paying for law school. Further, the terms do not appear boilerplate or as adhesive.

Therefore, Chris is not likely to succeed on the theory of unconscionability. Thus the contract is valid.

VII. Defenses to Specific Performance

Specific performance is an equitable remedy which may be granted by the court where 1) legal remedies are inadequate, 2) the terms are definite and certain, 3) there is

mutuality of remedies, 4) the remedy is feasible for the court to monitor, and 5) there are no defenses.

Here, Law Firm will argue that legal remedies are inadequate because they are seeking to employ the one and only Chris. Christ knows the firm from his paralegal work and Law Firm trusts him. The terms of the contract are certain, as the term and salary are stated on Lou's offer. Mutuality of remedies, recently not very important and leans more towards mutuality of performance, is also met because Law Firm is ready, willing, and able to meet their side of the bargain. The remaining issues to consider are feasibility and defenses.

Feasibility

It is very difficult for the court to monitor a service contract, especially an employment contract. Further, forcing someone to work violates the 13th Amendment of the Constitution banning involuntary servitude. Here, we are concerned with an employment contract, and the court will find it infeasible to enforce.

Laches

Chris can also assert the defense of laches. One can defend on the theory of laches regardless of the statute of limitations because they are completely different theories. Laches operates when a party has 1) unreasonably delayed assertion of their rights so that 2) there is prejudice to the other party.

Here, Law Firm said they would nonetheless support his choice of employment, and commended Chris on his integrity and social consciousness. Chris reasonably took this to mean that he was not bound by the contract to work for Law Firm, and that the law school expenses would be paid for regardless of his decision. Further, Law Firm waited 3 years to file a breach of contract action. Chris had worked for the advocacy center for 3 years at this time, and for Chris to go back to a law firm at paralegal wages would constitute severe prejudice.

Thus, Chris can successfully assert the defense of laches.

Unclean hands

Equity does not help those who do not come to the court with clean hands. If there was foul play on the part of Law Firm, equity will not help it pursue its goals.

Here, Law Firm made the offer knowing of Chris's naïveté. Further, Law Firm took Chris's father's death as an opportunity to file their claim. The father had been there at the two dinners with Lou and could offer support as well as testimony.

Therefore, Chris will most likely succeed on this defense as well.

Note, however, that the court has discretion in granting equitable defenses.

VIII. Defenses to recovery of law school expenses

Gift

Chris will argue that Law Firm made an irrevocable gift of the law school expenses. An oral gift is revocable, but a gift is finalized and cannot be revoked when there is delivery with the intent to give and the gift is accepted.

At the second dinner, Lou supported Chris's decision but mentioned nothing about the law school expenses. Lou also commended Chris on his decision. Therefore, Chris will assert that Law Firm made a gift. Here, there was delivery of the \$120,000 and the money was accepted. The problem is the question of intent. Law Firm will assert that is [an] obvious, common practice to repay someone on a prepayment when a contract is not fulfilled. This is a question of fact but, on balance, Chris will probably not succeed on this theory.

Waiver

Chris will argue that Law Firm waived its rights to take back the reimbursement.

At the second dinner, Lou supported Chris's decision but mentioned nothing about the law school expenses. Therefore, Chris will assert that he interpreted this to be a waiver. However, a waiver must be knowingly made, not assumed from silence. Further, a waiver of a significant debt must generally be in writing, and there was no such writing.

Therefore, Chris will not succeed on this defense.

Promissory Estoppel

Chris will next assert that he relied to his detriment on the gift or waiver, so that Law Firm is estopped from claiming the \$120,000 back. Promissory estoppel arises when reliance is induced and the other party in fact justifiably relies.

Here, Law Firm will argue that it induced no such reliance. Chris will argue that waiting 3 years is enough for reliance. While this is another question of fact, the court will most likely hold for Law Firm.

Therefore, Chris will most likely have no defense concerning the recovery of the \$120,000.

Answer B to Question 4

Law Firm (LF) v. Chris (C)

Contract Formation

A contract is formed if there is mutual assent and consideration. Mutual assent is found if there's an offer and an acceptance of the offer. An offer is the manifestation of willingness to enter into a bargain so as to justify another person in understanding that his assent to that bargain is invited and will conclude it. Acceptance is the manifestation to accept the terms of the offer. Consideration is the bargained-for exchange of legal detriment – which is the doing of something one has no legal obligation to do or forbearing on doing something one has a right to do.

Here, we have Lou of LF making a written offer to C for C to work for LF. The offer has certain terms and it was communicated to C properly. C accepted orally. Thus, mutual assent is found.

Consideration is likewise found here because LF was offering to reimburse C for law school expenses and C in return promised to work exclusively for LF for four years. Each party does not need to do what it promised to do absent a contract; thus, each has legal detriment involved in the bargain.

Thus, there is a contract formed here.

Defenses to Formation

Statute of Frauds

The law of contracts requires that certain contracts have to be in writing in order to be enforceable. The writing must identify the parties, must contain the critical terms of the agreement, and must be signed by the party to be charged. One of these types of contracts falling under the statute is contract which performance takes over a year.

Here, we have a four-year contract so it falls under the statute. Although there's an offer in writing, the acceptance of C was not in writing – i.e., he did not sign the offer so there is no writing evidencing a contract was formed between the parties. Thus, there is no writing that meets the requirements of the statute. This being so, LF cannot enforce C's promise.

However, a promise may be taken out of the Statute if the parties have already performed. Here, LF can argue that even if there's no qualifying writing, LF performed by reimbursing C the money – a clear evidence of the presence of a contract. On this issue, LF has the better of the argument.

Unconscionability/Public Policy

The law frowns upon and does not sanction unconscionable contracts where one party, because of its superior bargaining position, takes advantage of the other party either procedurally (i.e., during the negotiation phase where a party) or substantively (i.e., where the terms of the contract are unreasonably favorable to the party who drafted it and who has the superior position).

Procedurally, here, LF was the one in the superior bargaining position because it is the employer of C. C can argue that through its agent, LF took advantage of C's "naive understanding" of matters relevant to the contract. Additionally, LF, aware of C's naiveté, did not advise C to seek independent advice about the contract.

LF can argue that C has other choices, however, and was not coerced into accepting the contract. Besides, LF can argue that C had his father with him when the contract was being negotiated. Further, LF may argue that C has several reasonable alternatives, including not accepting the contract itself. LF has the better argument here.

Substantively, C has a stronger argument because the contract states that he would work for LF for four years at his paralegal rate of pay. The law will see this as an unreasonable term given the duration and low rate of pay even where C is already a lawyer. Further, C can argue that the promised junior partnership at the end of the 4

years is illusory because the firm retains the unrestricted right to say C's performance reviews are "not superior," unless LF can point to specific and objective standards by which C's performance can be measured.

Misrepresentation

Misrepresentation is the intentional making of false statements of material fact. It can [be] affirmative or it can be through silence. Silent misrepresentation is typically found where one party, who enjoys a fiduciary or special relationship with the other, stays mum about pertinent facts that the other party should know about in order to make a knowing and intelligent decision.

C may claim LF, through Lou, misrepresented by keeping silent about the pertinent aspects of the contract when he had the responsibility to apprise C of his rights and obligations. C can argue that Lou has a special relationship with him as he is his employer and also the managing partner of a law firm.

The court, however, will likely side with LF on this issue unless C can point to specific acts by which LF affirmatively or negatively, through silence, "misrepresented" facts because each party is allowed to drive as hard a bargain as possible in an arms-length transaction.

Specific Performance (SP)

SP is an action where a party goes to a court of equity seeking relief and asking the court to ask the breaching party in a contract to perform as promised. SP is granted where the following elements are met: there is inadequate remedy at law; the contract has definite and certain terms and all conditional terms precedent to formation have been met; performance is feasible for the parties; the court does not need to actively monitor performance; and there are no equitable defenses that the breaching party can raise.

Here, LF will argue that there are definite and certain terms because the offer specifies the relevant provisions of what the contract entails. It will also point out that all the conditional terms precedent to contract formation – i.e., C's graduation from law school and admittance of the Bar – have been met.

However, C will be able to argue that there are adequate remedies available for LF to pursue at law. For instance, it can ask for damages, measured by the cost of hiring another lawyer.

C will also argue that performance is not feasible because to require him to serve as LF's new lawyer against his will is unconstitutional – it is violative of the law against involuntary servitude. This is a huge argument in favor of C because it is well-established that courts are loathe to enjoin parties to perform personal services contracts against the wishes of the performing party. Additionally, the court does not want to actively monitor individual performances of this nature because of the impossibility of having measurable standards by which the party can be judged.

Moreover, C can raise two equitable defenses: (1) the doctrine of Unclean Hands and (2) Laches.

"Unclean Hands" provides that one must do equity in order to seek equity; in other words, a party cannot seek relief from a court of equity when the court's "hands" will be sullied because of the unethical, unlawful or otherwise improper conduct of the party seeking relief. Here, C will point out that Lou's conduct in taking advantage of his "naiveté" and of inserting those unconscionable provisions render LF unworthy of relief from the court of equity because these actions were unethical and improper, if not unlawful.

Laches is another equitable defense by which the defending party can raise the issue that the plaintiff slept on its rights, thus prejudicing his defense. Here, C will be able to point out that LF should have immediately sought relief and not waited three years. C will argue that the long waited prejudiced him because the only witness to the contract negotiations was his father, who died in 2008. While LF can point to the statute of

limitations of 5 years, this argument will be unavailing for the firm because a court of equity looks at the statute of limitations as just one factor in determining whether the doctrine of laches should apply. Because SP is an equitable remedy, the court will look at the totality of the circumstances and render a decision in favor of C here, whose ability to defend himself has been compromised by the unexpected death of his father.

Restitution of \$120K

Restitutionary remedies are proper where there is a promise which the defending/promising party made which the party should have reasonably expected will induce reliance on the other; the other actually relied on it and conferred a benefit on the breaching party; and unjust enrichment will result if the promising party is allowed to retain the benefit without reimbursing the other.

Here, LF will argue that C made a promise which C should have reasonably expected would induce LF to rely, and LF did rely, on his promise; that C benefited by receiving the \$120K reimbursement of his law school expenses; and that allowing C to retain the money will result in C's unjust enrichment.

This is a strong argument on the part of LF, and C really does not have much in the form of argument to rebut it, except possibly to say that C's receipt of the money was a reward for working as a paralegal for the firm and that the reward is part of employment benefits and not conditioned on his working for the firm even after passing the bar. It's a weak argument and C will be asked to return the money absent a stronger defense.

One possibility for C is the doctrine of waiver. Waiver is the voluntary relinquishment of a known right. C can argue that Lou knew about his decision and said that "although LF would miss his contributions, he and LF would nonetheless support his choice of employment," which is a noble one – i.e., working for an advocacy center. C can argue that by LF's conduct, it waived its right to restitution of the money, or otherwise indicated that indeed, the money was an employment benefit to reward [him] for his loyal and worthy employment as paralegal in the prior years.

Additionally, C can raise again the equitable doctrine of laches, as discussed supra, because LF “slept on its rights” when it waited 3 years to seek restitution. C will be able to again argue that the sole witness as to the real characteristics of that money is dead, thus prejudicing his ability to defend himself.



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**ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2011
CALIFORNIA BAR EXAMINATION**

This publication contains the six essay questions from the February 2011 California Bar Examination and two selected answers to each question.

The answers received good grades and were written by applicants who passed the examination. The answers were prepared by their authors, and were transcribed as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of their authors.

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Question 6

Green's Grocery Outlet ("Green's") sponsors a lawful weekly lottery. For one dollar, a player picks six numbers. All persons who select the six winning numbers drawn at random share equally in the prize pool.

Each week, for the past two years, Andrew has played the same numbers—3, 8, 10, 12, 13, and 23—which represent the birth dates of his children.

On June 1, Andrew purchased his weekly lottery ticket. Barney, a clerk employed by Green's, asked, "The usual numbers, Andrew?" Andrew replied, "Of course."

Barney entered the numbers on the computer that generates the lottery ticket and gave the ticket to Andrew. Without examining the ticket, Andrew placed it in his pocket. Unbeknownst to either Andrew or Barney, Barney had accidentally entered the number "7" on the computer rather than the number "8."

The winning lottery numbers that week were Andrew's "usual" numbers. Much to his horror, Andrew discovered Barney's error when he showed his wife the "winning" ticket. Andrew filed suit against Green's seeking to reform his lottery ticket by changing the "7" to an "8." Green's cross-complained seeking rescission.

1. At trial, Green's objects to Andrew's testimony about (a) Barney's question, (b) Andrew's answer, and (c) Andrew's attempt to explain what the phrase "the usual numbers" means. Should the court admit the testimony? Discuss. Answer according to California law.

2. How should the court rule on each party's claim for relief? Discuss.

Answer A to Question 6

1. How will the court rule on Green's objection to

a) Barney's question "The Usual Numbers, Andrew"

Relevant

All evidence must be logically and legally relevant.

Logical: Under California Rules of Evidence, evidence is relevant if it tends to prove or disprove a disputed fact. In this case, Green is disputing the fact that there is a contract or the terms of the contract. Therefore, Andrew's testimony regarding Barney's statement tends to prove that Andrew bought the ticket from Barney and that the terms were for the usual numbers. Andrew can show this is logically relevant.

Legal: To be legally relevant the probative value should outweigh the prejudicial effect. The probative value in this case is that this tends to show Andrew bought the ticket and that he had a usual set of numbers. While this may be prejudicial, the probative value is high and outweighs the prejudice because it establishes the facts of the situation.

Hearsay

Green will object that the evidence is inadmissible hearsay. Hearsay is an out-of-court statement made by a declarant used to prove the truth of the matter asserted.

Out-of-Court Statement by a declarant

In this case Barney's question was made out-of-court and by Barney, therefore meeting this element.

Truth of the Matter Asserted

The statements presented to prove what the statement is asserting. In this case Green will argue that Andrew is introducing Barney's statement to show that Barney knew about the usual numbers and that Andrew asked for the usual numbers.

Act of Independent Legal Significances

Andrew will argue he is not introducing to prove the truth of the matter asserted, but rather to show that there was a contract created when Andrew got the ticket. At this point this statement does not provide a contract.

Knowledge of facts stated

Andrew may also be using it to prove that he always purchased the same numbers and that Barney knew about his practice or habit. It is likely that Andrew can show this is not hearsay, but being used to show Barney had the knowledge of his usual numbers.

Even if this is being introduced for the truth of the matter asserted Andrew can see if it falls under an exception to the hearsay rule.

Party-opponent admission

Admissions by a party-opponent are an exception to the hearsay rule. Vicarious admissions by an agent are only attributed to the principal if the statement was made in the scope of the agency and the principal would be liable.

In this case Green will argue Barney made a mistake, but Barney was doing his job within the scope of the agency and principals are liable for the mistake of their agents.

Andrew can show this was a party-opponent admission.

Conclusion:

Barney's question is admissible evidence and the court should admit Andrew's testimony on this issue.

a) Andrew's answer

Relevant (see rule above)

Logical: (See previous rule.) Green may argue that the creation of a contract is not in dispute and Andrew's testimony only tends to prove the existence of a contract. Andrew will argue the testimony also refers to the question Barney asked and that he wanted his usual numbers. Andrew can likely show this is logically relevant because it tends to prove a disputed fact.

Legally: See previous rule: This is similar to the previous piece of evidence and tends to establish the facts of the incident and therefore the probative value outweighs the prejudicial effect.

Hearsay

Green will object that this testimony is hearsay. See previous rule. Green will assert that this is an out-of-court statement by Andrew to prove that he assented to the purchase of the lottery ticket which is the contents of his statement.

Independent Legal Significance

Andrew can show in this case as previously discussed that his statement created a contract and is therefore not being used to prove the truth of the matter asserted, but rather to prove the formation of a contract. Andrew's assent in this case does form a contract and is therefore not hearsay.

Party-opponent Exception (See previous rule)

In this case the statement is by Andrew and not a party-opponent because Andrew is testifying and Andrew is not the opponent against Andrew himself. So this exception does not apply.

Conclusion

Andrew's testimony about his own statement should be ruled admissible because it is not hearsay and is relevant.

b) Andrew's explanation of "usual numbers"

Relevant:

Logical: This is the issue in dispute. Therefore Andrew's testimony is highly relevant.

Legal: In this instance, this testimony is highly prejudicial to Green and therefore might be excluded. However it is also the main issue of the case and its probative value outweighs its prejudicial effect.

Character Evidence

Evidence of a person's character cannot be used to show they acted in conformity therewith on a particular occasion.

In this case Green will argue that the introduction of this evidence is trying to show Andrew acted similarly as he had on other occasions.

Habit

Evidence that shows specific instances of conduct to prove that they have a regular habit are allowed. Andrew will argue that in this case he is establishing a habit he has had every week for the past 2 years. Andrew can likely show this is habit evidence and not character.

Parol Evidence

Green may argue that the evidence violates the parol evidence rule because it is evidence prior to formation of an integrated contract to contradict the terms of that contract.

Andrew will likely be able to introduce this because he is trying to show a mistake and not to contradict the terms of an integrated contract. In this case there was a mistake Barney made and Andrew is trying to prove the mistake.

Conclusion

The court should rule that this evidence is admissible.

2. How should the court rule on each party's claim for relief?

Reform

The court will grant reformation of a contract when each party knew what the terms were and they both had the same mutual mistake.

Green will argue that Andrew had the opportunity to look at the ticket and negligently failed to do so and therefore assumed the risk of the ticket being wrong. Andrew will argue the prior course of dealing with Barney and Green establishes that lottery ticket was supposed to contain a seven instead of an eight.

Rescission

The court will assert rescission when there is evidence the contract was not valid or lacked assent on a material term.

Green will make the same argument that there was no meeting of the minds and as such the contract should be rescinded. Andrew will argue that this was just a transcription error and does not rise to a level warranting rescission of the contract.

Conclusion

The court should reform the contract because there is evidence that the mistake was mutual, but the mistake was a transcription rather than the objective belief of the parties. Both Barney and Andrew thought that the ticket should contain one number eight and not seven. The court should reform the contract.

Answer B to Question 6

(1) Green's (G) objections to Andrew's (A) Testimony

(a) A's testimony re Barney's (B's) question

Green will object to A's testimony re B's question as irrelevant and inadmissible as hearsay.

Under California law, evidence is relevant if it has any tendency to make a disputed fact of consequence to the action more or less likely to be true. In this case, A is suing Green for breach of contract, and there is a dispute between the parties as to the terms of that contract (i.e., the lottery numbers A picked). As a result, A's testimony about B's question is relevant because it goes to whether A & B agreed about the numbers that should be on A's lottery ticket, and if so, what A & B agreed to, both of which are disputed facts in this case.

Under California law, a relevant statement may nonetheless be excluded if it is substantially more prejudicial than probative, a waste of time, or likely to confuse the jury. The probative value of B's question here outweighs any potential prejudice or confusion.

Under California law, hearsay is an out-of-court statement offered for the truth of the matter asserted. In this case, B's question to A is an out-of-court statement because it was made before the suit on the day that A bought the lottery ticket in question. But A will argue, persuasively, that he is not offering B's question for the truth of the matter asserted. A will argue that he is offering B's statement to establish a verbal act -- the fact that B asked A the question, "The usual numbers, Andrew?" As such, the statement is being offered for a non-hearsay purpose because it is not being offered to prove the truth of the matter that Andrew asked for the usual numbers.

A could also argue that B's question should be admitted for the truth of the matter because B's question shows B's then-existing mental condition, an exception to the hearsay rule. A will argue, persuasively, that B's questions shows that B knew that A wanted A's usual numbers.

A could also argue that B's question is offered for the effect it had on A, the listener, another non-hearsay purpose. Under this argument, A is offering B's question to show that A inferred from B's statement that B knew A's usual numbers.

A could also argue that B's statement is admissible hearsay in California because it is an admission of a party. Green will argue that B is not a party to the case, but A can persuasively respond that Green should be bound by B's statements because B was acting within the scope of his employment when he made them, i.e., part of B's job is to sell lottery tickets to customers.

(b) A's testimony re A's answer

B will argue that A's answer is irrelevant and inadmissible hearsay.

A will argue that his answer is relevant because it goes to the disputed facts of whether A & B agreed to the numbers in A's lottery ticket, and what those numbers were. Moreover, A will argue that his answer has great probative value because [it] is directly related to a key disputed fact in the case, i.e., what numbers A & B agreed to put in A's lottery ticket. A's answer is relevant for those reasons.

B will argue that A's statement was made out of court -- on June 1 -- and is being offered to prove the truth of the matter asserted, that A asked for his usual numbers.

A will also argue, persuasively, that his answer is not offered for hearsay purpose because he is not offering it for the truth of the matter asserted. Rather, it is being offered as a verbal act -- agreement to the offer from B. Alternatively, A could argue

that A's answer is being offered for the non-hearsay purpose of showing the effect on the listener B, i.e., that B understood that A wanted his usual numbers.

A's answer will be admissible on these grounds.

(c) Andrew's attempt to explain what "the usual numbers" means

B will argue that A is attempting to offer parol evidence regarding the terms of the contract in violation of the parol evidence rule.

The parol evidence rule excludes evidence extrinsic to a contract where that contract is considered a final, or integrated writing. There are exceptions to the parol evidence rule, including to show a clerical error.

Here Green will argue that any testimony regarding what "the usual numbers" means is extrinsic evidence because the lottery ticket is the contract, and there is no evidence within the ticket regarding what A's usual numbers are.

A will argue, persuasively, that parol evidence should be admitted in this case to prove that B made a clerical error in entering A's numbers into the computer that generated A's ticket, the contract. A's testimony on this point will be allowed under the clerical error exception to the parol evidence rule.

(2) The parties' claims for relief

Reformation

Reformation is an equitable remedy that is available where one party can show, among other things, a unilateral mistake of material fact that caused A irreparable harm.

In this case, A will argue that he is entitled to reformation because he suffered irreparable harm as a result of B's unilateral mistake -- a clerical error in entering his

usual lottery numbers. A will argue that Green should be bound by B's error because B is Green's agent and was acting within the scope of his employment at the time of B's mistake. And A will argue that he was irreparably harmed by B's mistake because but for B's mistake he would have won the lottery, and that A's harm was foreseeable because only a ticket that has all the winning numbers will win the lottery, and it is foreseeable that a clerical error in entering one number could cause a party to lose a lottery he otherwise would have won.

Green will argue that A is not irreparably harmed, because Green can refund A the price of the lottery ticket, and that there was no mistake because the numbers A paid for are the numbers that are clearly printed on his lottery ticket. Moreover, Green will argue that A does not have clean hands, because he could have and should have confirmed that the right numbers were on his ticket, and that by failing to do so, A waived his right to complain after the fact that he got the wrong numbers.

Rescission

Green will argue for rescission because there was no meeting of the minds as to a material term of the contract. Rescission is an equitable remedy available where one party can show, among other things, mutual mistake of fact. Here Green will argue that there was a mutual mistake of fact as to what numbers A wanted on his lottery ticket, and that therefore there was no meeting of the minds required to form a valid contract. Green will argue that B thought A wanted the number 7 on his ticket, and A wanted the number 8 on his ticket, and that the numbers on the ticket were material elements of the contract between Green and A. As a result, there was no meeting of the minds as to a material term of the contract, and the contract should be rescinded.

A will argue that there was a meeting of the minds based on the question and answer between B and A -- "The usual numbers, Andrew?" "Of course." A will argue that B's question shows that B knew A's usual numbers and offered A a ticket with those numbers. A will argue that A accepted B's offer of those numbers, and that there was

consideration in A's payment of the price of the lottery ticket and Green's promise to pay A the winnings if the numbers of A's ticket matched the winning numbers.

This is a close question, but in this case, because all of the testimony discussed above is admissible and support's A's position, a court would likely find that A is entitled to reformation and B cannot rescind the contract. A wins the lottery.



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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2013

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1	Criminal Law and Procedure
2	Professional Responsibility
3	Remedies
4	Torts
5	Civil Procedure
6	Business Associations

Question 3

In 2004, Mary and Frank orally agreed to jointly purchase a small storefront space in City for \$80,000. Mary contributed \$40,000 of her own money. Frank contributed \$40,000 he had embezzled from his employer, Tanner. Mary and Frank agreed to put the property in Frank's name alone because Mary had creditors seeking to enforce debts against her. They further agreed that Frank would occupy the property, which he planned to use as an art studio and gallery. They also agreed that, if and when he vacated the property, he would sell it and give her one half of the net proceeds. He then occupied the property.

In 2005, Tanner discovered Frank's embezzlement and fired him.

In 2012, Frank sold the property, obtaining \$300,000 in net proceeds. Frank offered to repay Mary her \$40,000 contribution, but Mary demanded \$150,000.

Mary and Tanner each sued Frank for conversion.

At trial, the court found Frank liable to both Mary and Tanner for conversion.

1. What remedy or remedies can Mary reasonably obtain against Frank for conversion, what defenses (if any) can Frank reasonably raise, and who is likely to prevail? Discuss.
2. What remedy or remedies can Tanner reasonably obtain against Frank for conversion, what defenses (if any) can Frank reasonably raise, and who is likely to prevail? Discuss.

ANSWER A TO QUESTION 3

(1) Mary v. Frank

Mary's Remedies. There are several possible remedies Mary can obtain for the tort of conversion.

Tort of Conversion. The tort of trespass to chattels or conversion occurs when the defendant wrongfully interferes with the plaintiff's right to possess property. This tort constitutes the trespass of chattels when the interference is not so severe as to constitute conversion. The damages for trespass to chattel are the cost of repairing the property. The tort of conversion occurs when the interference with the plaintiff's personal property is substantial and severe. The damages for conversion are the fair market value of the property at the time and place of conversion.

In this case, Frank is guilty of converting Mary's 1/2 interest in the storefront space as his own. He is liable for conversion, and the damages would be 1/2 of the fair market value of the storefront space at the time of conversion. In this case, the conversion occurred when Frank failed to give Mary her 1/2 of the net proceeds. Thus, under tort law, her damages would be 1/2 of the fair market value of the storefront space when Frank failed to give Mary her 1/2 of the proceeds. If the sale of the storefront space for \$300,000 was close enough in time to the conversion, then a court can find that Mary is owed \$150,000 for the conversion.

Purchase Money Resulting Trust. A purchase money resulting trust occurs when one party purchases property, but another party supplies the consideration. The other party must have supplied consideration before the purchasing party obtains title. In such a situation, the court imposes a resulting trust on the purchasing party, construing her as a trustee holding the property in trust for the beneficiary, which is the party who supplied consideration. Because the resulting trust is a remedy implied at law, the requirements to create a valid trust are not required.

In this case, there is a purchase money resulting trust between Mary and Frank. They orally agreed to purchase a storefront space for \$80,000, and each agreed to contribute \$40,000. The title was placed in Frank's name alone, but Mary supplied one-half of the consideration required to purchase the storefront space. If Mary can show that she contributed the \$40,000 before Frank took title, then she is entitled to a purchase money resulting trust as a remedy. Mary can likely show that she contributed money before Frank took title, since the full purchase price of real property is usually conveyed before the deed to title is transferred.

Pro Rata Resulting Trust. Where the party who supplied consideration for the purchase of real property did not provide the total consideration, but only partial consideration, the court will construe a resulting trust in an interest pro rata to the amount of consideration supplied by the party.

In this case, Mary only supplied one-half of the consideration for the storefront space. Thus, she will be construed as having a 1/2 interest in the storefront space. However, the storefront space itself has been sold. Equitable rights to property are cut off by a sale to a bona fide purchaser who pays value and has no notice of prior wrongdoing. There is no indication in this case that Frank did not sell the property to a bona fide purchaser. Thus, because Frank already sold the storefront space, Mary will be deemed as having a 1/2 interest in the net proceeds from the sale. Under a pro rata share of a purchase money resulting trust, her remedy would be \$150,000, which is 1/2 of the \$300,000 in net proceeds that Frank obtained for selling the property.

Constructive Trust. Similar to the resulting trust, a court can impose a constructive trust on the defendant, which construes the defendant as holding property in trust for the plaintiffs. This remedy applies where the defendant has wrongfully obtained title to the plaintiff's property, and the defendant's retention of such property would result in unjust enrichment. The plaintiff can trace the property to another form, as long as the trust res can be identified. Additionally, the plaintiff is entitled to any increase in value in the property to avoid unjust enrichment to the defendant. Where the property has been

commingled with other funds and withdrawals have reduced the account's balance below the plaintiff's claim, the plaintiff is entitled to the next lowest intermediate balance.

In this case, Mary would argue that she obtained a 1/2 interest in the storefront property when she contributed \$40,000 for its purchase. This 1/2 interest was wrongfully appropriated by Frank when he sold the house and retained all proceeds except for the \$40,000 he was willing to give Mary. Additionally, Frank's retention of the 1/2 interest would amount to unjust enrichment because he only contributed 1/2 of the purchase price himself (and those funds were embezzled). Furthermore, Mary can trace her 1/2 interest to \$300,000 in net proceeds that Frank obtained from selling the property, she is entitled to the increase in value under the remedy of constructive trust, and there is no indication that the funds have been commingled with other funds or withdrawn to a balance lower than \$150,000. Frank would argue that he is entitled to a greater interest because he did more work by occupying the property, improving it, and selling it. However, Frank is likely to lose this argument because of the oral agreement he had with Mary. Mary is likely entitled to a constructive trust, compelling Frank to pay her \$150,000.

Equitable Lien. Similar to a constructive trust, a court can impose an equitable lien on the defendant's property in favor of the plaintiff. This remedy is appropriate where the defendant misappropriated the plaintiff's property under circumstances giving rise to a debt or obligation owed to the plaintiff, the property can be traced to the defendant, and the defendant's retention of the property would result in unjust enrichment. Like the constructive trust, the defendant can trace the property to another form as long as the res can be identified. However, unlike the constructive trust, the plaintiffs are not entitled to any increase in value in the property under an equitable lien. Where the property has been commingled with other funds and withdrawals have reduced the account's balance below the plaintiff's claim, the plaintiff is entitled to the next lowest intermediate balance.

The analysis for whether Mary would be entitled to an equitable lien is the same as the analysis conducted above for a constructive trust because Frank's misappropriation of

Mary's 1/2 interest in the property gave rise to a debt owed to Mary for that amount. However, under the remedy of equitable lien, the court would impose an equitable lien in the amount of \$150,000 in Mary's favor on the net proceeds that Frank received.

Specific Performance & Replevin. Specific performance and replevin are remedies where the defendant retains possession of the property in question. They do not apply here since Frank no longer owns the storefront property.

Damages. When a plaintiff also sues for conversion, she may be able to obtain damages for lost use of the property during the time it is wrongfully appropriated by the defendant. Mary here may be able to obtain additional damages if a substantial amount of time has passed between the conversion and her ability to obtain a remedy in court.

Frank's Defenses.

Statute of Frauds. The statute of frauds requires that any interest in real property, other than a lease for one year or less, be in a writing, signed by the party to be bound and identifying the related material terms and conditions. In this case, Mary and Frank's oral agreement pertained to an interest in real property; thus, it must be in writing in order to be enforced. Frank will most likely be able to raise the defense of statute of frauds to defeat Mary's remedies. If this is this case, Mary may be able to argue that she is entitled to restitutionary damages instead of the remedies above. Restitutionary damages grant damages in the amount that the defendant is unjustly enriched by.

Unclean Hands. Unclean hands are a defense where the plaintiff has engaged in misconduct related to the transaction sued upon. In this case, Frank would likely argue that Mary had unclean hands in the transaction because she agreed to put the title in Frank's name alone to avoid creditors who were seeking to enforce debts against her. He would argue that her avoidance of her creditors is misconduct, is related to their agreement to purchase the storefront space, and thus, bars Mary from obtaining a remedy. However, Frank's argument is likely to fail because Mary's decision to put the

title in Frank's name alone was unlawful, and her motivation to avoid creditors was not illegal. Thus, Mary's right to remedies would not be barred by unclean hands.

(2) Tanner v. Frank

Tanner's Remedies.

Tort of Conversion. See rule above. In this case, Frank committed conversion when he wrongfully appropriated \$40,000 from Tanner, rendering him liable for damages to Tanner.

Purchase Money Resulting Trust. See rule above. In this case, although Tanner was unaware of it at the time, it contributed \$40,000 to the purchase of a small storefront space in City, which was then titled to Frank. If it can show that it contributed this \$40,000 before Frank obtained title, then Tanner is entitled to a purchase money resulting trust as a remedy. It is likely that Tanner can show this, since title to property is usually transferred to the buyer after the buyer conveys the full purchase price.

Pro Rata Resulting Trust. See rule above. Since Tanner contributed only 1/2 of the consideration for the property, it is entitled to a 1/2 interest in the property. As noted above, a sale to a bona fide purchaser cuts off equitable rights to title, and there is no indication that Frank did not sell the property to a bona fide purchaser. Because Frank already sold the property, Tanner has a 1/2 interest in the \$300,000 in net proceeds from the sale.

Constructive Trust. See rule above. In this case, Tanner would argue that it obtained a 1/2 interest in the storefront property when it unknowingly contributed \$40,000 to its purchase. The 1/2 interest was wrongfully appropriated by Frank when he embezzled it from Tanner in 2004. Frank's retention of the 1/2 interest contributed by Tanner would result in unjust enrichment because the \$40,000 did not belong to Frank, and Frank supplied no consideration from his own funds to the purchase of the property.

Furthermore, Tanner can trace its 1/2 interest to the \$300,000 in net proceeds that Frank obtained from selling the property, it is entitled to the increase in value under the remedy of constructive trust, and there is no indication that the funds have been commingled with other funds or withdrawn to a balance lower than \$150,000. Thus, Tanner is likely entitled to a constructive trust in 1/2 of the \$300,000 in net proceeds, which is \$150,000.

Equitable Lien. See rule above. The analysis for whether Tanner would be entitled to an equitable lien is the same as the analysis conducted above for a constructive trust because Frank's embezzlement of \$40,000 from Tanner gave rise to an obligation to repay Tanner. However, under the remedy of equitable lien, the court would impose an equitable lien in the amount of \$150,000 in Tanner's favor on the net proceeds that Frank received.

Frank's Defenses.

Laches. Laches applies where the plaintiff has unreasonably delayed in bringing a lawsuit, and that unreasonable delay prejudices the defendant. The time for laches begins running when the plaintiff first learns of the injury. In this case, Frank would argue that he initially embezzled the \$40,000 in 2004, and Tanner discovered the embezzlement in 2005, but that Tanner did not bring suit until 2012, which prejudiced Frank. While the seven years that Tanner waited between learning of its injury and filing suit amounts to an unreasonable delay, there is no evidence that Frank's ability to defend himself has been prejudiced. Thus, Tanner cannot successfully raise this defense, unless he can show that he has been prejudiced in his ability to defend himself.

ANSWER B TO QUESTION 3

What remedy or remedies can Mary reasonably obtain against Frank for conversion, what defenses (if any) can Frank reasonably raise, and who is likely to prevail?

Mary's Remedies

Mary has several avenues she can pursue to try and recover damages from Frank.

Constructive Trust

The most promising remedy Mary can pursue against Frank is a constructive trust. A constructive trust is an equitable remedy whereby a court requires a person who wrongfully acquired title to property to hold that property as a forced trustee and to return it to its rightful owner. Although it will not defeat a bona fide purchaser, it does allow tracing. Moreover, a constructive trust will allow a person to recover any increase in value of the property. This remedy is generally only allowed when money damages would be inadequate.

Here, Mary will argue that she and Frank both owned the property and that he converted the property they owned when he sold it to another person. Because it appears that a bona fide purchaser bought the property, Mary will not be able to recover the house.

Tracing

However, a constructive trust allows a party to trace their converted property. Here, Mary gave Frank \$40,000, this went into a home, and then the home was sold for \$300,000. Mary will be able to argue that the money she put into the home can be traced to the home and then to the sale and that a constructive trust of one-half of the sale price should be placed on the \$300,000 proceeds that Frank gained from selling

the property. This is likely Mary's best argument because a constructive trust will make Frank the trustee and require him to pay the increased money over Mary's \$40,000.

Money Damages Inadequate

Mary will likely also be able to show that general tort damages are inadequate. Under general tort recovery from conversion, the individual is entitled to receive the market value of the item that was converted at the time it was converted. It could be argued that the \$40,000 was converted when Frank took the property, leaving Mary entitled to only \$40,000. Accordingly, damages would not be sufficient. Moreover, there is the risk, that without forcing Frank to be the trustee, he could spend the money, become insolvent, and leave Mary without any remedy.

Equitable Lien

Mary could also argue that an equitable lien should be placed on Frank's bank account. An equitable lien is also an equitable remedy whereby a person who acquires the personal property of another can have a court put a lien on that property. It is generally most useful when the property of another has been used to improve some other property or where the property has decreased in value and the owner of the property is seeking a deficiency judgment.

Here, Mary may argue that she should be entitled to an equitable lien, but this would be substantially less attractive than a constructive trust. For one thing, the value of the property, which can be traced, has increased significantly and can be secured through a constructive trust. For another thing, under the equitable lien theory tracing is not allowed. Thus, Mary would not be able to trace her money to the value of the increased value of the property that is now in the form of cash proceeds. Accordingly, this theory is less attractive to Mary.

Damages

As mentioned previously, Mary could be entitled to damages for conversion. But traditional tort damages for conversion allow recovery for the value of the property at the time it was converted. Here, it could be argued that the property was converted at the time that Frank took possession of the home. This would potentially limit Mary's recovery to \$40,000.

Restitution

Mary could also argue that she is entitled to restitution. Restitution is a remedy that is available to prevent a party from being unjustly enriched at the expense of another. Here, it could be argued that a court should split the \$300,000 that Frank received from the sale in half because if it was not for the contribution that Mary made, he would not have purchased the property and would not have later sold it at an enormous profit. For these reasons, restitution for the \$150,000 that Frank made in the subsequent sale may also be a viable option.

Frank's Defenses

Frank is likely to assert several defenses.

Adverse Possession

Frank may argue that he adversely possessed the property after occupying it for 8 years by himself and thus gained title to the full share. This will fail because he had Mary's permission to occupy the property.

Laches

Laches is a defense that arises because a party takes such a long time to bring a cause of action that it materially prejudices the opposing party. This defense will likely

fail. There is no indication that Mary waited an exceedingly long time to sell the property.

Statute of Frauds

Frank may also argue that Mary's agreement is barred by the statute of frauds. The statute of frauds is a defense that a party cannot assert to prevent a claim that a contract existed. It is applicable to an alleged contract to purchase or sell land, which must be in writing, signed by the grantor and include a purchase price. But this defense will likely not apply here. While the underlying issue involves an agreement regarding land, Mary is not suing to force the sale or purchase of property; rather, she is suing for money that was converted. Accordingly, this defense will likely not stand.

Unclean Hands

Frank's best argument will probably be unclean hands. The doctrine of unclean hands applies, especially in the equity context, to prevent a party from recovering where that party was involved in bad behavior relating to the underlying transaction. Here, Mary entered the agreement with Frank and put the property in his name for the purpose of avoiding creditors who were seeking to enforce debts against her. Accordingly, Frank could argue that Mary cannot recover in equity here because her own bad conduct was involved.

Who will likely prevail?

Under these facts, unless the court deems that Mary's conduct of trying to avoid creditors will bar her under the doctrine of unclean hands, she is likely to prevail. She will most likely seek a constructive trust or restitution for the additional money gained from the sale.

What remedy or remedies can Tanner reasonably obtain against Frank for conversion, what defenses, if any can Frank reasonably raise, and who is likely to prevail?

Tanner's Remedies

Tanner, like Mary, has several remedies it can seek against Frank.

Constructive Trust

See above definition. Tanner will argue that a constructive trust should be imposed because the money that Frank embezzled from them was used to purchase the property. Embezzlement consists of unlawfully obtaining title to the property of another by a person in lawful possession. Based on the facts here, Frank embezzled the \$40,000 from Tanner and thus obtained title to it.

Tracing

Under a constructive trust, tracing is allowed. Here, Tanner will argue that the \$40,000 was spent to purchase the property so title can be traced to the property, and when the property was sold, \$150,000 of the \$300,000 sale price can be traced to the original \$40,000. While it may be argued that a constructive trust does not apply here because this is an instance where the property of another was used to improve other property, that is likely not the case. The \$40,000 was used to purchase property that was kept in Frank's name and then sold with the proceeds going to Frank.

No adequate damages remedy

A problem may arise for Tanner in this instance if Frank can show that an adequate damages remedy would just be forcing him to pay back the \$40,000 that he had converted. This problem may prevent Tanner from successfully having a constructive trust set up to recover the \$150,000.

Equitable Lien

See above definition. An equitable lien may also be an option, but as mentioned previously, funds cannot be traced using an equitable lien. As a consequence, the money that was taken from Tanner would not be able to be traced to the home and then to the bank account. Accordingly, this option is not viable.

Damages

Tanner may just argue that it is entitled to damages for the money take. As mentioned, damages for conversion are the market value of the property at the time it was converted. Here, Tanner will be able to show that it is entitled to the \$40,000 that was taken from it.

Restitution

Tanner may also argue that it is entitled to either the \$40,000 or the \$150,000 under a theory of unjust enrichment. It would be clearly entitled to \$40,000 under this theory, but it may be able to argue that Frank would be unjustly enriched as a result of his fraudulent action if he is able to keep the money he made in addition to the \$40,000 that he stole.

Frank's Defenses

Laches

Frank's best defense against Tanner is Laches. See above definition. Here, Frank may be able to argue that Tanner found out about the embezzlement in 2005, but did nothing until 2012. On the other hand, Tanner may argue that it was not aware that Frank had any money to make a lawsuit worthwhile until it found out that the house was

sold for a significant profit. Because this is an equitable defense, a court will likely side with Tanner and not the wrongdoers.

Who will likely prevail?

Tanner will likely prevail on a theory of damages for the conversion limiting recovery to \$40,000 or restitution under which the recovery for unjust enrichment of Frank could be up to \$150,000. Either way, Frank's laches defense will likely not work.

FEBRUARY 2013

ESSAY QUESTIONS 4, 5 AND 6



California Bar Examination

Answer all three questions.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and facts upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles;

instead try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.



The State Bar Of California
Committee of Bar Examiners/Office of Admissions

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2013

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2013 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

<u>Question Number</u>	<u>Subject</u>
1.	Professional Responsibility
2.	Constitutional Law
3.	Community Property
4.	Contracts
5.	Wills/Trusts
6.	Remedies

Question 6

Paul owns a 50-acre lot in the country. Doug owns a smaller unimproved lot to the north. A stream runs through Paul's lot near the boundary line with Doug's lot. Paul has a house at the south end of his lot and uses it for summer vacations. He plans to build a larger house in the future.

Doug began to clear his land to build a house. To do so, he had to fell trees and haul them to a nearby lumber mill. He asked Paul if he could take a short cut across Paul's lot to the mill, and Paul agreed.

On his first trip, Doug dumped the trees on Paul's lot near the stream, in a wooded area Paul was unlikely to see, much less use. Several of the trees rolled in the stream, blocking its natural flow.

Paul left for the winter. As a result of the winter's normal rainfall, the stream overflowed, causing water to rush down to Paul's house at the other end of the lot, flooding his garage and damaging a 3-year-old motorcycle.

Paul returned in the summer and learned what had happened. It will cost \$30,000 to remove the trees. The trees' presence on the lot has depressed its market value from \$50,000 to \$40,000. It will cost \$5,000 to repair the motorcycle, and \$4,000 to buy a new one.

What intentional tort claims can Paul reasonably bring against Doug and what remedies can he reasonably seek? Discuss.

SELECTED ANSWER A

License

Doug may first claim that there have been no intentional torts committed against Paul. He may argue that he had permission to do what he did. Paul will admit that he did give Doug a license. A license is a permission to use another's land in a particular way. A license need not be in writing or evidence any of the formalities of an easement. However, a license is freely revocable.

Scope of the license.

Importantly, a licensee may only act within the scope of the license. Here, Paul gave Doug permission to cut across his land with his lumber. Doug had represented to Paul that he intended to bring the trees to a lumber mill. As such, the license only involved temporarily passing through the land with the lumber. It did not include Doug dumping the trees. Where a licensee exceeds the scope of his license, he trespasses on the land.

Trespass to Land

Trespass to land occurs when an individual intentionally invades the real property of another. The trespasser need not know the land is not his own – he need only intend to go where he goes or do what he does. Another important aspect of the rule is that trespass can occur with more than just the trespasser's body. When a trespasser causes a physical object to go onto the land of another, he has trespassed, even if his body does not actually break the relevant plane.

Trespass to land also occurs when a licensee (or any other guest) goes to a part of the land where he does not have permission to go. Here, Paul can reasonably claim that Doug did exactly that – he caused a physical object (the trees) to go exceed the scope of the license (being dumped into the forest). Doug may claim that he had permission to have the trees in this area – however, this permission was for transitory passing through – by allowing the trees to stay, Doug trespassed. Moreover, Doug likely further

trespassed by allowing the trees to go into the stream. It is not clear what caused the trees to roll away – however, it seems quite foreseeable that dumping a bunch of trees close to a stream might end up in a few of the trees going into the stream. Assuming this is a reasonably foreseeable consequence of Doug’s actions, the trees in the stream would be a further trespass.

Remedies for the Trespass to Land

Legal Remedies

Law prefers money damages. As such, the first question will be whether Paul can recover any legal damages for the trespass to land that Doug has committed. Damages will be accorded to a plaintiff if four conditions are met: the tort was the actual cause of the damages, it was the proximate cause of the damage, the damages are certain and ascertainable, and there was no failure to mitigate.

Actual cause.

A tort is an actual cause of damages when the damage would not have caused but for the tort. This element is fairly easily satisfied here. We are told that the rainfall was normal, suggesting that the flooding would not have normally occurred. Since the rainfall was normal, the best explanation for the actual cause of the flooding was the blocked river, which would not have happened but for the trespassory dumping of the trees. As such, this element is met.

Proximate cause.

A tortfeasor is only liable for those damages that are proximately caused by his tort. Proximate cause is a question of foreseeability – where the result is a foreseeable result of the actions of the tortfeasor. At the point where the damages become unforeseeable, law is willing to cut off liability and let the damages fall on the victim.

Here, Paul will plausibly be able to argue that all of the damages were reasonably foreseeable. The first step is that the blocking of the river was a reasonably foreseeable

consequence of dumping the trees. This is discussed above – the trees going in the river is certainly foreseeable.

The next step is whether the flooding was reasonably foreseeable. Doug may argue that the rain was an “Act of God” that should cut off his tort liability. He will lose this argument though – critically, there was only normal rainfall during the winter season. Normal rainfall is practically by definition not an Act of God, and as such should be reasonably foreseeable.

The next step is whether the flooding of the house was reasonably foreseeable. We are not given many facts here. Doug may argue that it was odd that the water would flow across a large, 50-acre plot of land and flood the house. However, this is likely foreseeable. Doug knew about Paul’s house, and he knew where the stream was. A reasonable person should have been alert to the possibility that flooding over the course of an entire season should cause flood damage.

The final step is whether the damage to the garage and motorcycle are foreseeable. This comes closer to the eggshell skull doctrine that you take your victim as you find him – once you flood someone’s garage, you are arguably liable for all the damage to the valuables therein. However, even sticking with merely proximate cause, the damage to the motorcycle is foreseeable. The motorcycle is not especially valuable or special. It is a normal vehicle and it suffered a normal amount of damage given flooding. As such, Paul would likely be able to recover damage to his motorcycle via the trespass to land theory (the precise amount is discussed below).

Additionally, it is fairly easy to see that the decrease in the market value of the property is reasonably foreseeable. Having your river backed up and your property flooded will tend to make the land worth less. As such, Paul would likely be able to recover, at least, for the decrease in property value (whether he will get this amount or the amount to remove the trees is discussed below).

Certainty.

Certainty does not seem to be an issue here. We know precisely how much it will cost to repair the bike or buy a new one, and how much the property value has been decreased. The only issue is if there is other damage to the garage that has not been accounted for. Any damages would need to be certain and ascertainable.

Mitigation.

A plaintiff has a duty to mitigate the damages wherever possible. There are several reasons to think this won't bar damage. First, he was gone for the winter, so he would not have been able to mitigate. Second and more importantly, the trees were dumped in an area where Paul was unlikely to see them. As such, mitigation would not have been reasonable. Paul is not under any duty to mitigate damages he should not ordinarily be aware of.

Mitigation may also play a role in deciding on the damage given for the motorcycle. Doug will reasonably argue that Paul could mitigate the damages by simply buying a new motorcycle instead of repairing his old one, since the price is \$1000 less. This is a good argument. Unless there is some special value that should give Paul a right to repair his own motorcycle, Paul is likely only entitled to the \$4000 cost to replace the bike as a form of mitigation. Indeed even this might be too much. Doug need only put Paul in the place where he found him, with a three-year old motorcycle. The value of this may well be less than \$4000. This is discussed more in the conversation section below.

Trees or property value.

One of the most difficult questions the court will face will be whether to award Paul the \$30,000 to actually remove the trees or only the \$10,000 for the decrease in the property value. Giving both amounts is likely inappropriate, since it seems that the decrease in property value is attributable to the presence of the trees.

On the one hand, Doug will argue that it would be wasteful to spend \$30,000 to remove the trees when the decrease in property value is only \$10,000. He will argue that if Paul didn't like the trees, he would be better off to simply sell the land and buy new land.

However, Paul has a strong counter: law recognizes that land is unique. Paul has a right to have trespassory items taken off the land, since, to Paul, the land is implied to have special value. Since the land is unique, and since Paul is entitled to be put into the condition he would have been on had the trespass not occurred, Paul is entitled to have the trees actually removed, despite the higher cost. As such, Paul should be able to recover the \$30,000 and not the \$10,000.

Restitutionary remedies

Paul might alternatively be able to recover restitutionary remedies. Restitution is appropriate where the tortfeasor has been unjustly enriched by his activities. Here, Paul might be able to argue that Doug effectively used his land as a tree storage space instead of taking the trees to the lumber mill. Paul might even argue that the value of this storage is \$30,000, since that is how much it costs a person to move the trees away, or \$10,000, since that may be equivalent to the amount of property value diminution Doug avoided by moving the trees. However, these values are not particularly certain, and we'd probably need more evidence to know the proper value that was conferred on Doug by simply leaving the trees on Paul's land.

Injunction

Paul might also ask for an injunction. Specifically, he may request that Doug actually remove the trees. For an injunction to be appropriate, there the legal remedy must be inadequate, the injunction must be enforceable, and we must balance the hardships. There must also not be any defenses.

Inadequate Legal Remedy.

Doug's best argument here is that there is an adequate legal remedy. To wit: since we know that it would cost \$30,000, the court could simply give that amount of damages if it concluded that the trees needed to be moved. Moreover, it seems that Doug could also make Paul whole by giving him \$10,000 to correct the decrease in property value of his land. As such, since it is not clear why a legal remedy would be inadequate, an injunction is probably inappropriate.

Enforceable.

Even if an injunction would be appropriate, here it would be questionable whether it would be enforceable. Affirmative injunctions are disfavored since they require supervision. Perhaps it would not require much time to move the logs. Nevertheless, making sure that Doug has actually performed would be troublesome, although not impossible.

Balancing hardships.

Since the conduct was willful, most courts would not balance the hardships. Nevertheless, it is doubtful whether forcing Doug to remove the trees would cause any significant hardships.

Defenses.

There are no valid defenses. Doug might point to laches (the failure to bring an action in a reasonable amount of time), but this argument fails because Paul was not on his land for the winter and could not have known about it sooner.

Ejectment

Another possible remedy is ejectment. Ejectment allows a person in rightful possession of land to eject a trespasser who is present on his land. This action is only appropriate where the trespasser is still on the land. Here, the ejectment action would be equivalent to an action to have Doug remove the trees, since the trees are the only item or person which remains as an invasion of Paul's property. For this, see the earlier section on the injunction.

Trespass to Chattel and Conversion

Trespass to chattel occurs when someone intentionally interferes with the possessory right to another's chattel. This can occur in two ways: the trespasser can actually deprive the owner of the chattel temporarily or permanently, or the trespasser can cause damage to the chattel. Here, the latter has occurred. The motorcycle is chattel

of Paul. Because of Doug's trespass, the chattel has been harmed, thus interfered with Paul's possessory rights.

Doug may argue that he did not intentionally interfere with the chattel. However, intentionality here only refers to the intention to do the actions that eventually gave rise to the trespass, a general intent. The question would be whether the actions that Doug engaged in reasonably foreseeably caused the damage to Paul's motorcycle. Please see the discussion above related to foreseeability. Paul has a strong claim that the dumping of the trees foreseeably caused the flooding, which foreseeably caused the damage to Paul's garage and bike. Since all these steps are foreseeable, Paul would likely be able to recover from Doug via a trespass to chattel theory.

The remedies to this theory of tort liability turn on the distinction between trespass to chattel and conversion. These torts are largely overlapping – the main difference is one of degree. Conversion consists of the trespass to another's chattel that so interferes with his right to possession that the owner is entitled to a replacement of the chattel. Essentially this is a "forced sale," where the tortfeasor has to pay the reasonable market price of the chattel.

A court would most likely find that the trespass consisted of conversion. The key fact is that the repair cost of the motorcycle is more than the cost to purchase a new one. This suggests that the damage is quite extensive, and that Paul should have the right to force a sale of the motorcycle on Doug for its reasonable fair market value.

Damages.

As stated above, the damages for conversion is the fair market value of the chattel. Here, we are only told that it would cost \$4000 to buy a new motorcycle. But Doug will argue that this is actually an overcompensation: Paul should be entitled to the fair market value of his motorcycle. The motorcycle is three years old, while it costs \$4000 to buy a brand new motorcycle. As such, Paul can reasonably argue that the appropriate damages are actually somewhat less than \$4000 and should be whatever it costs to buy a 3-year-old bike.

Punitive Damages

Paul may well try to seek punitives. Punitive damages have three requirements: there must be actual damages awarded, the punitives must be proportional to the actual damages, and the conduct must be more than negligent. Here, Doug's conduct seems intentional, at least at the outset. He may argue that he did not actually intend any harm, which would diminish any argument for punitives. However, since he did indeed intentionally trespass, and since the damages were reasonably foreseeable, he may well be able to get punitive damages.

Nominal Damages

Even if none of the above damages hold up, Paul would likely be able to get nominal damages, which are awarded when there is a violation of someone's rights but there are no actual damages.

Intentional Infliction of Emotional Distress

This tort requires outrageous conduct that causes severe emotional distress in the plaintiff. The conduct here is probably not so transgressive of all bounds of human decency. And, most importantly, we are not told anything about the emotional consequences that Paul suffered.

Battery

Battery requires an intentional conduct with another's person that would be considered harmful or objectionable to the ordinary person. Here, Doug's actions did not so contact Paul.

SELECTED ANSWER B

Paul (P) v. Doug (D)

Trespass to land.

Trespass to land is an intentional interference with one's possession of his land. The only interference necessary to constitute a trespass is the entry onto one's land because a person has a right to possess their land, free from others. The entry need not be by a person, but can be by a chattel caused to enter by the defendant.

Here, there are several instances in which D might have trespassed on P's land.

Doug's first trip.

Doug entered Paul's land initially with intent to cross it in order to bring the trees to the lumber mill. This was an intentional entry. Further, this interfered with P's possession because P was no longer in exclusive possession of his land. Therefore, D's entry was potentially a trespass to land.

Defenses: consent.

Where one has consent to commit an intentional tort, this will generally function as a complete defense.

Here D "asked Paul if he could cut across Paul's lot to the mill, and Paul agreed," thereby affecting his consent. Therefore, D has a defense of Paul's consent to part of the trespass, to the extent that it was to "cut across Paul's lot to the mill" this trespass will be excused. To the extent that D's actions exceeded the scope of this consent, D will be liable to P for trespass.

Leaving the trees on Paul's land

A trespass can also be a “continuing trespass,” by leaving of chattels that the defendant caused to be present on the plaintiff's land, on the plaintiff's land.

Here, D likely is responsible for his continuing trespass by “dumping trees on Paul's lot near the stream in a wooded area [where] Paul was unlikely to see [them].” Note that D's dump[ing]” was likely done intentionally, and not negligently, satisfying the intent requirement for trespass to land. It makes no difference whether or not P was aware (except in his actual awareness to bring this action in tort) in order to constitute trespass. The interference with possession need not affect Paul's use and enjoyment—it is an interference with possession. Placing these trees on P's lot is sufficient trespass to constitute a continuing trespass, and Doug will be liable for this, as well.

Defenses: consent.

D will argue consent, for the same reasons above. It will fail, as the scope of the consent granted was very narrow - to cross P's land, not to dump trees on P's land.

Defenses: necessity.

D may argue that he had a necessity to dump the trees on P's land, thereby alleviating him from responsibility for all but the actual damage caused by his trespass. This will not work, as there is nothing in the record to suggest that D had any private necessity.

Trees rolling down and blocking the stream.

Transferred intent.

When a defendant acts with the requisite intent to commit a tort, the fact that another intentional tort is committed in a different manner will still have the original intent, even if the exact ends are not what the defendant foresaw.

Here, D will argue that he did not intend for the trees to roll down the hill and block the stream. P will counter that as D had the intent to “dump the trees,” that this intent should be transferred to the unintentional consequence of blocking the river. A court is likely to accept P’s argument as courts are more willing to hold tortfeasors liable than innocent plaintiffs.

Proximate cause.

Proximate cause is not generally at issue in intentional torts, but it merits addressing here. In order to determine if D is liable for the following, it must be clear that he was the proximate cause of the damages. This requires determining whether it would be foreseeable at the time D committed his tort that this harm might occur.

Here, it is very foreseeable that intentionally blocking the stream would be foreseeable. The amount of rain that caused the flood was the “winter’s normal rainfall.” D may argue that he did not foresee it because his only experience with the area was as the owner of a “small unimproved lot.” Apparently, D was not a resident of the area. However, blocking a stream with trees and leaving for winter, it would be foreseeable that it might flood and cause damage to the nearby property. Accordingly, on this theory alone, D will be liable to P for the damage issues that follow. However, in an attempt to hold D liable for as many torts as possible, potential intentional tort theories are also discussed.

Paul’s motorcycle

Trespass to chattels.

There is a possible argument that D’s original trespass’s intent transfers sufficiently to constitute a trespass to the chattel that was P’s three-year-old motorcycle. A trespass to chattel is an intentional interference with the use and enjoyment of the chattel.

Here, D intentionally set into motion the events that caused P’s motorcycle to be damaged. Provided that this causal chain is sufficiently clear for the court, the court will

find that this constituted a trespass to chattel, relying on the doctrine of transferred intent.

Conversion.

A severe interference with P's chattel so significant as to justify the Defendant being forced to pay the market value of the good at the time of the interference is known as conversion. Importantly, transferred intent does not apply to conversion.

Here, as the intent to harm P's motorcycle likely came from the transfer of intent from D's dumping of trees, there is likely not basis to find that D intentionally interfered with P's motorcycle in a sufficient manner to constitute conversion.

P's garage.

Trespass to land: garage.

For all of the reasons noted above, D will be liable to P's land for damage done to the garage, under a trespass to land theory.

Remedies.

Damages.

The underlying theory of damages in Tort is to place the plaintiff in the position as if the tort had never been committed. Further, under the doctrine of "thin shell plaintiffs," the D is liable for all harm proximately caused (as discussed above) whether economic, noneconomic, or property.

Trespass to land.

Nominal damages.

Nominal damages are recoverable where there is no harm to the land.

Accordingly, P will be able to recover the essentially declaratory relief of D's fault, in a nominal damage claim for the exceeding of P's consent in trespass to land.

Actual damages.

Actual damages are also recoverable in a trespass to land tort, where they occur. The calculation is either diminution in value of the property or cost to repair the property. As courts abhor waste, they tend to award the lowest dollar amount, but on a factual consideration may award one or the other.

Diminution in value.

The diminution in value is the decrease in value of the property. Here, D will argue that this is the appropriate amount that should be awarded.

The trees' presence on the land (as caused by D), has decreased the value of the land \$10,000, from \$50,000 to \$40,000. D will argue, and some courts will agree, that as this is the lower cost (cost of repair is \$30,000), this should be awarded to avoid waste and forfeiture. However, many courts will award against D as he is the more wrongful party.

Cost of repair: removal of the trees.

The cost of repair is the cost to bring the land back to how it was before the tort was committed.

In this case, the tort caused trees to be present on the land and to remove them would cost \$30,000. The fact that Paul has owned this 50-acre lot for a significant amount of time (potentially) and uses it for summer vacations will go in favor of the court awarding cost of repair. That P was "unlikely to see, much less use" the area where the trees were is not as important as the fact that P "plans to build a larger house [on the lot] in

the future.” Courts will be likely to award the diminution in value as P intended to continue using the land and to build a bigger house on the land.

Punitive damages.

Punitive damages are available in cases where the tort was committed willfully. Here, there is nothing to suggest that D dumped the trees willfully and with intent to harm P, so punitive damages are unlikely to be awarded.

Special damages.

If the court views the garage and the motorcycle not as separate torts, but as special damages caused by D’s trespass to land, damage to repair those costs (or potentially to replace the motorcycle—discussed below) will be awarded.

Defenses: avoidable consequences.

P will not be able to recover for damages that he could have reasonably avoided.

Here, there is nothing in the record to show that P could have avoided any of the damages caused by D’s tort. D may attempt to argue that P’s recovery should be reduced because P “left for the winter,” thereby increasing the amount of damages. D may, unpersuasively, argue that had P been present, he could have stopped the flood and prevented the damage to his garage and his motorcycle. This is, as indicated, unpersuasive because P’s duty to avoid consequences is a reasonable one, and it is unreasonable to assume that someone will stay at their house, avoiding floods.

Trespass to land: garage.

The same damage discussion as above would apply if the court determines that the garage was a separate trespass to land.

Trespass to chattel or conversion.

Conversion.

Despite the doctrinal limitations of transferred intent, as noted above, there is an interesting remedy issue with conversion. If the court were willing to consider the motorcycle as being damaged so significantly as to constitute a conversion, the remedy is the fair market value at the time of conversion, and the tortfeasor gets title to the converted chattel. It is a forced sale.

Here, oddly, D may argue that this should be considered a conversion so that he need not pay the \$4,000 for a “new one” (assuming that “new one” means the fair market value of a three-year old motorcycle). P may well be happy with this, depending on the extent of the damage to his motorcycle.

Trespass to chattel.

The proper remedy for trespass to chattels is cost of repair. Here, there is a \$5,000 dollar cost to repair, so it is possible that P will argue that this is the appropriate measure of damages. D will argue, as noted above, that the damages should be limited at the replacement value of 4,000 and this may well be persuasive.

Restitution.

Restitutionary damages.

Restitutionary damages seek to disgorge any unjust enrichment from the defendant by making the defendant pay the plaintiff any ill-gotten gain.

Here, P will argue that D received an unjust benefit because he did not have to pay (do you have to pay?) to have the lumber taken to the lumber mill, and rather was able to avoid that cost by dumping the trees on P’s land. There is nothing in the record to indicate the value of this, so no further discussion will be had as to valuation.

Ejectment.

Ejectment is a legal restitutionary remedy that removes trespassers from land.

Here, P may argue that an ejectment action may be a proper means for placing the entire burden on D to remove the trespassing logs. This is not a typical use of an action in ejectment, but perhaps. . .

Injunction.

P may seek an injunction.

A permanent injunction is an equitable remedy. It requires that there be no adequate remedy at law, that there be a feasible enforcement of the injunction, that the hardships balance in favor of granting of the injunction, and that there are no defenses.

Here, P will argue that the remedies discussed above are not adequate because he wanted to maintain the property as it had been before the trespass. P will rely on the fact that courts are particularly sensitive to the nature of real property as unique and may well consider the legal remedy inadequate.

Feasibility may well work too. While the courts are generally reluctant to order a mandatory injunction requiring the D to do some affirmative act (here—removing the trees) they may well do that here. It would be a one-time enforcement and would not require supervision over a long period of time.

Hardships.

Hardships balance in favor of the plaintiff. He was entirely innocent in this case, according to the record. D wanted to not have to take the trees to the lumber mill but wanted the benefit of having his lot clear so that he could build a house. D was almost lazy and avoiding costs whereas P was innocent. There is nothing to place on P's scale and, therefore, the injunction should grant.



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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2014

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2014 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

<u>Question Number</u>	<u>Subject</u>
1.	Professional Responsibility
2.	Community Property
3.	Civil Procedure
4.	Real Property
5.	Constitutional Law
6.	Remedies

Question 6

Angela hired Mark, a real estate broker, to help her find a house to buy.

A week later, Mark contacted Angela and told her that he had found the perfect house for her. She asked him what he knew about the house. He said that the house had been owned for some years by Carol, who had kept it in pristine condition. When she visited the house, Angela noticed what appeared to be animal droppings on the deck. Carol assured her that they were only bird droppings, had never appeared previously, and would be removed before closing. Carol added that she never had any problem with any kind of "pests." Angela made an offer of \$500,000 for the house, and Carol accepted.

After closing, Angela spent \$10,000 to move her household goods to the house. A few weeks after moving into the house, Angela made several discoveries. First, the house suffered from a seasonal infestation of bats, which urinated and defecated on the deck. Second, Carol was in fact Mark's cousin, had owned the house for about a year, and had been desperate to sell it because of the bats. Mark was aware of all of these facts.

After the sale, Mark evenly split the proceeds with Carol and invested his \$250,000 in stocks that are now worth \$750,000.

At trial, Angela has established that Mark and Carol are liable to her in tort and contract.

1. What remedy or remedies may Angela obtain against Carol? Discuss.
2. What remedy or remedies may Angela obtain against Mark? Discuss.

QUESTION 6: SELECTED ANSWER A

1. Angela v. Carol

Rescission

Angela (A) may seek to have the contract with Carol (C) for the sale of the house rescinded. There must be grounds for the rescission and no defenses preventing it. A asked C about animal droppings she saw on the back deck and C assured A that they were only bird droppings and had never appeared previously. C then added, on her own, that she never had any problem with pests. These statements amount to a material misrepresentation of fact by C to A. A material misrepresentation is grounds for rescission if the seller made a misrepresentation of a fact that a reasonable buyer would have relied on and the buyer did in fact rely on the statements. While generally the doctrine of caveat emptor applies to omissions, there is implied in every land contract a duty not to make material misrepresentations. Generally the failure to mention a material fact is not actionable, though in some instances a court may hold the seller liable for known latent defects. However, here, C affirmatively represented, of her own accord, the fact that there were no problems with pests. And C also misrepresented the fact that the droppings were from bats that seasonally infest the house. These assurances made by C to A are of the type reasonably relied on by a buyer, since a buyer can't inspect a house for a whole year, she must rely on the seller's representation regarding seasonal conditions. Here, A did in fact rely on the misrepresentation. Thus, A has grounds for rescission.

C may try to bring the defenses of laches or unclean hands, however, A did nothing wrong to make her hands unclean and she discovered the infestation within weeks of the sale. This short period of time did not unfairly prejudice C so laches does not apply either.

Compensatory Damages

Compensatory damages aim to make the plaintiff whole, to put them in the position they would have been in had the contract been fully and properly performed. Here, A expected to own a house free of infestation. With the contract rescission, A has a right to the return of the price paid for the house plus any consequential and incidental damages. Consequential damages are those damages specific to the plaintiff that were foreseeable at the time the contract was entered. Incidental costs are those associated with dealing with the breach. Here, A is entitled to a return of the purchase price (\$500,000) plus the costs associated with moving her household goods into the house since it was foreseeable at the time of contract that she would need to move her items (\$10,000) plus any other incidental damages incurred in dealing with the breach (for instance, moving out costs or protecting her personal property from damage from the bats).

Punitive Damages

Punitive damages are not awarded in contracts claims. However, C's misrepresentations likely raise to the level of fraud and are thus actionable under tort law. In that case, C may be liable for penal damages for fraud. See discussion below regarding Mark's liability for penal damages.

Restitutionary Damages

Alternatively, A may recover restitutionary damages from C. Restitutionary damages seek to prevent the defendant from being unjustly enriched. The plaintiff may recover the reasonable value of the benefit received by the defendant. Here, C was unjustly enriched when she received the full contract price of \$500,000 for a house she knew to be seasonally infested with bats. A could recover the benefit to C of the contract price. However, the house was likely worth something, just not the full contract price. So any restitutionary recovery will likely look at the fair market value of the house as is (with

infestation) and award A the difference between the contract price and the fair market value.

Note that A may not recover both compensatory and restitutionary damages and thus will likely elect compensatory as the larger amount of damages.

Constructive Trust / Equitable Lien

A may get a constructive trust or an equitable lien over the compensatory or restitutionary money damages due to her. (See rules below)

2. Angela v. Mark

Angela may have entered into a contract with Mark (M) for his brokerage services but more likely he was held liable in tort for fraud. Fraud is the intentional misrepresentation of a past or present fact, made with the intent that the other rely on it and the other does reasonably rely. M was C's cousin, he knew of the bat infestation and that C was desperate to sell the house. He told A that the house was in pristine condition and he stood by while C represented that the house was free of any infestation. M also received half the proceeds from the house.

Compensatory Damages

See rule above. A may recover the full cost of the house as well as the cost of moving in (\$510,000), which represents the position she would have been in if the tort had not occurred. If M had not committed a fraud and induced A to purchase the house, she would not have spent the money to purchase and move in to the bat infested house.

Punitive Damages

If a defendant acts wantonly, willfully or maliciously, the plaintiff may also recover punitive damages as long as she recovers either compensatory or nominal damages as well (and sometimes restitutionary). Punitive damages seek to punish the defendant for his willful wrongdoing. Here, M was related to C and knew of the poor condition of the house. He knew that the house was infested and that C was desperate to sell because of the bats. This knowledge made M's actions in showing the house to A, representing that it was in pristine condition and not warning A of the bats willful. Thus, A will likely recover punitive damages for M's willful conduct.

Note: As mentioned above, C may also be liable for fraud and her active misrepresentations could also be found to be willful and malicious. Thus, A may also recover punitive damages from C in connection with the compensatory or restitutionary damages owed by C.

Restitutionary Damages

See rule above. M has been unjustly enriched since he received half the proceeds from the sale to A which was based on his fraud. He may have also received a broker's fee, also an unjust enrichment. A is entitled to the reasonable value of this benefit. Here, M received a \$250,000 benefit. Thus, A may recover \$250,000.

Constructive Trust / Equitable Lien

A constructive trust is a court order that the defendant hold the property in trust for the benefit of the plaintiff and return the property to the plaintiff, along with any enhanced value. If the property is no longer available but may be traced to another form, as long as it can be traced with certainty, the plaintiff may still recover the value of the property by tracing. Here, A may seek a constructive trust on M's \$250,000. M invested the money in stocks that are now worth \$750,000. Because the original \$250,000 can be

clearly traced to the stocks, A may recover the full, enhanced value of the property. Thus A is entitled to the stocks which are now worth \$750,000.

An equitable lien is a court-imposed security interest in the property which must be sold and the proceeds returned to the plaintiff. If the sale results in less money than is owed, the plaintiff may get a deficiency judgment and a lien on the defendant's other property to secure that judgment. However, the plaintiff may not recover any enhanced value in the property. Tracing may also be used to ensure return of the property. Here, A could get an equitable lien on the stocks (traceable from the money M received) and force a sale of the stocks in order to receive the \$250,000 of restitutionary damages she is owed. She would not be entitled to the full \$750,000 under an equitable lien.

Thus, A will seek a constructive trust in order to recover the restitutionary damages owed to her.

QUESTION 6: SELECTED ANSWER B

1. Angela's remedies against Carol.

The issue is to what remedies Angela is entitled to obtain against Carol for Carol's liability in tort and contract.

In contract

Damages for breach of contract can either be legal or equitable.

Legal Remedies

Damages

The typical measure of damages in contract is the expectation measure. That is, the non-breaching party to a contract is entitled to be put in the same position that she would have been in had the other party not breached the contract. Here, at the end of the contract, Angela expected to be in possession of a house that was in "pristine condition" that did not have a bat infestation.

Presumably, the seasonal bat infestation reduced the market value of the house and Angela would not have paid \$500,000 for the house had she known of it. Therefore, in order to protect Angela's expectation, she is entitled to receive the difference between \$500,000 contract price and the market value of the house at the time of closing.

Angela is not entitled to her \$10,000 of moving expenses as damages because she would have had to spend that amount if the house was in the condition she expected it to be, regardless of the bats.

Finally, Angela has not suffered any consequential damages from the purchase

of the house (losses that are foreseeable at the time of contract) and punitive damages are not recoverable in contract.

Restitution

Angela may also recover on a restitution theory. Restitution is a remedy that is used to avoid unjust enrichment from a party's wrongdoing. Here, due to Carol's misrepresentations, she was able to sell the house at a price above its market value. Therefore, Angela may recover the difference in the contract price and the fair market value of the house at the time of closing.

Again, Angela is not entitled to the \$10,000 in moving expenses in restitution because those moving expenses were paid to a mover, not to Carol.

Equitable Remedies

Rescission

Rescission of a contract is an equitable remedy whereby the contract is rescinded as if it never happened. Essentially, the party seeking rescission must argue that the contract was never formed because there was no meeting of the minds. If the contract here is rescinded, Angela would receive her \$500,000 purchase price while Carol would be put back in possession of the house. Grounds for rescission include: mistake and misrepresentation.

There are two types of mistake: Mutual Mistake and Unilateral Mistake. Mutual mistake exists where both parties to a contract are mistaken as to a fact that substantially affects the basis of their bargain. Here, Carol was not mistaken about any facts with regard to the contract--she knew of the bat infestation and its effects.

Angela will be able to successfully argue unilateral mistake. Unilateral mistake is not typically a grounds for rescission. However, when the non-mistaken party knows of the mistake of the other party and proceeds with knowledge in the face of that mistake, the mistaken party may rescind the contract. Here, because Angela did not know of the bat infestation, and Carol both knew of the infestation and knew that Angela did not know of it, unilateral mistake is applicable and Angela may rescind on that ground.

In addition to the ground of unilateral mistake, Angela may rescind on grounds of misrepresentation. Misrepresentation occurs when a party makes a material misrepresentation, with the intent that the other party rely on the statement, the reliance is justified, the other party does indeed rely on the statement and that party suffers damage. Here, Carol misrepresented that she had never seen the droppings before and that they were bird droppings. She intended for Angela to rely on the statement and Angela did indeed rely on the statement and suffer damages. The only issue is whether Angela's reliance was justified. Considering that Mark said that Carol kept the home pristine and Angela was assured by Carol, the homeowner, regarding the condition of the house, Angela's reliance was likely justified. Carol may be able to argue that Angela should have hired an independent appraiser of the house instead of relying on her statement, but this argument will fail because Angela's reliance was justified given Mark's corroboration of the condition of the house.

Therefore, the equitable remedy of rescission is warranted on grounds of unilateral mistake and misrepresentation and Angela should be entitled to her \$500,000, and the house will be returned to Carol.

In Tort

Legal Remedies

Damages

Angela may sue Carol for damages in the amount that Carol's misrepresentation cost her. Therefore, she should be able to recover the amount that will be required to fix the bat infestation and any damage already caused by the bats.

In addition, Angela may be able to recover punitive damages from Carol because of Carol's outrageous lies and conduct. Not only did Carol lie about the droppings and that she had never seen them before, she had been desperate to sell the house and was Mark's cousin, with whom she perpetrated a fraud on Angela. Typically, punitive damages are limited to a cap of less than ten times the actual damages.

Equitable Remedies

Constructive Trust

A constructive trust is a restitutionary equitable remedy. If a constructive trust is imposed, the defendant must return the property to the plaintiff. A constructive trust will be imposed when 1) the defendant holds title to property, 2) title was acquired by the defendant's wrongful conduct, and 3) retention of the property would result in the unjust enrichment of the defendant. Typically, the plaintiff will pursue a constructive trust when the value of the property increases while the defendant has held the property.

Here, Carol holds the proceeds from the sale, she acquired it with wrongful conduct as discussed above, and retention of the proceeds would result in unjust enrichment. However, the legal remedies described above are adequate to remedy Angela's harm. Therefore, the court should not grant this remedy.

Equitable Lien

An equitable lien is also a restitutionary equitable remedy. If an equitable lien is imposed, the plaintiff will acquire a security interest in the property and the property will be subject to an immediate court ordered sale, and the plaintiff will be entitled to the

proceeds. An equitable lien will be granted upon the same conditions as a constructive trust.

Angela will be able to show the conditions for imposition of an equitable lien have been met. However, the legal remedies described above are adequate to remedy Angela's harm. Therefore, the court should not grant this remedy.

2. Angela's remedies against Mark.

Equitable Remedies

Constructive Trust

The requirements of a constructive trust are listed above. Because the source of the funds used to purchase the stock is directly traceable to his unjust enrichment from the transaction, Angela will be able to force Mark to turn over the stock to her in a constructive trust. She will be entitled to keep the entire value of the stock.

Equitable Lien

Angela will be able to show she is entitled to an equitable lien. The court will trace the proceeds that Mark used to purchase the stock to his unjust enrichment from his involvement in the transaction, and Angela will be granted a security interest in the property. Then, the stock will be subject to sale and Angela will be entitled to receive Mark's \$250,000.

Legal Remedies

Replevin-

Damages-



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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2014

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<u>Question Number</u>	<u>Subject</u>
1.	Contracts/Remedies
2.	Evidence
3.	Business Associations / Professional Responsibility
4.	Criminal Law and Procedure
5.	Trusts / Community Property
6.	Torts

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, 5000 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.



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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2015

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2015 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

<u>Question Number</u>	<u>Subject</u>
1.	Contracts
2.	Real Property
3.	Civil Procedure
4.	Remedies
5.	Business Associations
6.	Wills/Trusts

QUESTION 4

Steve owned two adjoining improved tracts of land, Parcels 1 and 2, near a lake. Parcel 1 bordered the lake; Parcel 2 bordered Parcel 1, and was adjacent to an access road. Steve decided to sell Parcel 1 to Belle. Belle admired five 100-year-old oak trees on Parcel 1 as well as its lakefront location.

On February 1, Steve and Belle executed a contract for the sale of Parcel 1 at a price of \$400,000. The contract specified that the conveyance included the five 100-year-old oak trees. In addition, the contract stated that Belle was to have an easement across Parcel 2 so that she could come and go on the access road. Although the access road was named Lake Drive, Steve and Belle mistakenly believed that it was named Top Road, which happened to be the name of another road nearby. The contract referred to the access easement as extending across Parcel 2 to Top Road, which would not have been of any use to Belle. The contract specified a conveyance date of April 1.

Later in February, Steve was approached by Tim, who offered Steve \$550,000 for Parcel 1. Steve decided to breach his contract with Belle and agreed to convey Parcel 1 to Tim. Despite Belle's insistence that Steve honor his contract, he told her that he was going ahead with the conveyance to Tim in mid-April, and added, "Besides, our contract is no good because the wrong road was named."

In March, Belle learned that, in April, Steve was going to cut down the five 100-year-old oak trees on Parcel 1 to better the view of the lake from Parcel 2.

1. What equitable remedies can Belle reasonably seek to obtain Parcel 1? Discuss.
2. What legal remedies can Belle reasonably seek if she cannot obtain Parcel 1? Discuss.

QUESTION 4: SELECTED ANSWER A

1. What equitable remedies can Belle reasonably seek to obtain Parcel 1? Discuss.

Equitable Remedies

Remedies are ordinarily split into two categories, equitable remedies and remedies at law. Equitable remedies are only available where a remedy at law is inadequate to repair the harm. Equitable remedies are decided by the judge whereas legal remedies are usually decided by a jury. Unlike legal remedies that usually only declare damages owed from the defendant to the plaintiff, equitable remedies are backed by the contempt power of the court. If a defendant fails to comply with an equitable order, she can be held personally in contempt of court. There are several equitable remedies that Belle may seek to protect her rights with respect to the land sale contract for Parcel 1 with Steve.

Temporary Restraining Order (TRO)

A temporary restraining order is a stop gap measure wherein a court can order a defendant not to act, or occasionally to act affirmatively, in order to preserve the status quo until a hearing on a preliminary restraining order can be heard. A temporary restraining order will only be granted where the plaintiff can demonstrate that (1) she will suffer irreparable harm without the order, (2) the balance of the equities between the plaintiff and defendant favors the order, (3) the plaintiff is likely to prevail on the merits of her claim. A temporary restraining order can be heard ex parte if the plaintiff demonstrates a good faith attempt to give notice or demonstrates good cause for not giving notice. A temporary restraining order is a time-limited measure, typically limited to ten days. In this case, Belle might seek a TRO to stop Steve from cutting down the trees on Parcel 1 and not to sell Parcel 1 to Tim or any other buyer.

Irreparable Harm

First, Belle must demonstrate irreparable harm. In other words, she must show that a remedy at law would be inadequate and, without this order, any further remedy would be inadequate. Belle can demonstrate irreparable harm with respect to the cutting down of trees because her contract specifically protects her right to the 100-year-old oak trees and the trees were important to her decision to purchase the property. If Steve cuts down the trees, they cannot be replaced by damages. It would take another 100 years to grow similar oak trees. Belle likely also can show irreparable harm regarding Steve's selling of the property. Belle seeks to enforce her contract to purchase the property. If Steve sells the property to another bona fide purchaser in the meantime, she will not be able to seek specific performance. Steve may argue that he is not planning to sell to Tim until mid-April; therefore a TRO is not necessary. However, Belle can reasonably argue that Steve is not acting in good faith and there is a possibility that he will expedite the sale in order to deprive Belle of her right to specific performance. Therefore, Belle can demonstrate irreparable harm.

Balance of the Equities

Next, Belle must demonstrate that the balance of equities tips in her favor. In other words, Belle must prove that the hardship on her of not receiving the TRO is greater than the hardship to Steve of the TRO. Belle will argue that if the trees are cut down or the property is sold, she will forever lose the benefit of her contractual bargain. Therefore, there is a strong equitable argument in favor of granting Belle the TRO. Steve will argue that a TRO is inequitable because he will lose the right to an improved view of the lake on his property and might lose his interested buyer. However, a TRO will only interrupt Steve's view for a short time if he is able to prevail later and Steve is unlikely to lose his buyer based on this short time-limited order and if he does, there are likely other buyers available. The court may also disfavor Steve's arguments because he is breaching his contract with Belle and therefore his equitable arguments are not as strong. As such, the balance of the equities tips in favor of Belle.

Likelihood of Success on the Merits

Belle must demonstrate that she is likely to succeed on the merits. Belle will be able to prove a likelihood of success on the merits. A valid contract requires offer, acceptance, and consideration and must not be subject to any valid defenses. The land sale contract signed by both parties demonstrates offer and acceptance and satisfies the Statute of Frauds. The contract provides for the exchange of \$400,000 for a parcel of land, which satisfies the bargained-for exchange requirement. The contract requires Steve to transfer the land to Belle and specifically protects Belle's rights to the five oak trees. Nonetheless, Steve has unequivocally plans to cut down the trees and sell to another buyer. As such, he has anticipatorily breached. If Steve receives notice, he may argue that the contract is not valid because of the mistake in the contract with respect to the name of the road. Such a mutual mistake, however, does not invalidate the contract. Therefore, Belle can establish a likelihood of success on the merits.

Preliminary Injunction

A preliminary injunction is a longer lasting pre-judgment equitable remedy. A preliminary injunction is a court order restraining the defendant from action (or more rarely, requiring the defendant to affirmatively act) to preserve the status quo. It lasts until there is a final judgment on the merits. The requirements for a preliminary injunction are identical to those for a temporary restraining order: (1) irreparable harm, (2) balance of the equities and (3) likelihood of success on the merits. However, a preliminary injunction requires notice to the defendant and a hearing.

As discussed above, Belle can demonstrate irreparable harm, balance of the equities, and likelihood of success on the merits. To receive a preliminary injunction, Belle will have to give Steve notice and the court must hold a hearing. Steve will argue that the contract is invalid because of the mistake regarding the name of the road for the easement and therefore, Belle is unlikely to succeed on the merits. But Belle can seek

reformation of the contract to correct that error. Even if she could not prevail on reformation, the mistake is only harmful to Belle; therefore Steve cannot void the contract on the basis of this mistake, only Belle can. Therefore, Steve's argument will not be successful. Belle will likely be successful in receiving a preliminary injunction pending the court's determination of Belle and Steve's right to Parcel 1.

Contract Reformation

Contract reformation is an equitable remedy wherein the court will correct an error in a written contract in order to conform the contract with the actual agreement of the parties. Reformation is most often available where there is an error in the contract on the basis of a mutual mistake or scrivener's error. A mutual mistake occurs where both parties intend the contract to reflect an agreement between them but, due to a mistake by both parties, the contract does not properly reflect this agreement.

Belle can argue that the land sale contract should be reformed to include an easement over Parcel 2 to reach Lake Drive rather than Top Road. She can demonstrate to the court that both she and Steve intended the contract to include an easement over Parcel 2 to reach the access road adjacent to Parcel 2, which is Lake Drive. Both Steve and Belle mistakenly thought that the adjacent access road was called Top Road. Therefore, she can demonstrate the proper elements of mutual mistake to justify the reformation.

Steve will argue that the parol evidence rule bars extrinsic evidence related to the contract where there is a written contract. This argument will not be successful because the parol evidence rule does not apply in cases related to contract reformation. Belle can successfully seek reformation of the contract.

Specific Performance

Next, Belle will seek specific performance of the contract. Specific performance requires the defendant to actually perform under the contract rather than pay legal damages for the breach. Specific performance is available where there is (1) a valid contract, (2) that is sufficiently definite in its terms, (3) all conditions have been met for defendant's performance, (4) that there is no adequate remedy at law, (5) enforcement is feasible and (6) it is not subject to any equitable defenses.

As discussed above, Belle has a valid contract for the sale of the land for \$400,000. There are no valid defenses as Steve's theory on the basis of mutual mistake fails because Belle can reform the contract and he cannot invalidate the contract on the basis of a mutual mistake that only injures Belle. The contract is sufficiently definite. The contract clearly describes the parcel of land to be sold (with the oak trees intact), the parties, and the price and payment information. Finally, Belle must be prepared to pay the purchase price to satisfy the condition of Steve's performance.

Belle has no adequate remedy at law. Every piece of land is unique. Therefore, land sale contracts are per se unique and damages are per se inadequate for a buyer (and seller under the theory of mutuality of remedies). As such, Belle can easily establish inadequate remedy at law. The enforcement of specific performance here is certainly feasible because it only requires a single transaction. Courts are hesitant to grant specific performance for repeated transactions and will never allow specific performance for personal services. But these concerns are not present; enforcement is feasible.

Finally, there must be no equitable defenses, specifically the defenses of laches and unclean hands. The defense of laches bars specific performance or other equitable remedies where the plaintiff has unjustifiably delayed in bringing the action and the delay prejudices the defendant. There is no indication that Belle has delayed since she will bring this action before the closing of the contract was even due. There is no prejudice to Steve. The defense of unclean hands bars specific performance where the plaintiff is guilty of some wrongdoing, even if not technically a breach or illegal act, in

relation to the transaction. In this case, there is no suggestion of any wrongdoing by Belle. The only mistake she made with respect to the contract was entirely unintentional and innocent. This defense does not apply. Belle can seek specific performance of the contract.

If Steve cuts down the trees, Steve may argue that he is excused from specific performance of the contract because it would be impossible for him to perform the contract. However, where complete performance is not possible, a plaintiff seeking specific performance can still seek specific performance of the contract to the extent possible and seek abatement of the purchase price based on the damages from incomplete performance. Therefore, even if Steve cuts down the trees, if Belle still wants the property, she can seek specific performance and request that the court value the trees and abate the price accordingly. Of course, Belle will have to establish the value of the trees with reasonable certainty, which may be difficult given the intangible aesthetic benefit of the trees.

2. What legal remedies can Belle reasonably seek if she cannot obtain Parcel 1?

Expectation Damages

If Belle does not obtain Parcel 1, she can seek legal remedies instead. A land buyer's legal remedy for the seller's breach of contract is ordinarily expectation damages. Expectation damages seek to put a non-breaching party in the same position they would be in but for the breach. In land sale contracts they are calculated by the difference in the fair market value of the land and the contract price for the land. In this case, Belle needs to establish the fair market value of the land. A reasonable estimate for that might be the recent offer from Tim for \$550,000. Therefore the difference would be \$150,000 (\$550,000-\$400,000). Belle is entitled to the return of any deposit and \$150,000 in damages, that will put her in the same legal position as if the contract was performed.

Belle may also seek consequential damages that arise from the breach if they were reasonably foreseeable. Since it is unclear what Belle bought the property for, it is unclear whether or not she could prove any consequential damages. If she was purchasing for a business purposes, she may seek to prove lost profits from the delay in finding a new property. Any lost profits claim would be limited by a defense of foreseeability and reasonable certainty.

Reliance or Restitution Damages

Where a buyer is unable to prove expectation damages, perhaps because the market price is below the contract price, a buyer can seek reliance damages for the breach. Reliance damages seek to put the buyer in the same place she was before the contract was made. Most often in land sale contracts, the reliance damages are the out-of-pocket expenses including any down payment or earnest money paid to the seller. Where a seller breaches in good faith, for example because he is unable to deliver marketable title due to no fault of his own, a buyer may also be limited to her reliance damages. In this case, expectation damages are appropriate because Belle can prove that the fair market value is greater than the contract price and Steve's breach was not in good faith.

Finally, restitution damages are available where other remedies are inappropriate and inadequate and the defendant has been unjustly enriched by this action. In this case, restitution damages would include the return of her down payment. If Steve actually sells to Tim, they may also include the additional \$150,000 in profits that Steve gained from breaching his contract with Belle and selling to Tim.

The most typical defenses available to damages in contract cases are failure to mitigate damages or uncertainty. In this case, neither will apply. There is no evidence that Belle failed to act in any way that ran up her damages and by seeking the difference in fair market value and the contract price, the damages are reasonably foreseeable.

QUESTION 4: SELECTED ANSWER B

1. Equitable Remedies

The issue here is what equitable remedies Belle may seek to obtain Parcel 1.

Temporary Restraining Order

A temporary restraining order ("TRO") is an order from the court requiring, or forbidding, the nonmoving party to take an action, while the nonmoving party seeks a preliminary injunction. The purpose is to preserve the status quo pending a decision on the motion for a preliminary injunction. To obtain a TRO, a plaintiff must show (1) that, without the TRO, she will suffer imminent irreparable harm, as balanced against the hardship that the defendant will suffer from the issuance of the TRO, and (2) a likelihood of success on the merits. A plaintiff may seek a TRO *ex parte* - that is, without notice to the nonmoving party - if, in addition to showing a likelihood of irreparable harm, the plaintiff shows a strong showing for why notice could not be practically provided, or why it should not have to be provided (for example, if issuing notice would cause the defendant to take the action causing irreparable harm). A TRO is only available for up to 10 days (or 14 days, under the Federal Rules of Civil Procedure).

Irreparable Harm

Here, Belle purchased the property from Steve in part because they contained the five 100-year-old oak trees. If Steve cut them down, it would prevent Belle from enjoying their presence on the property. Because they are so old, they could not be readily replaced; instead, should she have to plant new ones, she would need to wait 100 years to have comparable trees on the property. Thus, she would suffer irreparable harm should Steve cut them down.

Moreover, Belle would suffer irreparable harm if Steve sold the property to Tim. If Tim did not know about the prior contract (that is, if he was a bona fide purchaser for value), and Steve sold him the property, the sale would be valid, and Belle would not be able to recover the property. Even though the conveyance to Tim will not occur until mid-April - and thus, is not scheduled to occur until after the 10-day TRO would dissolve - Belle would successfully argue that the TRO is still necessary to prohibit Steve from accelerating the sale in light of the pending litigation.

In contrast, there is no similar risk of harm to Steve. Regardless of the outcome of the litigation, Steve is either going to sell the property to Belle or to Tim in April. Preventing him from cutting down the trees will only obstruct his view of the lake for a period of less than two months, which is a minor inconvenience at most. Moreover, he will not suffer irreparable harm if he cannot convey the property immediately to Steve.

Thus, Belle would show the irreparable harm required for a TRO.

Likelihood of Success on the Merits

Belle would also be able to show a likelihood of success on the merits. Steve and Belle appear to have a valid contract, and Steve has breached the contract. Moreover, Steve's defenses here are limited.

First, under the Statute of Frauds, contracts for the conveyance of land must be in writing and signed by the party against whom enforcement is sought. The facts suggest that the contract was in writing, but they do not say so expressly. To the extent that the contract was not in writing or signed, Steve might raise the Statute of Frauds as a defense. But, because the facts suggest a writing, this is unlikely to be successful.

Second, Steve might argue that the contract is void because of the parties' mutual mistake. A contract is void for mutual mistake if both parties were mistaken to a material fact and the party seeking to invalidate the contract did not bear the risk of

mistake. Here, even though the parties made a mistake in the writing, they both subjectively understood which road was meant to be included in the contract; and, in any event, as the property owner with superior knowledge, Steve likely bore the risk of mistake. Thus, Steve's defense would likely fail. Belle would likely succeed on the merits.

Conclusion

Belle can seek a TRO to stop Tim from cutting down the trees and conveying the property to Tim.

Preliminary Injunction

A Preliminary Injunction ("PI") is an order from the court requiring, or forbidding, the nonmoving party to take an action, in order to preserve the status quo pending trial on the merits. The test for a PI is similar to that for a TRO. A plaintiff must show (1) that, without the PI, she will suffer imminent irreparable harm, as balanced against the hardship that the defendant will suffer from the issuance of the PI, and (2) a likelihood of success on the merits. Unlike a TRO, however, a PI may not be issued ex parte.

For the same reasons described above, the court would grant Belle a PI pending trial.

Specific Performance

Specific performance is an equitable remedy that requires the breaching party to perform his or her obligations under the contract. To obtain specific performance, a plaintiff must show (1) that there was a valid contract with sufficiently certain terms, (2) that the plaintiff performed or was able to perform her obligations under the contract, (3) no adequate remedy at law, and (4) feasibility of enforcement. Also, specific performance is not available if the defendant has any equitable defenses.

Valid Contract

To be sufficiently definite, a land sale contract must identify the parcel to be conveyed, the purchase price, and the parties. Here, the contract specified all three. Moreover, as described above, the contract appears to be valid and Steve does not appear to have any defenses to formation. Thus, the first prong is met.

Performance

Even though Belle has not yet paid the purchase price, there is nothing in the facts to suggest that she is not able or willing to fulfill her obligations and pay the contract price. Thus, the second prong is met.

Inadequate Remedy at Law

Under the law, all land is considered unique. Moreover, here, the parcel had unique features - it was near a lake and had 100-year-old oak trees. It would be impossible for Belle to obtain another identical parcel. Thus, simply awarding her monetary damages would not be an adequate remedy. She has no adequate remedy at law.

Feasibility of Enforcement

Requiring specific performance here would be feasible. It is not clear whether the parcel is in the same state as the court but, in any event, the court has personal jurisdiction over Steve and can require him to convey the property to Belle. Thus, enforcement is feasible.

Defenses

In some cases, a court will not award specific performance if it will result in undue hardship to the defendant, resulting from the plaintiff's sharp practices. Here, Steve

might argue that he would suffer undue hardship if he cannot obtain the value of his separate bargain. But he has not shown any sharp practices by Belle, and simply forgoing another opportunity is not a sufficient hardship to constitute a defense to specific performance. Thus, Steve does not have any defenses to specific performance.

Conclusion

Belle can obtain specific performance and require Steve to sell her the property.

Reformation

Reformation is an equitable remedy where the court will reform the terms of the agreement to reflect the true understanding of the parties. It requires (1) a showing of the mutually-understood contractual terms and (2) valid grounds, such as a mistake in rendering the contract to writing. Parol evidence may be used to show the existence of such a mistake.

Here, even though the contract identified the easement as giving Belle access to "Top Road," this was plainly not the true understanding of the parties. The parties both believed that the contract was giving Belle an easement to access the road known as "Lake Drive." Thus, there was a true meeting of the minds here and a court would be able to use parol evidence to determine that this was the true intent of the parties. Thus, the court would reform the contract to substitute "Lake Drive" for "Top Road."

2. Legal Remedies

The issue here is what is the appropriate measure of damages, should Belle not be able to obtain equitable relief.

The standard measure of contract damages is the expectancy measure. The purpose of contract damages is to put the non-breaching party into the same position she would have been in had the contract been fully performed. In a land sale contract, the expectation measure is the difference between the contract price and the fair market value of the property at the time of sale.

Here, Tim offered to purchase the property for \$550,000. The fact that a buyer was willing to pay this price is strong evidence that it is the fair market value. Accordingly, should Belle not be able to obtain specific performance, she would be able to obtain monetary damages from Tim totaling \$150,000 - the difference between the contract price and the fair market value. She would also be able to obtain any incidental damages resulting from the breach (for example, the transaction costs of cancelling the sale).



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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2015

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2015 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

<u>Question Number</u>	<u>Subject</u>
1.	Contracts
2.	Real Property
3.	Civil Procedure
4.	Remedies
5.	Business Associations
6.	Wills/Trusts

QUESTION 4

Steve owned two adjoining improved tracts of land, Parcels 1 and 2, near a lake. Parcel 1 bordered the lake; Parcel 2 bordered Parcel 1, and was adjacent to an access road. Steve decided to sell Parcel 1 to Belle. Belle admired five 100-year-old oak trees on Parcel 1 as well as its lakefront location.

On February 1, Steve and Belle executed a contract for the sale of Parcel 1 at a price of \$400,000. The contract specified that the conveyance included the five 100-year-old oak trees. In addition, the contract stated that Belle was to have an easement across Parcel 2 so that she could come and go on the access road. Although the access road was named Lake Drive, Steve and Belle mistakenly believed that it was named Top Road, which happened to be the name of another road nearby. The contract referred to the access easement as extending across Parcel 2 to Top Road, which would not have been of any use to Belle. The contract specified a conveyance date of April 1.

Later in February, Steve was approached by Tim, who offered Steve \$550,000 for Parcel 1. Steve decided to breach his contract with Belle and agreed to convey Parcel 1 to Tim. Despite Belle's insistence that Steve honor his contract, he told her that he was going ahead with the conveyance to Tim in mid-April, and added, "Besides, our contract is no good because the wrong road was named."

In March, Belle learned that, in April, Steve was going to cut down the five 100-year-old oak trees on Parcel 1 to better the view of the lake from Parcel 2.

1. What equitable remedies can Belle reasonably seek to obtain Parcel 1? Discuss.
2. What legal remedies can Belle reasonably seek if she cannot obtain Parcel 1? Discuss.

QUESTION 4: SELECTED ANSWER A

1. What equitable remedies can Belle reasonably seek to obtain Parcel 1? Discuss.

Equitable Remedies

Remedies are ordinarily split into two categories, equitable remedies and remedies at law. Equitable remedies are only available where a remedy at law is inadequate to repair the harm. Equitable remedies are decided by the judge whereas legal remedies are usually decided by a jury. Unlike legal remedies that usually only declare damages owed from the defendant to the plaintiff, equitable remedies are backed by the contempt power of the court. If a defendant fails to comply with an equitable order, she can be held personally in contempt of court. There are several equitable remedies that Belle may seek to protect her rights with respect to the land sale contract for Parcel 1 with Steve.

Temporary Restraining Order (TRO)

A temporary restraining order is a stop gap measure wherein a court can order a defendant not to act, or occasionally to act affirmatively, in order to preserve the status quo until a hearing on a preliminary restraining order can be heard. A temporary restraining order will only be granted where the plaintiff can demonstrate that (1) she will suffer irreparable harm without the order, (2) the balance of the equities between the plaintiff and defendant favors the order, (3) the plaintiff is likely to prevail on the merits of her claim. A temporary restraining order can be heard ex parte if the plaintiff demonstrates a good faith attempt to give notice or demonstrates good cause for not giving notice. A temporary restraining order is a time-limited measure, typically limited to ten days. In this case, Belle might seek a TRO to stop Steve from cutting down the trees on Parcel 1 and not to sell Parcel 1 to Tim or any other buyer.

Irreparable Harm

First, Belle must demonstrate irreparable harm. In other words, she must show that a remedy at law would be inadequate and, without this order, any further remedy would be inadequate. Belle can demonstrate irreparable harm with respect to the cutting down of trees because her contract specifically protects her right to the 100-year-old oak trees and the trees were important to her decision to purchase the property. If Steve cuts down the trees, they cannot be replaced by damages. It would take another 100 years to grow similar oak trees. Belle likely also can show irreparable harm regarding Steve's selling of the property. Belle seeks to enforce her contract to purchase the property. If Steve sells the property to another bona fide purchaser in the meantime, she will not be able to seek specific performance. Steve may argue that he is not planning to sell to Tim until mid-April; therefore a TRO is not necessary. However, Belle can reasonably argue that Steve is not acting in good faith and there is a possibility that he will expedite the sale in order to deprive Belle of her right to specific performance. Therefore, Belle can demonstrate irreparable harm.

Balance of the Equities

Next, Belle must demonstrate that the balance of equities tips in her favor. In other words, Belle must prove that the hardship on her of not receiving the TRO is greater than the hardship to Steve of the TRO. Belle will argue that if the trees are cut down or the property is sold, she will forever lose the benefit of her contractual bargain. Therefore, there is a strong equitable argument in favor of granting Belle the TRO. Steve will argue that a TRO is inequitable because he will lose the right to an improved view of the lake on his property and might lose his interested buyer. However, a TRO will only interrupt Steve's view for a short time if he is able to prevail later and Steve is unlikely to lose his buyer based on this short time-limited order and if he does, there are likely other buyers available. The court may also disfavor Steve's arguments because he is breaching his contract with Belle and therefore his equitable arguments are not as strong. As such, the balance of the equities tips in favor of Belle.

Likelihood of Success on the Merits

Belle must demonstrate that she is likely to succeed on the merits. Belle will be able to prove a likelihood of success on the merits. A valid contract requires offer, acceptance, and consideration and must not be subject to any valid defenses. The land sale contract signed by both parties demonstrates offer and acceptance and satisfies the Statute of Frauds. The contract provides for the exchange of \$400,000 for a parcel of land, which satisfies the bargained-for exchange requirement. The contract requires Steve to transfer the land to Belle and specifically protects Belle's rights to the five oak trees. Nonetheless, Steve has unequivocally plans to cut down the trees and sell to another buyer. As such, he has anticipatorily breached. If Steve receives notice, he may argue that the contract is not valid because of the mistake in the contract with respect to the name of the road. Such a mutual mistake, however, does not invalidate the contract. Therefore, Belle can establish a likelihood of success on the merits.

Preliminary Injunction

A preliminary injunction is a longer lasting pre-judgment equitable remedy. A preliminary injunction is a court order restraining the defendant from action (or more rarely, requiring the defendant to affirmatively act) to preserve the status quo. It lasts until there is a final judgment on the merits. The requirements for a preliminary injunction are identical to those for a temporary restraining order: (1) irreparable harm, (2) balance of the equities and (3) likelihood of success on the merits. However, a preliminary injunction requires notice to the defendant and a hearing.

As discussed above, Belle can demonstrate irreparable harm, balance of the equities, and likelihood of success on the merits. To receive a preliminary injunction, Belle will have to give Steve notice and the court must hold a hearing. Steve will argue that the contract is invalid because of the mistake regarding the name of the road for the easement and therefore, Belle is unlikely to succeed on the merits. But Belle can seek

reformation of the contract to correct that error. Even if she could not prevail on reformation, the mistake is only harmful to Belle; therefore Steve cannot void the contract on the basis of this mistake, only Belle can. Therefore, Steve's argument will not be successful. Belle will likely be successful in receiving a preliminary injunction pending the court's determination of Belle and Steve's right to Parcel 1.

Contract Reformation

Contract reformation is an equitable remedy wherein the court will correct an error in a written contract in order to conform the contract with the actual agreement of the parties. Reformation is most often available where there is an error in the contract on the basis of a mutual mistake or scrivener's error. A mutual mistake occurs where both parties intend the contract to reflect an agreement between them but, due to a mistake by both parties, the contract does not properly reflect this agreement.

Belle can argue that the land sale contract should be reformed to include an easement over Parcel 2 to reach Lake Drive rather than Top Road. She can demonstrate to the court that both she and Steve intended the contract to include an easement over Parcel 2 to reach the access road adjacent to Parcel 2, which is Lake Drive. Both Steve and Belle mistakenly thought that the adjacent access road was called Top Road. Therefore, she can demonstrate the proper elements of mutual mistake to justify the reformation.

Steve will argue that the parol evidence rule bars extrinsic evidence related to the contract where there is a written contract. This argument will not be successful because the parol evidence rule does not apply in cases related to contract reformation. Belle can successfully seek reformation of the contract.

Specific Performance

Next, Belle will seek specific performance of the contract. Specific performance requires the defendant to actually perform under the contract rather than pay legal damages for the breach. Specific performance is available where there is (1) a valid contract, (2) that is sufficiently definite in its terms, (3) all conditions have been met for defendant's performance, (4) that there is no adequate remedy at law, (5) enforcement is feasible and (6) it is not subject to any equitable defenses.

As discussed above, Belle has a valid contract for the sale of the land for \$400,000. There are no valid defenses as Steve's theory on the basis of mutual mistake fails because Belle can reform the contract and he cannot invalidate the contract on the basis of a mutual mistake that only injures Belle. The contract is sufficiently definite. The contract clearly describes the parcel of land to be sold (with the oak trees intact), the parties, and the price and payment information. Finally, Belle must be prepared to pay the purchase price to satisfy the condition of Steve's performance.

Belle has no adequate remedy at law. Every piece of land is unique. Therefore, land sale contracts are per se unique and damages are per se inadequate for a buyer (and seller under the theory of mutuality of remedies). As such, Belle can easily establish inadequate remedy at law. The enforcement of specific performance here is certainly feasible because it only requires a single transaction. Courts are hesitant to grant specific performance for repeated transactions and will never allow specific performance for personal services. But these concerns are not present; enforcement is feasible.

Finally, there must be no equitable defenses, specifically the defenses of laches and unclean hands. The defense of laches bars specific performance or other equitable remedies where the plaintiff has unjustifiably delayed in bringing the action and the delay prejudices the defendant. There is no indication that Belle has delayed since she will bring this action before the closing of the contract was even due. There is no prejudice to Steve. The defense of unclean hands bars specific performance where the plaintiff is guilty of some wrongdoing, even if not technically a breach or illegal act, in

relation to the transaction. In this case, there is no suggestion of any wrongdoing by Belle. The only mistake she made with respect to the contract was entirely unintentional and innocent. This defense does not apply. Belle can seek specific performance of the contract.

If Steve cuts down the trees, Steve may argue that he is excused from specific performance of the contract because it would be impossible for him to perform the contract. However, where complete performance is not possible, a plaintiff seeking specific performance can still seek specific performance of the contract to the extent possible and seek abatement of the purchase price based on the damages from incomplete performance. Therefore, even if Steve cuts down the trees, if Belle still wants the property, she can seek specific performance and request that the court value the trees and abate the price accordingly. Of course, Belle will have to establish the value of the trees with reasonable certainty, which may be difficult given the intangible aesthetic benefit of the trees.

2. What legal remedies can Belle reasonably seek if she cannot obtain Parcel 1?

Expectation Damages

If Belle does not obtain Parcel 1, she can seek legal remedies instead. A land buyer's legal remedy for the seller's breach of contract is ordinarily expectation damages. Expectation damages seek to put a non-breaching party in the same position they would be in but for the breach. In land sale contracts they are calculated by the difference in the fair market value of the land and the contract price for the land. In this case, Belle needs to establish the fair market value of the land. A reasonable estimate for that might be the recent offer from Tim for \$550,000. Therefore the difference would be \$150,000 (\$550,000-\$400,000). Belle is entitled to the return of any deposit and \$150,000 in damages, that will put her in the same legal position as if the contract was performed.

Belle may also seek consequential damages that arise from the breach if they were reasonably foreseeable. Since it is unclear what Belle bought the property for, it is unclear whether or not she could prove any consequential damages. If she was purchasing for a business purposes, she may seek to prove lost profits from the delay in finding a new property. Any lost profits claim would be limited by a defense of foreseeability and reasonable certainty.

Reliance or Restitution Damages

Where a buyer is unable to prove expectation damages, perhaps because the market price is below the contract price, a buyer can seek reliance damages for the breach. Reliance damages seek to put the buyer in the same place she was before the contract was made. Most often in land sale contracts, the reliance damages are the out-of-pocket expenses including any down payment or earnest money paid to the seller. Where a seller breaches in good faith, for example because he is unable to deliver marketable title due to no fault of his own, a buyer may also be limited to her reliance damages. In this case, expectation damages are appropriate because Belle can prove that the fair market value is greater than the contract price and Steve's breach was not in good faith.

Finally, restitution damages are available where other remedies are inappropriate and inadequate and the defendant has been unjustly enriched by this action. In this case, restitution damages would include the return of her down payment. If Steve actually sells to Tim, they may also include the additional \$150,000 in profits that Steve gained from breaching his contract with Belle and selling to Tim.

The most typical defenses available to damages in contract cases are failure to mitigate damages or uncertainty. In this case, neither will apply. There is no evidence that Belle failed to act in any way that ran up her damages and by seeking the difference in fair market value and the contract price, the damages are reasonably foreseeable.

QUESTION 4: SELECTED ANSWER B

1. Equitable Remedies

The issue here is what equitable remedies Belle may seek to obtain Parcel 1.

Temporary Restraining Order

A temporary restraining order ("TRO") is an order from the court requiring, or forbidding, the nonmoving party to take an action, while the nonmoving party seeks a preliminary injunction. The purpose is to preserve the status quo pending a decision on the motion for a preliminary injunction. To obtain a TRO, a plaintiff must show (1) that, without the TRO, she will suffer imminent irreparable harm, as balanced against the hardship that the defendant will suffer from the issuance of the TRO, and (2) a likelihood of success on the merits. A plaintiff may seek a TRO *ex parte* - that is, without notice to the nonmoving party - if, in addition to showing a likelihood of irreparable harm, the plaintiff shows a strong showing for why notice could not be practically provided, or why it should not have to be provided (for example, if issuing notice would cause the defendant to take the action causing irreparable harm). A TRO is only available for up to 10 days (or 14 days, under the Federal Rules of Civil Procedure).

Irreparable Harm

Here, Belle purchased the property from Steve in part because they contained the five 100-year-old oak trees. If Steve cut them down, it would prevent Belle from enjoying their presence on the property. Because they are so old, they could not be readily replaced; instead, should she have to plant new ones, she would need to wait 100 years to have comparable trees on the property. Thus, she would suffer irreparable harm should Steve cut them down.

Moreover, Belle would suffer irreparable harm if Steve sold the property to Tim. If Tim did not know about the prior contract (that is, if he was a bona fide purchaser for value), and Steve sold him the property, the sale would be valid, and Belle would not be able to recover the property. Even though the conveyance to Tim will not occur until mid-April - and thus, is not scheduled to occur until after the 10-day TRO would dissolve - Belle would successfully argue that the TRO is still necessary to prohibit Steve from accelerating the sale in light of the pending litigation.

In contrast, there is no similar risk of harm to Steve. Regardless of the outcome of the litigation, Steve is either going to sell the property to Belle or to Tim in April. Preventing him from cutting down the trees will only obstruct his view of the lake for a period of less than two months, which is a minor inconvenience at most. Moreover, he will not suffer irreparable harm if he cannot convey the property immediately to Steve.

Thus, Belle would show the irreparable harm required for a TRO.

Likelihood of Success on the Merits

Belle would also be able to show a likelihood of success on the merits. Steve and Belle appear to have a valid contract, and Steve has breached the contract. Moreover, Steve's defenses here are limited.

First, under the Statute of Frauds, contracts for the conveyance of land must be in writing and signed by the party against whom enforcement is sought. The facts suggest that the contract was in writing, but they do not say so expressly. To the extent that the contract was not in writing or signed, Steve might raise the Statute of Frauds as a defense. But, because the facts suggest a writing, this is unlikely to be successful.

Second, Steve might argue that the contract is void because of the parties' mutual mistake. A contract is void for mutual mistake if both parties were mistaken to a material fact and the party seeking to invalidate the contract did not bear the risk of

mistake. Here, even though the parties made a mistake in the writing, they both subjectively understood which road was meant to be included in the contract; and, in any event, as the property owner with superior knowledge, Steve likely bore the risk of mistake. Thus, Steve's defense would likely fail. Belle would likely succeed on the merits.

Conclusion

Belle can seek a TRO to stop Tim from cutting down the trees and conveying the property to Tim.

Preliminary Injunction

A Preliminary Injunction ("PI") is an order from the court requiring, or forbidding, the nonmoving party to take an action, in order to preserve the status quo pending trial on the merits. The test for a PI is similar to that for a TRO. A plaintiff must show (1) that, without the PI, she will suffer imminent irreparable harm, as balanced against the hardship that the defendant will suffer from the issuance of the PI, and (2) a likelihood of success on the merits. Unlike a TRO, however, a PI may not be issued ex parte.

For the same reasons described above, the court would grant Belle a PI pending trial.

Specific Performance

Specific performance is an equitable remedy that requires the breaching party to perform his or her obligations under the contract. To obtain specific performance, a plaintiff must show (1) that there was a valid contract with sufficiently certain terms, (2) that the plaintiff performed or was able to perform her obligations under the contract, (3) no adequate remedy at law, and (4) feasibility of enforcement. Also, specific performance is not available if the defendant has any equitable defenses.

Valid Contract

To be sufficiently definite, a land sale contract must identify the parcel to be conveyed, the purchase price, and the parties. Here, the contract specified all three. Moreover, as described above, the contract appears to be valid and Steve does not appear to have any defenses to formation. Thus, the first prong is met.

Performance

Even though Belle has not yet paid the purchase price, there is nothing in the facts to suggest that she is not able or willing to fulfill her obligations and pay the contract price. Thus, the second prong is met.

Inadequate Remedy at Law

Under the law, all land is considered unique. Moreover, here, the parcel had unique features - it was near a lake and had 100-year-old oak trees. It would be impossible for Belle to obtain another identical parcel. Thus, simply awarding her monetary damages would not be an adequate remedy. She has no adequate remedy at law.

Feasibility of Enforcement

Requiring specific performance here would be feasible. It is not clear whether the parcel is in the same state as the court but, in any event, the court has personal jurisdiction over Steve and can require him to convey the property to Belle. Thus, enforcement is feasible.

Defenses

In some cases, a court will not award specific performance if it will result in undue hardship to the defendant, resulting from the plaintiff's sharp practices. Here, Steve

might argue that he would suffer undue hardship if he cannot obtain the value of his separate bargain. But he has not shown any sharp practices by Belle, and simply forgoing another opportunity is not a sufficient hardship to constitute a defense to specific performance. Thus, Steve does not have any defenses to specific performance.

Conclusion

Belle can obtain specific performance and require Steve to sell her the property.

Reformation

Reformation is an equitable remedy where the court will reform the terms of the agreement to reflect the true understanding of the parties. It requires (1) a showing of the mutually-understood contractual terms and (2) valid grounds, such as a mistake in rendering the contract to writing. Parol evidence may be used to show the existence of such a mistake.

Here, even though the contract identified the easement as giving Belle access to "Top Road," this was plainly not the true understanding of the parties. The parties both believed that the contract was giving Belle an easement to access the road known as "Lake Drive." Thus, there was a true meeting of the minds here and a court would be able to use parol evidence to determine that this was the true intent of the parties. Thus, the court would reform the contract to substitute "Lake Drive" for "Top Road."

2. Legal Remedies

The issue here is what is the appropriate measure of damages, should Belle not be able to obtain equitable relief.

The standard measure of contract damages is the expectancy measure. The purpose of contract damages is to put the non-breaching party into the same position she would have been in had the contract been fully performed. In a land sale contract, the expectation measure is the difference between the contract price and the fair market value of the property at the time of sale.

Here, Tim offered to purchase the property for \$550,000. The fact that a buyer was willing to pay this price is strong evidence that it is the fair market value. Accordingly, should Belle not be able to obtain specific performance, she would be able to obtain monetary damages from Tim totaling \$150,000 - the difference between the contract price and the fair market value. She would also be able to obtain any incidental damages resulting from the breach (for example, the transaction costs of cancelling the sale).



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<u>Question Number</u>	<u>Subject</u>
1.	Trusts
2.	Torts
3.	Professional Responsibility
4.	Remedies
5.	Evidence
6.	Contracts

QUESTION 4

Pop obtained a liability insurance policy from Insurco, covering his daughter Sally and any other driver of either of his cars, a Turbo and a Voka. The policy limit was \$100,000.

On the application for the policy, Pop stated that his cars were driven in Hometown, a rural community, which resulted in a lower rate than if they were driven in a city. However, Sally kept and also drove the Voka in Industry City while attending college there.

Subsequently, Pop asked Insurco to increase his coverage to \$500,000; Insurco agreed if he paid a premium increase of \$150; and he did so. Days later, as he was leaving for Sally's graduation, Pop received an amended policy. He failed to notice that the coverage had been increased to \$250,000, not \$500,000.

Unfortunately, while driving the Turbo in Industry City, Pop caused a multi-vehicle collision. At first, Insurco stated it would pay claims, but only up to \$250,000. Six months later, Insurco informed Pop that it would not pay any claim at all, because of his statement on the application for the policy that both the Turbo and the Voka were located in Hometown.

Insurco filed a complaint against Pop for rescission of the policy. Pop filed a cross-complaint to reform the policy to increase coverage to \$500,000.

1. What is the likelihood of success of Insurco's complaint, and what defenses can Pop reasonably raise? Discuss.
2. What is the likelihood of success of Pop's cross-complaint, and what defenses can Insurco reasonably raise? Discuss.

QUESTION 4: SELECTED ANSWER A

(1) Likelihood of Success of Insurco's Complaint for Rescission

Rescission Generally

Rescission is an equitable remedy, under which a court will invalidate a contract in its entirety, such that the parties to the contract are completely excused from continued performance under the contract. Generally, rescission is available when one party has a valid defense to the formation of the contract. Moreover, typically only the wronged party can seek rescission.

Because rescission is an equitable remedy, a court has broad discretion in deciding whether it should be awarded. The court will consider the equities of the situation, taking into account the fairness of rescission to both parties. In addition, as an equitable remedy, rescission is subject to equitable defenses, such as acquiescence, estoppel, laches, and unclean hands.

Here, Insurco seeks rescission of the insurance policy so that it will not be required to reimburse Pop for his liability.

Insurco's Likely Grounds for Rescission

Fraud/Misrepresentation

Insurco's primary grounds for rescission will likely be on the basis of fraud. A contract may be invalid on the basis of fraud where: (1) a party made a false statement of past or present fact; (2) the statement was either fraudulent or was material to the contract; and (3) the other party relied on that statement of fact in entering into the contract.

Insurco can likely make out a claim of fraud under the facts of this case. Here, in applying for the liability insurance, Pop made a misstatement of fact--i.e., that his cars were driven solely in Hometown, a rural community. This was a false statement because one of his cars was driven by his daughter, Sally, in Industry City. Moreover, Pop was driving the other car in Industry City when he was involved in the collision.

Second, this statement may be deemed fraudulent, as it can probably be shown that Pop was aware of the falsity of the statement. It is very likely that Pop knew that the car was not being used solely in Hometown, as his daughter, Sally, used the car while she was attending college in Industry. Moreover, pop certainly knew that he was driving the Turbo in Industry City when he was involved in the accident.

Even if Insurco cannot establish that the statement was fraudulent, the elements of fraud are still likely established because it is clear that this statement was material to the contract. The location of the use of the cars appears to be a key factor in determining the insurance rates, and indeed, the facts make clear that Pop received a lower rate given this false statement of fact.

For this same reason, Insurco can establish that it relied on Pop's false statement in entering into the contract. As made clear in the facts, Insurco would not have entered into the contract at that lower rate, had it been aware that the car was used in Industry City.

Notably, this original contract is not the one Pop is intending to enforce. Rather, he is attempting to enforce the amended contract, in which Pop sought to increase his coverage. Because Pop paid consideration for this increase in coverage (\$150), this modification of the contract is valid under the common law. In any event, this amended contract is subject to the same claim of rescission as the original contract, as there is no indication that Pop corrected his false statement when requesting the amended contract. Thus, Insurco's same arguments for establishing fraud discussed above apply equally with respect to the amended contract.

Accordingly, Insurco has a strong case for seeking rescission on the basis of fraud or misrepresentation.

Mistake

Insurco also may seek to rescind the contract on the basis of mistake. Under the doctrine of mutual mistake, a contract may be invalidated where both parties are mistaken about a material fact, that is, a fact that was a basic assumption of the contract. Under the doctrine of unilateral mistake, a contract may be invalidated where one party is mistaken about a material fact underlying the contract, and the other party knows or has reason to know about that mistake.

Here, to the extent Pop was unaware that Sally was using the car in Industry City, and somehow unaware that he was driving the car in Industry City when he entered into the accident, both he and Insurco were mistaken about this fact. Thus, the doctrine of mutual mistake of fact may be found to apply.

Moreover, to the extent Pop was aware of Sally's use of the car, or his use of the car in Industry City, he clearly also knew that Insurco would be mistaken as to this fact, given his false statement in applying for the insurance. Accordingly, under that scenario, the doctrine of unilateral mistake may apply. Note that unilateral mistake can serve as grounds for rescission of the contract only where the unmistaken party had actual knowledge of the other party's mistake.

However, because this situation involves a false statement of fact, this issue is more properly analyzed under the doctrine of fraud, for the reasons discussed above.

Pop's Likely Defenses

As noted above, a court will consider any equitable defenses before choosing to order rescission of a contract.

Laches

Pop will first rely on the equitable doctrine of laches. That defense applies where a claimant unreasonably delays in bringing suit, and where that suit prejudices the plaintiff.

Here, Pop will argue that Insurco's delay in bringing suit for rescission of the contract--six months after the accident, and even longer after Pop entered into the contract with Insurco--was unreasonable. The facts here are unclear as to the reasonableness of this delay, as it is not clear when Insurco became aware of Pop's misstatement. Given the fact that Pop's accident occurred in Industry City, however, there is a strong argument to be made that Insurco should have been aware of the use of Pop's cars in Industry City at the time Pop made his claim for reimbursement. Thus, Pop may be able to show the delay was unreasonable.

That said, there is no evidence that the Pop was prejudiced by the delay. Pop clearly will be prejudiced by not receiving payment for his liability, but there is no indication that the delay itself in seeking rescission caused Pop any harm. Thus, the defense of laches is likely unavailable.

Acquiescence

Pop may also rely on the equitable doctrine of acquiescence, which serves as a defense where the plaintiff has previously acquiesced to similar conduct on the part of the defendant for which the plaintiff is now seeking relief.

Here, Pop will argue that this defense is appropriate because Insurco has not previously objected to coverage on the basis of Pop's misstatement in applying for coverage, and that Insurco stated that it would pay his claims. However, Insurco will respond that it had no reason to be aware of Pop's misstatement until Pop sought reimbursement under the policy, and that this is the first time Pop has sought such reimbursement.

Insurco likely has the better argument here, given that it has never previously paid Pop under the policy in spite of the misrepresentation.

Unclean Hands

Unclean hands is an equitable defense available where the plaintiff has engaged in some wrongful or inequitable conduct with respect to the same underlying transaction for which the plaintiff is seeking relief.

Here, Pop may attempt to point to Insurco's previous statement that it would pay out on Pop's claim, and then its reversal of course. However, a court is unlikely to deem this inequitable or wrongful conduct, especially if Insurco was not aware of Pop's initial misstatement when it first agreed to pay Pop's claims.

Estoppel

Estoppel is an equitable defense available where a defendant reasonably, foreseeably, and detrimentally relied on a plaintiff's statement that the plaintiff's conduct is permissible, and where it is equitable to enforce that promise.

Pop will attempt to argue that Insurco is estopped from refusing to pay out on the claim, given its previous statement to Pop that it would reimburse him for his claim. However, there are no facts indicating that Pop relied on this promise to his detriment. Rather, the only harm Pop appears to have suffered is the fact that Insurco refuses to pay out on his claim. The facts do not indicate that Pop changed his position in any way in reasonable reliance on Insurco's promise itself.

Thus, this defense is unlikely to succeed.

(2) Likelihood of Success of Pop's Cross-Complaint for Reformation

Reformation Generally

Like rescission, reformation is also an equitable remedy. However, under the doctrine of reformation, a court will not invalidate the contract in its entirety, but rather will rewrite the contract to conform it to the parties' original intent. Moreover, like rescission, reformation is typically only available to the wronged party.

Again, because reformation is an equitable remedy, a court has broad discretion in deciding whether it should be awarded, taking account all of the equities. Reformation too is subject to equitable defenses, such as acquiescence, estoppel, laches, and unclean hands.

Pop's Likely Grounds for Reformation

Mistake

Pop will likely seek rescission on the doctrine of mutual mistake. As discussed above, that doctrine applies where both parties are mistaken about a material fact--i.e., a fact that was a basic assumption of the contract.

Here, the elements of that doctrine appear to apply. It seems that both parties intended that the amended contract increase the coverage limit to \$500,000, as opposed to \$250,000. In reducing the contract to writing, it appears that a clerical error was made, and that the contract was mistakenly written to state that the limit is \$250,000. This appears to have been a mutual mistake, as the facts indicate that both parties initially intended that the limit be \$500,000. Moreover, the mistake clearly regards a basic assumption of the contract, as a liability limit is one of the key elements of an insurance contract.

The doctrine does not apply where the party seeking to reform the contract assumed the risk of the mistake. That exception does not apply here, however, as it was Insurco, not Pop, who drafted the contract.

Accordingly, Pop has likely made out a prima facie case for mistake, and a court will likely reform the contract to make it consistent with the parties' intent that the liability limit be \$500,000.

Insurco's Likely Defenses

Parol Evidence

Insurco may first rely on the parol evidence rule, which generally holds that where a contract is integrated (intended by the parties to be a final agreement), a party may not admit evidence of a prior agreement that is inconsistent with the contract's terms.

However, there is an exception to the parol evidence rule where a party seeks to provide evidence of mistake or clerical errors in reducing the contract to writing. This exception will apply here.

Unclean Hands

As noted above, the equitable defense of unclean hands applies where the plaintiff has engaged in some wrongful or inequitable conduct with respect to the same underlying transaction for which the plaintiff is seeking relief.

Here, Insurco has strong arguments for application of this defense, given that it can likely show that Pop fraudulently induced the contract. For the reasons discussed above, this claim will likely succeed. Accordingly, Pop's wrongful conduct in inducing the contract will likely serve as a defense to any claim for reformation.

Acquiescence and Laches

Insurco may also assert the defense of acquiescence and laches, the elements of which are discussed above.

With respect to both of these defenses, Insurco will argue Pop did not seek to reform the contract until many months after the amended policy went into effect, thus prejudicing Insurco. Insurco will focus on the fact that Pop had the policy in his possession at this time, and easily could have become aware of the mistake and sought reformation at an earlier time.

However, this argument is unlikely to be successful. A court will likely note that Insurco had a greater ability to have found the mistake, given that it was the party that reduced the contract to writing. Moreover, there do not appear to be facts indicating that Insurco was prejudiced by Pop's delay in seeking rescission.

QUESTION 4: SELECTED ANSWER B

1. INSURCO'S COMPLAINT

APPLICABLE LAW

The contract at issue is an insurance contract. UCC Article 2 governs sale of goods. All other contracts are governed by the common law. Accordingly, the common law would control.

RESCISSION

The issue in Insurco's complaint is whether it is entitled to rescission of the contract. The remedy of rescission allows the party asserting rescission to avoid its obligations under the contract. Rescission is allowed if there is a valid basis for rescission and there are no valid defenses. The remedy of rescission is meant to cure a problem that occurred during contract formation. Typical bases for rescission include: mutual mistake; unilateral mistake; fraudulent misrepresentation; misrepresentation of a material fact (even if not fraudulent); and ambiguous terms in the contract that neither party understood. The applicable bases for rescission in this case will be discussed in turn below.

A. Misrepresentation

Misrepresentation occurs when one party: (i) states a fact to the other party; (ii) the fact turns out to be false; (iii) the other party relied on the false statement when agreeing to enter the contract; and (iv) the party making the false statement either did so fraudulently, or the statement involved a material part of the contract (i.e., even if the statement was not made fraudulently, if it involved a material fact, that is still enough to make out a claim of misrepresentation).

Here, Insurco will argue that Pop made either a fraudulent or material misrepresentation in his application for insurance. In the application, Pop stated that his cars were driven in Hometown, which is a rural community that presumably has less traffic and less risk of accident than an urban center. In reality, however, one of the cars to be insured, the Voka, was also driven in Industry City by daughter while attending college. This made a difference to Insurco, as evidenced by its later refusal to pay once it realized that the application had only listed Hometown as the location of the cars, when in actuality the Voka was located much of the time in Industry City. The issue, however, is whether that discrepancy in the application was either fraudulently represented or material to the contract.

Fraud

There is no indication in the facts regarding whether Pop acted in good faith when he listed Hometown as the location of both cars. It is possible that Pop thought because the Turbo was always located in Hometown, and the Voka was only located in Industry City when college was in session, that he only needed to list Hometown. Pop would argue that Hometown was really the Voka's homebase, and that the car was only temporarily in Industry City for periods of time when college was in session.

Insurco would argue that Pop fraudulently listed only Hometown. Insurco would argue that anyone who drives a car knows that insurance rates go up in urban centers and will be lower in rural areas.

Based on the limited facts, Pop will likely prevail on the issue of fraud. Pop may still be on the hook for misrepresentation, however, if the fact at issue was material.

Materiality

A material fact is one that both parties needed to agree on for the contract to be valid--it is a term that cuts to the heart of what the contract is about. Here, the fact of where

both cars were located most likely would be considered a material term. It would be considered a material term because the price of car insurance is affected greatly by where a car is driven. In urban centers the rates may be considerably higher than in rural areas. Accordingly, the fact of where the cars were located likely would be considered material.

Pop may argue it was an innocent mistake that he did not include Industry City in his application. Nonetheless, this is not a defense to mutual misrepresentation of a material fact. It does not matter whether the person who made the statement intended to defraud, it only matters whether they made an untrue statement of material fact.

Pop would further argue that he did not make an untrue statement. His statement that the cars were driven in Hometown was true, although incomplete. Although a party to a contract does not have a duty to disclose facts he is not asked about, he is not allowed to conceal facts or fail to disclose facts he is asked about. Here, Pop was asked in the application where the cars were located. By failing to answer the question completely, it is more likely a court would consider this a misrepresentation or concealment as opposed to a mere failure to disclose. Accordingly, Insurco can likely establish that the location of the cars was material.

Other Elements

In addition, Insurco can likely establish that Pop made a statement that turned out to be false regarding the location of the cars and that Insurco relied on that information when entering into the contract. As discussed above, Pop's intent is not what is at issue, it is only whether his answer turned out to be false. Here, the answer did turn out to be false because the Voka was also driven in Industry City.

Finally, Insurco also relied on the fact when it entered the contract. Insurco's rates were tied to the location of the cars. The fact that Insurco later refused to pay out the claim

based on the location of the cars is evidence that it relied on the fact when entering into the contract.

Based on the above, Insurco can likely make out a claim of misrepresentation of a material fact. Thus, Insurco would be entitled to rescission unless Pop raises a valid defense.

B. Mutual Mistake

Mutual mistake occurs when both parties to a contract made a mistake regarding a material term of the contract on which the contract was based. For a party to successfully assert mutual mistake, that party must not have assumed the risk of the mistake occurring. A classic example of mutual mistake was the case involving the sale of a cow that both parties believed was barren, but that later turned out to be able to have children. In that case the two parties made a contract for the sale of a barren cow. The fact that the cow was barren was a mistake that involved a material issue that the contract was based on. In that case, if the seller could have easily had the cow examined to find out whether it was actually barren, then the seller assumed the risk and would not be able to assert mutual mistake.

Here, Insurco would argue that even if it cannot establish the misrepresentation discussed above, it can establish mutual mistake. The mutual mistake would be the fact of where the cars were driven. It was a mistake from Pop's end because he mistakenly forgot to include the fact that the Voka was driven in Industry City. It was a mistake from Insurco's end because it mistakenly thought the cars were driven only in Hometown even though the Voka was also driven in Industry City.

This argument is weaker than the misrepresentation argument. Here, Insurco's mistake was not really based on the terms in the offer or acceptance, but instead was based on Pop failing to disclose information. Mutual mistake usually applies in situations where a fact in the offer or acceptance turns out to be different than both parties thought. Here,

Pop knew the Voka was driven in Industry City, and Insurco did not know because Pop failed to disclose that information. Accordingly, mutual mistake is not as strong an argument for Insurco as misrepresentation.

C. Unilateral Mistake

Unilateral mistake can serve as a basis for rescission when one party made a mistake in the contract formation that the other party knew or should have known about. The typical example arises when many subcontractors are bidding for a construction contract and one subcontractor's bid is so low that the general contractor should know that the subcontractor made an error in its bid. In such a situation, the subcontractor who made the error can rescind the contract based on unilateral mistake because the general contractor knew or should have known of the mistake. In unilateral mistake, the negligence of the party that made the mistake is not a defense to rescission of the contract.

Here, Insurco would argue that it made a unilateral mistake in issuing the insurance policy under rates applicable only to Hometown. Further, Pop knew or should have known of the error. It appears Pop reviewed the initial policy because he requested an increase in coverage. Accordingly, Pop should have known that there was a mistake in the initial policy based on Insurco's misunderstanding of where the cars were located.

Unilateral mistake is a difficult claim to make out, and Insurco would likely not succeed in this argument. The doctrine would be more applicable if Insurco made a mistake in information it provided to Pop. Here, the real issue is information Pop provided to Insurco. Accordingly, misrepresentation is a stronger basis for Insurco's argument.

D. Ambiguity

If a term in contract formation is ambiguous, such that it is open to multiple interpretations, then one of the parties to the contract can later avoid the contract based

on that ambiguity. The classic example of ambiguity is the case of the Peerless, where one party thought the shipment referred to the November Peerless, and the other party thought the shipment referred to the December Peerless. In that case, because the term Peerless was open to multiple meanings, it was considered ambiguous, and the party was able to avoid the contract as a result. However, if one party knows that the ambiguous term could refer to multiple interpretations, then that party is charged with knowledge and the unknowing party can enforce the contract based on what it believed the ambiguous term to mean.

Here, Insurco would argue that the term regarding where the cars were driven was ambiguous. The term was ambiguous because Pop understood the term to refer only to where the cars were located much of the time, whereas Insurco believed the term to refer to where the cars were located all of the time. Under such an argument, Insurco would claim that because Pop had reason to know that the Voka was driven in Industry City as well, Pop was the party with knowledge, and the contract should be construed against Pop to Insurco's benefit.

This argument is also a difficult one. Usually ambiguous terms refer to the word itself. Here, the word "Hometown" was not ambiguous. What was ambiguous was the question on the application of where the cars were located. If Insurco can establish that the question was ambiguous to the point it led to miscommunication, then it may be able to succeed in its argument. Still, the stronger claim for Insurco is misrepresentation.

E. Defenses

Rescission is an equitable remedy, so equitable defenses apply. The defenses of unclean hands and laches are the most common. Unclean hands refers to the plaintiff taking inequitable actions regarding the contract itself. Laches refers to an unreasonable delay in bringing a claim that prejudices the defendant.

Laches

Here, Pop would argue that the claim for rescission is barred by laches. After the accident, Insurco agreed to pay out the \$250,000. Only six months later, did Insurco inform Pop it would not pay the claim at all. Pop would argue the six month delay was unreasonable. After the accident occurred, Insurco had all the information it needed to make its decision about paying the claim. If Insurco intended not to pay out the claim, it should have made that clear right away after the accident. By waiting six months, Pop and Sally were prejudiced by the delay. They likely incurred many costs associated with the accident, and were depending on the insurance payout to be able to cover those costs.

Insurco would counter that it was unable to ascertain the fact that the Voka was located in Industry City until doing in-depth investigation. The facts do not state how Insurco ultimately learned the Voka had been located in Industry City. If it is true that that information was difficult to find out, then Insurco has a good argument for the delay. If, however, it was easily ascertainable that the car was located in Industry City, Insurco's argument is weaker.

Because rescission is an extreme remedy here given the damage in the accident and also given that the most Insurco is willing to pay out is only \$250,000 and not \$500,000, the court would likely not find rescission to be the appropriate remedy.

2. POP'S CROSS-COMPLAINT

Pop's cross-complaint asserts a claim to reform the contract to allow for the full \$500,000 in coverage. For reformation to be available, there must be a valid contract, grounds for reformation, and no valid defense. Reformation is typically ordered in situations where both parties agreed to certain terms of the contract, and those terms did not end up in the finalized contract due to an error such as a scrivener's error.

Here, Pop will argue that he and Insurco made a valid contract modification to increase the coverage of the insurance policy from \$100,000 to \$500,000. For a contract modification to be valid, there must be consideration for the modification. Here, there was \$150 in consideration paid, and as a result, both Pop and Insurco agreed that the coverage would be increased to \$500,000. Here, Pop paid the additional \$150, and at that point the agreement was complete and the modification should have been for coverage of \$500,000.

Pop will further argue that even though there was a valid modification, the increase was only to \$250,000. Pop will claim this must have been due to a scrivener's error or some other error, because the agreement he had made with Insurco before receiving the amended policy was clear.

Based on the facts, Pop has a strong argument for reformation of the contract because it appears that the clear intent of the parties was to modify the contract for \$500,000 coverage, and Pop complied with his end of the bargain by paying the \$150.

Defenses

Lack of Initial Contract

Insurco can argue that reformation is not permitted because there was never a valid contract in the first place. For reformation to be a possible remedy, there first must have been a valid contract. Insurco would assert the same arguments discussed above regarding contract formation (i.e., mistake, misrepresentation, ambiguity) to argue there never was a valid contract in the first place, and therefore reformation is not allowed.

Parol Evidence

Insurco would also argue that the oral agreement between Pop and Insurco regarding the increase in coverage is inadmissible under the parol evidence rule. Under the parol

evidence rule, if there is a final, fully integrated contract, then any communications regarding the contract terms that contradict or supplement the contract either before or contemporaneous with the contract being finalized are inadmissible.

Here, Insurco would argue that the amended policy was a final integration of the contract, and that any evidence of what happened leading up to the amendment is inadmissible parol evidence.

Pop would counter that because the agreement served as the basis for the contract itself, it would not be considered parol evidence, but rather was the basis for the entire modification. Based on the facts, however, it appears the amended policy was a final integrated contract. Accordingly, Pop's arguments would likely fail.

Unclean Hands

Finally, Insurco could assert a defense of unclean hands. Insurco would argue that Pop intentionally misled Insurco into believing the two cars were located solely in Hometown, when in reality the Voka was located in Industry City. Insurco would make similar arguments as discussed above in its claim for rescission. Ultimately Pop would probably prevail on this argument, because there is no evidence he acted in bad faith.

Conclusion

The court would probably not grant Pop's claim for reformation of the contract because of the parol evidence rule. However, they could probably also not grant Insurco's claim for rescission. Acting in equity, the court would most likely find that the contract for \$250,000 of coverage controlled.



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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2017

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2017 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

<u>Question Number</u>	<u>Subject</u>
1.	Wills
2.	Remedies / Torts
3.	Evidence
4.	Business Associations
5.	Professional Responsibility
6.	Criminal Law and Procedure

QUESTION 2

Steve agreed to convey his condominium to Betty for \$200,000 in a written contract signed by both parties. During negotiations, Steve told Betty that, although there was no deeded parking along with the unit, he was allowed to park his car on an adjacent lot for \$50 a month. Steve stated that he had no reason to believe that Betty would not be able to continue that arrangement. Parking was important to Betty because the condominium was located in a congested urban area.

On June 1, the conveyance took place: Betty paid Steve \$200,000, Steve deeded the condominium to Betty, and Betty moved. She immediately had the entire unit painted, replaced some windows, and added a deck. The improvements cost \$20,000 in all. She also spent \$2,000 to remove the only bathtub in the condominium and to replace it with a shower, leaving the condominium with two showers and no bathtub.

On August 1, Betty discovered that the owner of the adjacent parking lot was about to construct an office building on it and was going to discontinue renting parking spaces. She also learned that Steve had known about these plans before the sale. She quickly investigated other options and discovered that she could rent parking a block away for \$100 a month. At the same time, she also found that, immediately before Steve had bought the condominium, the previous owner had been murdered on the premises. Steve had failed to tell Betty about the incident.

Betty has tried to sell the condominium but has been unable to obtain offers of more than \$160,000, partly due to the disclosure of the murder and the lack of a parking space. Betty has sued Steve for fraud.

What is the likely outcome of Betty's lawsuit and what remedies can she reasonably seek? Discuss.

QUESTION 2: SELECTED ANSWER A

Steve's Breach in Respect of the Parking Space

The issue is whether Steve misrepresented to Betty the facts relating to the parking space in a way that would give cause to a right of action.

A misrepresentation is a (i) statement of fact, (ii) that is false, and (iii) either material or the known to the declarant to be untrue, and (iv) which induces a person to act to their detriment in reliance on the representation.

Steve made a clear statement of fact when he said there was an existing parking space available for rent at \$50 a month and he had no reason to believe that the arrangement would not be continued. This fact is clearly false since the construction of an office building means that the parking arrangement will be discontinued.

Steve told Betty that he saw no reason she could not continue to park her car subject to the pre-existing arrangement (payment of a \$50 a month fee). Parking was important to Betty given the nature of the area (a congested urban area) - a fact that Steve should have been aware of, having lived in the area himself. Betty will argue that this was a material fact of importance in her decision to enter into the condo sale. Steve will argue the opposite, that parking is ancillary to the property purchase and therefore lacks the materiality required for misrepresentation. As Betty later discovered, Steve knew about the plans to discontinue renting parking spaces before the sale occurred, therefore even if the statement is not considered material it will satisfy the requirement of knowledge that it was untrue.

Given the importance of parking to Betty, she will argue that the fact there was a parking arrangement in place was central to her decision to purchase the condo and she therefore acted in reliance on the statement. Again, Steve will try to argue that the parking is ancillary to the condo, it was not part of the deeded property and does not

sufficiently constitute reliance as there must have been many other factors that induced Betty to purchase the condo such as price, size and location.

Given that parking is something Betty probably does on a daily basis, the existence of adequate parking arrangements is likely to be viewed by the courts as sufficient motivation for reliance. Therefore Steve's statement is indeed likely to be viewed as a fraudulent misrepresentation.

Failure to Disclose the Murder

The issue is whether Steve was under a duty to disclose that a murder had previously occurred in the condo.

At common law, the seller of property had no duties of disclosure to the buyer, under the doctrine of caveat emptor. The buyer was entitled to inspect the property prior to purchase and had the obligation to discover any defects for herself. The modern trend is to impose on sellers a duty to disclose material defects of which the buyer was not aware and could not easily discover on inspection. Liability for failure to do so arises under the principles of concealment and fraud.

The fact that a murder had taken place in the condo itself is a fact very likely to affect the marketability of the condo. Indeed Betty found the value had dropped significantly once she disclosed this fact to potential new buyers. Betty will argue that Steve had a duty to actively disclose this information to her and his failure to do so constituted fraud. Steve, on the other hand, will argue that he made no representation about the murder and never stated that a murder had not happened and therefore cannot be found liable for fraud because he did not do or say anything dishonest.

The courts will likely find that Steve did have a duty to disclose this information to Betty, as it is a material fact concerning the property that will have an adverse effect on its value. Steve's failure to disclose will amount to concealment and consequently Betty should have a strong course of action against Steve for fraud.

Appropriate Remedies

Where there is fraud in the inducement of a contract, the contract becomes voidable and entitles the innocent party to treat the contract as void and seek remedies accordingly.

The appropriate remedies for Betty will depend on whether she wishes to stay in the condo, but make good her financial loss, or whether she wishes to force a sale of the property and move out.

Money Damages

If Betty decides to stay in the condo the most appropriate course of action will be to affirm the contract and seek money damages. The various money damages rules are all aimed at compensating for loss of expectation, where the expectation was simply no breach. Expectation damages will be used to put the plaintiff in the position she would have been in had the contract been as expected. In order to claim damages, the claimant must show that (i) the defendant's actions were the cause of the loss, (ii) the loss was reasonably foreseeable at the time the contract was entered into, (iii) the loss is certain and not too speculative, and (iv) it was unavoidable (meaning the claimant has taken all steps available to reduce her loss).

For the Parking Space - With respect to the parking, Betty's expectation was that she would have a place to park her car for \$50 a month. Steve's misrepresentation is the clear cause of this loss and it was reasonably foreseeable at the time that if Steve's statement about the parking was false, Betty would suffer damage by either having no parking or potentially having to pay more for it. Betty has taken appropriate steps to find an alternative parking space and thereby mitigate her loss. But the parking space will be twice the cost of what she was expecting. This loss is certain in monetary terms (a clear \$50 per month). Therefore Betty should have a successful claim against Steve for monetary damages to make good the loss of the parking place.

Judgment for money damages is normally made in one lump sum payment, discounted to today's value without taking account of inflation. However, the modern trend of some courts is to allow for inflation.

For the Loss in Value Due to the Murder - The courts will apply the same test to ascertain damages in respect of the drop in the condo's value due to the murder.

As before, the causal link is clear - Steve's failure to disclose the murder resulted in Betty paying an inflated price for the condo; this was foreseeable at the time, since it is clear to reasonable people that such a fact would necessarily result in the property being less marketable. Betty has attempted to sell the house but has been unable to do so for more than \$160,000; therefore the measure of expectation damages will be \$40,000. However, Betty has also spent \$22,000 on making improvements to the condo and she will argue that they have raised the value of the condo and she should therefore be able to recover for these too under the consequential damages rule. Consequential damages may be sought in order to compensate the claimant for losses over and above expectation damages that were foreseeable.

Steve will argue that removing the only bathtub in the condo has in fact depreciated the property and that the drop in value is more due to this than the disclosure of the murder.

Rescission

Rescission is an equitable remedy that the courts may use in their discretion when there is no available legal remedy. Rescission would allow Betty to treat the contract as void, the condo would be returned to Steve and her purchase money would be returned to her.

If Betty decides she no longer wants to live in the condo, this would be a more appropriate remedy. Since land is always considered unique, Betty may argue that the legal remedy of damages is not appropriate and she should be entitled to avoid the contract altogether.

In addition to obtaining back her purchase money, Betty could seek reliance damages for the amounts spent on improving the property. Reliance damages seek to put the claimant in the position she would have been in had she never entered into the contract.

This would allow Betty to recover the \$22,000 spent on improvements.

QUESTION 2: SELECTED ANSWER B

Valid Contract:

Governing Law:

The UCC governs contracts for the sales of goods. The common law governs contracts for services, the sale of land, and all others not under the UCC.

Here, the contract was for the sale of a condominium (condo) which is real property; thus the Common Law applies.

Contract formalities:

A valid contract requires: 1) offer, 2) acceptance, and 3) consideration. Further, a land sale contract must be in writing to satisfy the statute of frauds (SOF).

Here, there is a written contract by both parties relating to the sale of the condo, thus this satisfies the SOF. Steve agreed to sell Betty his condo for \$200,000. Thus, this was a valid offer. On June 1, the conveyance took place. Steve deeded the condo to Betty; she paid the \$200,000 and moved in. Thus, Betty accepted.

Thus, the parties had a valid contract.

Breach of Contract:

A breach of contract occurs when one of the parties fails to perform on the contract. With land sale contracts, once the conveyance is made, it extinguishes the contract and the parties can only sue on the deed and based on which future covenants were granted in the deed (further assurances, quiet enjoyment, or warranty).

Here, the conveyance had already occurred; thus the deed will control and Betty will not be able to sue for breach of contract relating to the land sale. However, a party can

nonetheless sue based on fraud if there was an intentional failure to disclose. If Betty can establish that there was fraud, she would be entitled to sue on a fraud theory.

Fraud:

Fraud requires 1) a misrepresentation, 2) of material fact, 3) known to induce reliance, 4) actual reliance, and 5) damages.

Parking:

On August 1, Betty discovered that the owner of the adjacent parking lot was about to construct an office building on it and would discontinue renting parking spaces and Steve knew about these plans. Here, there was a misrepresentation because during negotiations Steve told Betty that although there was no deeded parking, she would be allowed to park on an adjacent lot for \$50 per month just as he had. Meanwhile he knew about the building owner's plans that Betty would not be able to park in that lot. Thus, there was a misrepresentation.

This was a material fact because parking was important to Betty because the condo was located in a congested urban area. The materiality is further evidenced by the fact that she is having a hard time reselling the condo because of the parking.

Further, Steve knew this misrepresentation would induce reliance because he told Betty that he had no reason to believe that Betty would not be able to continue that arrangement. This shows that he knew that Betty would rely on this fact in deciding to continue with the purchase.

The next element is met because Betty actually relied on the misrepresentation because she decided to continue with the purchase of the condo and she did not know about the lack of parking until after the sale had been completed.

Betty's damages are established because she will lose lost the ability to park in the

nearby lot.

Thus, there was a misrepresentation as to the parking.

Murder:

A misrepresentation does not have to be a lie, but can be an omission as well, if the seller knew of the defect and failed to inform the buyer of the defect.

Here, Betty learned in August, some two months after the purchase, that the previous owner had been murdered on the premises, and Steve failed to disclose to Betty about the incident. Steve knew about the murder but failed to disclose it to Betty. Such a failure to disclose would amount to a misrepresentation based on omission. Here, he knew that this was a material fact because a prospective buyer would want to know if a person had been murdered on the premises. Further, the failure to disclose such a horrible fact would result in an innocent buyer to rely on the fact that no such murders had occurred on the premises. He knew that if he disclosed the murder, Betty would back out of the deal. Further, Betty relied on the fact that there had been no murders in the condo when she decided to proceed with the sale. Had she been informed about the murder, she could have had the opportunity to decide if she nonetheless wanted to continue with the purchase. Lastly, Betty has suffered damages because she cannot sell the house for more than \$160,000, partly because she has to disclose the murder to prospective buyers.

Thus, there was a misrepresentation about the murder.

In conclusion, because Steve engaged in fraud for the misrepresentation of the parking situation and the murder, Betty will be successful in her suit against Steve.

Rescission:

A contract can be rescinded based on a mutual mistake or fraud.

Here, Betty will seek that the contract be rescinded because she can successfully assert her claim for fraud against Steve, as established above.

Reliance:

Reliance damages can be obtained to avoid any unjust enrichment on the part of the defendant. Reliance seeks to put the non-breaching party in the position as if there had been no contract.

Here, Betty was excited to own her own condo. In anticipation of living in the condo for a long period of time, she decided to make improvements to it. Betty immediately had the entire unit repainted, replaced windows and added a deck. The total value of improvements cost \$20,000. She also spent \$2,000 to remove the only bathtub and replace it with a shower. Betty made such improvements because she had relied on the fact that there were no defects with the property. It would be unfair to rescind the contract and return the condo to Steve with \$22,000 worth of improvements. Thus, Betty should be able to receive reimbursement for the \$22,000 she expended on improvements to the condo.

Expectation:

Expectation damages seek to put the non-breaching party in the same position as if no breach had occurred.

Betty will seek expectation damages to put her in the same position as if she had never purchased the condo. When she purchased the condo she expected to live in a unit with nearby parking and no previous murder. But due to Steve's fraudulent misrepresentations, Betty will not be able to do so. As a result, Betty should be compensated as if no contract had occurred.

Betty has tried to sell the condo, but is unable to get offers of more than \$160,000 because of the disclosure of the murder and the lack of parking. If Betty sells the condo for \$160,000, Steve will be required to pay her for the difference in the original sale

price (\$200,000) and the sale price of the condo. Assuming she can get \$160,000 for it, Steve will be required to pay Betty \$40,000.

Thus, Betty is entitled to \$40,000 in expectation damages.

Incidental:

Incidental damages are those damages that the non-breaching party incurs as a result of the breach.

Here, Betty will be entitled to any funds expended in the attempt to sell the condo, such as brokerage fees and listing fees. Further, she should be able to recover the difference of the \$50 to park in the current parking lot and the \$100 to park in the other lot, until the condo sells.

Punitive Damages:

Punitive damages seek to punish the defendant for willful and wanton misconduct. Generally, punitive damages are not awarded for breach of contract actions. However, a plaintiff may recover punitive damages if there is an underlying tort.

Here, Betty's underlying theory for suit against Steve is for fraud, and fraud is a tort. The court may be compelled to grant Betty punitive damages to punish Steve for his fraudulent actions, and to teach him a lesson.

Thus, Betty may be able to recover for punitive damages.

Limitations on Damages:

Damages must be causal, certain, foreseeable and mitigated.

Here, Betty's damages are caused by Steve's fraud. Her damages are certain because we can place an exact dollar figure on her damages. Her damages are foreseeable

because it was foreseeable that she would have to obtain parking at another parking lot which could cost more money. It was also foreseeable that when she discovered the murder in the condo, she would not want to live there, thus motivating her to move out and sell the property. Lastly, damages must be mitigated. This means that Betty must make a good-faith attempt to sell the condo for a reasonable sum of money and within a reasonable time. Further, until she sells the property she will be

Steve's Defenses:

Parol Evidence Rule:

The Parol evidence rule (PER) seeks to prohibit prior oral negotiations of a contract because the parties intended to put their final expression in the writing itself.

During negotiations Steve told Betty that there was no deeded parking but she would be allowed to park on an adjacent lot for \$50 per month, just as he had. Steve will argue that because such communications were oral and prior to the final contract, that the court should exclude them. This defense will fail because his actions constituted fraud, and the contract had already been performed.

Laches:

Laches seeks to bar a plaintiff's recovery if they wait too long to assert a claim and such delay of time causes an undue prejudice to the defendant.

Here, the sale occurred in June and Betty is suing in August. Thus, this was only a three month period and not an unreasonable delay.

Unclean Hands:

The court of equity will not aid suitors who come to the court with unclean hands.

Here, Betty did not engage in any misconduct. Rather, she was an innocent purchaser. Thus, this defense too will fail.



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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2017

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the July 2017 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

<u>Question Number</u>	<u>Subject</u>
1.	Community Property
2.	Professional Responsibility / Evidence
3.	Remedies
4.	Civil Procedure
5.	Torts

QUESTION 3

Rick Retailer owns all pieces but the queen of a chess set carved by Anituck, a famous artist who carved 15 chess sets. No one today owns a complete Anituck chess set.

Six existing Anituck queens are owned by collectors. The last one was sold in 1983 for \$175,000. The current owners have refused to sell their queens to anyone.

If Rick could exhibit a complete Anituck chess set, he would draw people worldwide who would buy memorabilia with pictures of the full chess set and other products. It is impossible to know exactly how much Rick would make, but a complete Anituck chess set could be worth in excess of \$1 million.

Last week, Sam Seller brought to Rick an Anituck queen he found in his attic and asked if it was worth anything. Rick asked what Sam wanted for the queen. Sam asked whether \$450 would be fair. Rick replied that \$450 would be fair and offered to write a check immediately. Rick and Sam entered into a valid contract. Sam agreed to hand over the queen the next day.

The next day, Sam called Rick and said, "I learned that you defraud people out of expensive antiques all the time and that the queen is worth thousands of dollars. I am going to sell the queen to another collector."

Rick has sued Sam for specific performance for breach of contract, and has sought a temporary restraining order and a preliminary injunction.

What is the likelihood that Rick will obtain:

1. A temporary restraining order? Discuss.
2. A preliminary injunction? Discuss.
3. Specific performance? Discuss.

QUESTION 3: SELECTED ANSWER A

(1) TEMPORARY RESTRAINING ORDER

The issue is whether or not Rick will likely be successful in obtaining a temporary restraining order.

TEMPORARY RESTRAINING ORDER

A temporary restraining order (TRO) is an order granted in equity that preserves the status quo until a preliminary hearing on the matter can be heard. They are generally granted in emergency situations. For a TRO to be granted, the party seeking the TRO must show: (1) **irreparable harm** will occur in the absence of awarding the TRO; (2) **balance of hardships** favors granting the TRO; and (3) the party seeking the TRO is **likely to prevail on the merits**. While a TRO may be granted ex parte (without opposing counsel's presence), courts will generally require a strong showing of a good-faith effort to notify the opposing party or a strong showing of why notice could not be effectuated. TRO's are awarded for a short duration, typically 10-14 days, depending on the jurisdiction. Some courts also require a showing that damages are inadequate.

Here, Rick is seeking a temporary restraining order in order to prevent Sam from selling the Anituck queen to another collector. We do not know when Sam will find a collector or when the sale will be executed. Rick will likely be excused from providing **notice** of the TRO to Sam because Sam, agitated, may decide to expedite the sale to another collector. If the jurisdiction requires a showing that **damages are inadequate**, Rick will be successful because the chess piece is unique (there are only 15 chess sets made, 6 possessed by collectors who are refusing to sell). Moreover, as discussed further below, Rick's damages are speculative with respect to how much he would make if he had the complete chess set. Thus, the notice and inadequate damage elements are satisfied)

In all jurisdictions, in order to be successful, Rick must satisfy the elements:

(1) **Irreparable Harm:** irreparable harm may occur because it is possible that Sam will sell the queen to another collector before the preliminary hearings. If Sam sells the queen to another collector, Rick will suffer irreparable harm because there are only 15 pieces made in the entire world, 6 owned by collectors and all other current owners have refused to sell their queens. Thus, this factor leans in favor of a finding that Rick will suffer irreparable harm.

(2) **Balance of Hardships:** The balance of hardships must favor granting a TRO, which means that the party seeking the TRO will be substantially harmed if the TRO is not granted during the period before a hearing can be had. Rick will argue that the balance of hardships favors approving the TRO. If Sam does not go through with the sale, Rick will be prevented from obtaining another queen piece. Because Sam does not currently have an expiring offer from another collector, the court will likely find that the balance of hardships favors granting Rick a TRO until a full hearing on the merits can be had.

(3) **Likely to Prevail on the Merits:** While it is true that Rick will likely not be successful in being awarded specific performance (see below), the court does not analyze the parties defenses when granting a TRO. On its face, there appears to be a valid contract and Sam is repudiating on the contract: Rick offered to buy and Sam agreed to sell the chess piece for \$450. Thus, it appears that Rick will likely prevail on his action for specific performance. At the later hearing, the court will consider defenses and other equitable remedies. Thus, the court will likely find that Rick will prevail on the merits.

CONCLUSION

Because the court does not consider defenses in granting a TRO, the court will likely grant Rick a TRO to restrain Sam from selling the piece until a hearing could be had on

the matter. If Sam fails to comply with the courts order, he will be held in contempt.

(2) PRELIMINARY INJUNCTION

The issue is whether or not Rick will likely be successful in obtaining a preliminary injunction.

PRELIMINARY INJUNCTION

Similar to a TRO, a preliminary injunction is an injunction issued to preserve the status quo until a full hearing on the merits can be had granted by equity courts. In addition to the elements of the TRO (irreparable injury, balance of hardships, likelihood to prevail on the merits, and in some jurisdictions, inadequate legal remedies), in order for a preliminary injunction to be granted, the opposing party must have notice and an opportunity to be heard at the hearing and no defenses may apply. Additionally, the court may require the plaintiff (here, Rick) to post a bond in case Rick is ultimately not successful in his claim for specific performance.

(1) **Irreparable Harm.** See above.

(2) **Balance of Hardships.** See above.

(3) **Likelihood of Prevailing on the Merits.** See above.

(4) **Inadequate legal remedy.** See above.

(5) **Notice.** Rick must give notice to Sam and give Sam an opportunity to be heard at the hearing for the preliminary injunction. At that point, Sam will be able to raise all of his defenses (see below). If Rick fails to give Sam notice, then the court will deny Rick's preliminary injunction.

(6) **Bond.** The court may require Rick to post a bond to cover any losses to Sam in the event Rick ultimately loses the claim for specific performance. Courts are more relaxed on this requirement if the plaintiff is indigent. There are no facts with respect to Rick's current earnings, thus it is not possible to ascertain whether the court will excuse Rick from the bond requirement.

(7) **No Defenses.** In order for the court to grant a preliminary injunction, there must not be any viable defenses raised by the defendant. Here, Sam will likely be successful in defending against the grant of the permanent injunction by claiming **unclean hands**.

Unclean Hands: Unclean hands is an equitable defense. Under this defense, a plaintiff who acted unfairly with respect to the current action will be barred from recovery because they too have "unclean hands." Here, Sam will likely successfully argue that Rick materially misrepresented the value of the chess piece. The last chess piece to be sold was for \$175,000 and Rick knew this. Thus, it would be inequitable for him to buy the piece for \$450, knowing the true value of the piece, and representing to Sam that \$450 is a fair price. Rick will argue that he did not know the true value of the goods. However, this argument will likely fail because Rick understood and appreciated the value of the full set (\$1,000,000) and how much money he could make selling memorabilia pictures of the full chess set and other products. Because injunctions are granted in equity, it will be unfair to allow Rick to recover when he was not acting fairly. Thus, the court will likely find the defense of unclean hands applies.

Laches: Laches is another equitable remedy in which case the plaintiff's unreasonable delay in bringing a claim caused substantial prejudice to the defendant. Here, Rick is seeking the preliminary injunction immediately after learning that Sam is repudiating on the contract and thus the laches defense does not apply.

Misrepresentation. See below in damages section.

CONCLUSION

The court will likely not grant the preliminary injunction because Sam will likely successfully raise an unclean hands defense.

(3) SPECIFIC PERFORMANCE

In order for Rick to be entitled to specific performance, there must be a breach of contract.

GOVERNING LAW

The UCC governs contracts for the sales of goods, which are tangible, moveable things. Common law governs all other contracts, including service and real estate contracts. Here, because the queen set is a good (tangible, moveable thing), the **governing law** is the UCC.

ANTICIPATORY REPUDIATION

Under the UCC, if a party unequivocally expresses their intent to not perform their obligation under the contract, the party has anticipatorily repudiated, which entitles the other party to stop performance and sue immediately. Here, under the terms of their contract (which was valid, see below), Sam was obligated to sell Rick the chess piece for \$450. Sam called Rick and told him that he was going to sell the queen to another collector. Because Sam only had one queen piece, this expression evidences Sam's refusal to perform.

Accordingly, Rick is entitled to stop performance and sue Sam for damages or for specific performance.

SPECIFIC PERFORMANCE

The issue is whether or not Rick will likely be successful in obtaining specific performance.

In contracts, specific performance is a remedy in which the court orders the defendant to perform his obligations under the contract. This is usually available only for unique goods and for real estate transactions. In order for the court to grant specific performance, the following elements must be met: (1) valid contract with clear and definite terms; (2) inadequate legal remedy; (3) feasibility of enforcement; (4) mutuality of performance; and (5) no defenses.

VALID CONTRACT

In order for the court to order specific performance, there must be a valid contract with definite and certain terms. To be valid, a contract must have assent (offer and acceptance) and be supported by consideration. Here, because the queen set is a good (tangible, moveable thing), the **governing law** is the UCC. Under UCC principles, there was a valid contract formed, at least on its face: there was an offer (offer to buy the chess piece by Rick); there was acceptance (Sam agreed to sell the chess piece), and there was consideration (\$450 in exchange for the good).

Additionally, because the contract price was for \$450, evidence of the oral agreement did not need to be in writing because the Statute of Frauds does not apply.

Moreover, the facts state that the contract was valid. Thus, this element is satisfied.

However, as discussed below, Sam will likely be successful in raising defenses to the contract formation, including misrepresentation and unilateral mistake.

INADEQUATE LEGAL REMEDY

Money damages must be inadequate in order for a court to grant specific performance. Here, Rick will likely be successful in satisfying this element because the queen set is unique -- there are only 15 sets made and the current owners are refusing to sell their queens to anyone. Moreover, money damages are speculative. Rick does not know how much he would make if he has the full chess set -- he believes that people all over the world would come to him to take memorabilia pictures and purchase other products. He also speculates that the value of the entire chess set would be about \$1,000,000. However, these calculations are entirely speculative. Because the goods are unique, the UCC will allow specific performance.

FEASIBILITY

This element refers to whether or not a court can enforce the specific performance. This is usually not a problem in situations where the court is ordering the defendant not to do something (negative) because of the court's power of contempt. Ordering behavior may be more difficult if the defendant is in another jurisdiction and there are oversight issues. Here, that doesn't seem to be the case. The court can order Sam to perform his contract obligations (sell the queen to Rick for \$450), and if he fails to do so, the court can hold him in contempt.

MUTUALITY OF PERFORMANCE

Mutuality of performance requires each party to the contract to be willing and able to perform their obligations. Here, this element will be satisfied because Rick has the \$450 to pay for the chess piece, and Sam still has the chess piece in his possession.

DEFENSES

Both equitable and legal defenses are available because specific performance is an

equitable remedy, but because it requires the existence of a valid contract, contract defenses also apply.

Misrepresentation. Misrepresentation is a defense in which case the party seeks to either rescind the contract or argue that the contract never existed because there was no meeting of the minds. Misrepresentation applies where a party (1) makes a misrepresentation; (2) about a material fact; (3) with the intent to induce reliance; and (4) the other party actually and justifiably relied. Here, Sam will likely be successful in invalidating the contract on this ground. Rick misrepresented the true and fair value of the chess piece, telling Sam that the offering price was fair. However, chess pieces are worth thousands of dollars. The material fact element is satisfied because the price is a fact of the basis of the bargain--the selling price. Rick intended to induce Sam's reliance into believing it was worth only \$450 so that Sam would sell it to him for that price. Sam did enter into a contract on that basic assumption, and thus the elements are satisfied. Thus, Sam will likely be successful in defending this contract.

Unilateral Mistake. Unilateral mistake is generally not a defense to a contract. A mistake exists where the party is mistaken about a material fact that is a basic assumption of the contract. If the non-mistaken party knew or should have known that the other party was mistaken, the court will allow the contract to be rescinded. If the other party knew the other was mistaken, then the court will allow the contract be reformed to reflect the intention of the mistaken party. Here, Rick will argue that the court should not prejudice Rick just because Sam failed to do his research and learn the true value of the chess piece. This argument will likely fail because, as previously indicated, Rick knew, or at least should have known, of the true value of the chess piece and that Sam was mistaken. Here, Sam asked Rick if the asking price (\$450) was fair... demonstrating his reliance on Rick's response. Thus he was mistaken.

Unclean Hands. See above.

Laches. Will not apply (see above).

CONCLUSION

The court will likely not grant Rick specific performance.

QUESTION 3: SELECTED ANSWER B

1. Temporary Restraining Order ("TRO")

A TRO is a temporary injunction ordered by the court to maintain the status quo until a hearing for a preliminary injunction, and then ultimately a hearing and trial on the merits, can be heard. A TRO lasts no longer than necessary to have the hearing on the preliminary injunction and should not last longer than 14 days. In order to get a TRO, a plaintiff must show they will suffer irreparable harm in the amount of time it takes to wait for a preliminary injunction hearing and that they are likely to succeed on the merits of their case. Typically, the plaintiff must give defendant notice of the TRO and there should be a hearing, unless the plaintiff can show that he tried to notify defendant and failed, or notifying defendant may lead to the irreparable harm. In such case, a TRO hearing may be done ex parte. Here, there are no clear facts showing Rick attempting to notify Sam about a TRO hearing, but he may argue it would be counterproductive because Sam may sell the queen after being served notice of a hearing.

Irreparable Harm

Here, Rick is likely to suffer irreparable harm unless the court grants the TRO preventing Sam from selling the Queen. A TRO is necessary because Sam could likely sell the valuable queen in the amount of time it would take to wait for a preliminary hearing, and if he did so, Rick would be unable to retrieve the queen and unable to replace it because of how rare the Anituck queen piece is. The harm would be irreparable since there are only six existing Anituck queens and the last one was sold 20 plus years ago. Therefore, Rick can likely establish irreparable harm requirement for a TRO.

Likely to Succeed on the Merits

Rick must show/demonstrate a probability that he will be successful on the merits. Here, there was a contract to sell the queen piece between the parties, and the facts state there was a valid contract. Although Sam has many defenses, he can ultimately raise on the merits as to the validity of that contract, the showing of an agreement to enter the contract is likely sufficient to establish the likelihood of success for a TRO.

Balancing of Hardships and Placing of Bond

The court will also balance the hardships in determining whether to grant a TRO. The court will balance the hardship to the plaintiff (extent of the irreparable harm) without the TRO and the hardship to the defendant should the TRO be ordered. Here, the hardships clearly weigh in favor of Rick. Should the court deny the TRO, Sam may sell the queen. The last time a queen was for sale was 1983 and there may not be another opportunity to buy one for years. Moreover, the potential losses if this occurs are monumental, as the completion of the set with the queen could be worth millions to Rick. Meanwhile, the delay in selling the piece in the event that Rick loses on the merits is of very little effect on Sam. He will still possess the queen piece and be able to sell at just a high price. Therefore, the court should grant the TRO preventing Sam from selling the queen piece.

The court should, however, require Rick to post a bond to insure against any injuries that Sam may suffer in the amount of time it takes to have a preliminary hearing should Sam be wrong and lose on the merits.

2. Preliminary Injunction

The process and requirements for a preliminary injunction are almost identical to the requirements for a TRO. The preliminary injunction preserves the status quo for the time it takes to hear the case on its merits in trial. A preliminary hearing may never be

done ex parte, and so defendant must be given notice of the hearing. Like a TRO a plaintiff must show irreparable harm and likelihood of success on the merits. Here, for the reasons stated above, the court should grant Rick's request for a preliminary injunction preventing Sam from selling the rare Anituck queen until after a trial on the merits. Again, the court may require Rick to post a bond to cover any potential injuries Sam may suffer from a result of having to wait to sell until after the trial should Rick lose.

3. Specific Performance

Governing Law

The UCC governs all contracts for the sale of goods. Here, the contract is for the sale of a queen piece of a chess set, which is a movable, tangible thing, and therefore goods. Therefore, the UCC governs.

Specific Performance

Specific performance is an equitable remedy in which the court compels a party to a contract to perform his duties under the contract as he promised. A court will grant specific performance when (i) there is a valid, enforceable contract with certain and definite terms (ii) the plaintiff has already performed or is ready, willing and able to perform his duties under the contract, (iii) legal remedies are inadequate, (iv) enforcement of the contract by the court is feasible (v) and the defendant has no defenses to the contract.

(i) Valid, Enforceable Contract with Certain and Definite Terms

A court will not enforce a contract unless there is a valid contract and certain and definite terms so the court knows what to enforce. Here, the facts state Rick and Sam entered a valid contract. Moreover, the terms are certain and definite, the sale of the

queen in exchange for \$450. Although it is not clear if there was a writing, the statute of frauds does not apply here because the contract is for the sale of goods for less than \$500 since the price was set at \$450.

(ii) Plaintiff is Ready to Perform

To receive specific performance, the plaintiff seeking performance must have been ready to perform himself. Here, Rick offered to write Sam a check immediately, thus indicating he was willing to perform his side of the contract.

(iii) Inadequate Legal Remedies

In order to receive specific performance, the plaintiff must show that legal remedies, typically damages, are inadequate. In the case of contracts for property, legal remedies may be inadequate if the property is rare or unique. Here, the chess piece is nearly a one of a kind. There are only six in the world and rarely do they become available for sale. Therefore, damages are inadequate because Rick could not use money to cover by going out and buying the queen somewhere else. Therefore, legal remedies are inadequate.

(iv) Enforcement is Feasible

A court will only grant specific performance if enforcement of the contract is feasible. The court enforces orders of specific performance through its contempt power, so the court must have jurisdiction over either the property or the person. Here, so long as Sam and Rick are before the court, there should be no issues of feasibility of enforcement. If Rick wins, the court will simply order Sam to perform under the contract and sell the queen piece to Rick or else be held in contempt of court, subjecting himself to civil and potentially criminal penalties. Therefore, the specific performance is feasibly enforced by the court.

(v) Defenses

The court will not grant specific performance if the defendant has a viable defense. Since specific performance is an equitable remedy, equitable defenses are available to the defendant. Here, Sam has multiple defenses he may raise against Sam to prevent specific performance.

Misrepresentation

A misrepresentation occurs when one party makes a false statement intended or reasonably known to induce action by the other party and the other party justifiably relies on that statement to his detriment. Here, Sam asked Rick if \$450 was a fair price. Sam replied to Rick that \$450 would be a fair price, even though he knew this was false. He also knew that Sam was likely to rely on this false statement because he had asked Rick if it was a fair price and clearly did not know for himself. Also, Rick clearly intended his response that it was fair to induce Sam to sell at that price. Sam may not have been justified in depending on Rick without seeking his own valuation, especially considering what Sam later learned about Rick's practice of swindling people. However, the court would likely find that Sam did in fact rely on the false statement by Rick, and that this misrepresentation would prevent a granting of specific performance.

Unilateral Mistake

A contract may be voidable by a mistaken party if the mistake was concerning a material fact of the bargain, the mistake had material effect on the bargained for exchange, the unmistaken party knew or should have known of the mistaken party's mistake, and the mistaken party did not assume the risk of the mistake. Here, Sam was mistaken as to the value of the queen piece. He asked for \$450 when the queen was in reality worth thousands of dollars. This is a material fact and has a material effect on the bargained for exchange since it impacts how much Sam would have asked for the

queen and agreed to sell it for had he known its true value. Moreover, Rick had reason to know of Sam's mistake because he knew the piece was worth thousands of dollars as a collector of chess pieces and someone looking for the queen. When Sam suggested \$450, Rick would have known he was mistaken as to its value. Finally, the risk is likely not one Sam assumed. Typically both parties assume the risk of a bad deal and over or under valuing the property. However, here Sam specifically asked Rick if \$450 was a fair price and Sam had reason to know that Sam was relying on Rick's evaluation. As such he was not assuming the risk of being wrong. Therefore, the court may void the contract due to Sam's unilateral mistake.

Unclean Hands

Unclean hands is an equitable defense that prevents the court from granting equitable remedies when the one seeking performance has exercised some misconduct in the transaction at issue in the case. Here, Sam lied to Rick about the fairness of the price. As such he likely did not come to court with clean hands and will not be granted remedy in a court of equity.

UCC Good Faith and Fair Dealing

The UCC implies a duty of good faith and fair dealing in all contracts for sale of goods. Here, Rick breached this duty by lying to Rick. Therefore, it would not be enforced under the UCC.



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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2019

CALIFORNIA BAR EXAMINATION

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<u>Question Number</u>	<u>Subject</u>
1.	Civil Procedure
2.	Remedies / Constitutional Law
3.	Criminal Law and Procedure
4.	Professional Responsibility
5.	Contracts

QUESTION 2

Clear City is home to 50 churches, one of which burned down earlier this year. Fire investigators suspected that the cause was a burning candle.

Clear City has enacted an ordinance that prohibits burning candles in any church and authorizes the fire marshal to close down any church in which candle burning occurs. The Mayor told the press that Clear City would vigorously enforce the ordinance and that the fire marshal would randomly visit churches during their Sunday services to close down violators.

The fire marshal visited six churches last Sunday, but did not visit the Clear City Spiritual Church ("SC"). Two of the six churches visited were burning candles, but were only issued warnings, not shut down. Immediately after visiting the last of the six churches, the fire marshal publicly announced that it was likely no further warnings would be issued to churches caught violating the ordinance. The fire marshal also announced that, due to a lack of personnel, these random visits would not resume for "at least eight weeks."

The members of SC burn candles during Sunday services to signify spiritual light in the world. The day after the fire marshal's announcements, SC gave notice to Clear City's attorney that it would immediately sue Clear City in federal court seeking: (1) a temporary restraining order and a preliminary injunction to enjoin Clear City from enforcing the ordinance during the pendency of the lawsuit; and (2) a declaration that the ordinance violates the First Amendment.

Clear City's defense is that it has not taken any action and there is no controversy.

1. What is the likelihood of SC's success in obtaining a temporary restraining order? Discuss.
2. What is the likelihood of SC's success in obtaining a preliminary injunction? Discuss.
3. What is the likelihood of SC's success in obtaining declaratory relief in its favor?

QUESTION 2: SELECTED ANSWER A

This question triggers issues of Freedom of Religion under the First Amendment, associational standing, mootness, ripeness, and potentially conduct as speech under the First Amendment.

Preliminary Issues

A necessary prerequisite to SC's ability to obtain any form of relief is that standing exists and that ripeness and mootness can be cleared. Article 3 courts (federal courts) are courts of limited jurisdiction. Under the Constitution, they are not permitted to issue advisory opinions and may only issue opinions where cases or controversies exist. The defense of Clear City ("CC") is essentially that standing does not exist here--that there is no live action or controversy that may be appropriately assessed and provided a remedy. Each of the three questions below will require that there is standing before the remedy may be addressed. Thus, we must tackle the issues of standing, ripeness, and mootness before proceeding to the three questions below, as each of these has the ability to remove the "case/controversy" requirement and thus preclude Art. 3 jurisdiction over the case.

Standing

The issue here is whether there is either individual or associational standing. In order to have standing, one must have suffered a concrete and particularized injury in fact, there must be causation between the defendant's conduct and the plaintiff's injury, and redressability by a favorable decision of the Art. 3 court must exist. In addition, we should note that the association bringing the lawsuit here is exactly that--an association

and not an individual. There are additional rules in order to find associational standing. First, the individual members who make up the organization must have standing. Second, the lawsuit at issue must accord with the organization's purposes. Third, the association must be able to sue in its own right without requiring the active participation of its individual members.

Here, we should find that both individual standing and associational standing are satisfied. The requirement of injury in fact is probably the most tenuous link. SC has not been visited, issued a warning, or shut down. However, they engage in activity that is now prohibited under the ordinance and did so previous to the ordinance's creation. As such, the possibility that they will be reprimanded for their use of burning candles should constitute an injury in fact, as it interferes with the free exercise of their religion. (This finding is bolstered by the lurking First Amendment issues. It might not be so convincing in a non-religious context. See below.) We should note that the fire marshal's statement that they probably wouldn't keep issuing warnings is ambiguous. This could either indicate that the ordinance will not be enforced going forward, or that it will be enforced strictly and to the full extent of its reach. It is more likely that the latter is the correct response because it accords with the Mayor's press announcement that the ordinance would be vigorously enforced. This also increases the likelihood of an actual injury in fact occurring to SC directly.

Additionally, the causation between the defendant's conduct and plaintiff's injury is clear. Here, the defendant's action was to pass an ordinance that prohibits the burning of candles in churches, a religious activity. Without the passing and enforcement of that ordinance, SC would have been permitted to continue burning candles in their church at

their leisure.

Additionally, redressability is within the power of the court. Here, if the court finds the ordinance to be unconstitutional (as requested in the prayer for declaratory relief), the injury in fact imposed on churches in CC will cease.

Thus, we can conclude that an individual member of the church would likely have standing. We should then consider associational standing. In addition to the requirement that the individual members who make up the organization would have standing (satisfied directly above), the lawsuit in question must accord with the association's purpose. Here, the purpose of the association is not directly stated, but one could conclude that it is "to signify spiritual light in the world," the reasoning given for the burning of candles during Sunday services. Realistically, it is probably broader than this. The church's purpose is to provide spiritual guidance and so on, and one part of that is to signify spiritual light in the world to others who might consider joining and so on. Regardless, the nexus between the association's purpose and the lawsuit should be sufficient to satisfy this requirement.

The final requirement is that the association must be able to represent itself in the lawsuit without requiring the individual input of any of the particular members. There are no facts in the pattern that indicate otherwise. Thus, I assume this element is satisfied.

As such, there is both associational and individual standing here. Because SC is bringing the lawsuit, associational standing is most pertinent to our purposes. It is satisfied.

Ripeness

The issue here is whether the case or controversy here is actually ripe. The conclusion should be yes, but CC will argue that it is not. In order to be ripe, a lawsuit must be capable of actually being determined. Issues of ripeness arise with respect to proposed legislation, ordinances that have not yet been enacted, laws that have not yet been violated, and so on. In short, the injury is essentially to come, and the plaintiff is seeking a declaration that the ordinance (or otherwise) is invalid before harm can occur.

Generally, ripeness questions can also arise when there is a dearth of appropriate facts such that the court cannot appropriately answer the question. A case is less likely to be unripe when the question is essentially one of law. Here, the question is essentially one of law--is the ordinance compatible with the First Amendment? Thus, there is no need for a slew of facts before judicial review can be appropriately had.

SC will also point out that the ordinance has actually been enforced (at least in part), because the fire marshal has begun to make random visits and has begun to issue warnings. The ambiguity of the fire marshal's statement is again in issue here, because it is not entirely clear whether he means to ramp up or down enforcement after the eight weeks have passed. Because of the threat of interference with religion, and because the question here is mostly one of law, the court should find the issue to be ripe and to take up the case.

Mootness

The issue here is whether the case or controversy in question has been mooted. CC could claim that there is no controversy, because the fire marshal publicly announced that they would not seek any further warnings to issues caught violating the ordinance.

Additionally, he announced that the random visits would not occur for the next 8 weeks because of a lack of personnel. Thus, CC might claim that there is no longer any live issue in the case as there is no risk that SC will be caught burning a candle during a Sunday service and being closed down. If there is no live controversy, then a federal court cannot act on the issue.

However, there are two exceptions to the mootness doctrine. One exists where the problem in the lawsuit is capable of repetition, yet evading review. The best example of this is abortion. By the time a decision is made in federal court, typically 9 months have passed and the live issue has been resolved. However, if this standard were strictly followed, there would never be an opportunity to adjudicate on the issue. Here, SC could raise this exception, perhaps arguing that the fire marshal might just cease enforcement activity whenever a lawsuit is threatened. However, this doesn't exactly accord with the facts, as SC informed CC of its intent to sue the day after the fire marshal's announcements.

The better argument for SC is that this is an example of the voluntary cessation mootness exception. Where the conduct complained of by defendant pauses or is halted, such that the live controversy disappeared as a result of defendant's own free will, the case cannot be said to have been resolved. Rather, it is wholly possible that upon dismissal of the case the defendant will begin to once again engage in the conduct complained of. As such, voluntary cessation is an exception to the mootness doctrine. Here, voluntary cessation neatly fits the facts. The fire marshal indicated that there was a lack of personnel, so the random visits would stop for at least eight weeks. However, if many new personnel signed up the very next day, random visits could start again

immediately. Additionally, the fire marshal's decision to "likely" not issue any further warnings is voluntary. The ordinance giving him the authority to do so has not been repealed; this is simply a policy decision on his behalf. As such, this is a good case of voluntary cessation that should prevent the mootness doctrine from disposing of this case.

Potential Remedies

Above we have ensured that the case is an appropriate case or controversy under Article 3 such that it is permissible for a federal court to hear it. Now we must assess the remedies issues assigned.

One preliminary issue with respect to remedies is that the suit is being filed against Clear City, a municipality. Municipalities are not entitled to state sovereign immunity under the 11th amendment, and at any rate it appears that CC has not attempted to fight the suit on an immunity basis, so I will not consider that potential defense further.

(1) Temporary Restraining Order

The issue here is whether a temporary restraining order is appropriate. Temporary restraining orders are devices that are intended to be available only when there is a serious threat of immediate, irreparable injury to the plaintiff. Temporary restraining orders require the showing of two elements (1) likelihood of success on the merits for plaintiff, and (2) likelihood of irreparable injury to the plaintiff if not granted. Temporary restraining orders ("TROs") are also allowed to be issued before a hearing occurs--thus

ex parte--and in some cases without notice to the other party. Notice is not required if the plaintiff can show that provision of notice would potentially lead to the destruction of the item in question in a goods case or some other good reason why it might be inappropriate to furnish the defendant with a warning. Another good reason can also include simply documented unavailability of the defendant. Temporary restraining orders in federal court are good for 14 days. They can be extended for another 14 days with a showing of good cause, but all reasonable efforts must be made to secure a preliminary hearing before that point. When a preliminary hearing occurs, the court will determine whether or not to issue a preliminary injunction. If the court does not hold a hearing before both 14 day periods have passed, the TRO effectively morphs into a preliminary injunction.

Here, there is probably not a compelling case for a TRO. First, there is probably a likelihood that plaintiff can establish a likelihood of success on the merits (see section 3 below). However, it is unlikely that irreparable injury would occur without a TRO. The fire marshal's statement indicated that there would not be any random visits for eight weeks. Eight weeks consisting of 7 days is 56 days. A TRO would be good for, at maximum, 28 days. As such, there is no pressing need that requires a TRO be granted in order to prevent the SC church from being shut down.

SC's likelihood of success in obtaining a temporary restraining order is low, unless they can demonstrate some increased likelihood of irreparable injury (i.e., if the fire marshal suddenly hired 50 new employees and could carry out the ordinance in full).

(2) Obtaining a Preliminary Injunction

The issue here is whether SC will be able to obtain a preliminary injunction. The test for a preliminary injunction is much the same as that of a TRO. The plaintiff must establish a likelihood of success on the merits; a likelihood of irreparable injury if a preliminary injunction is not granted; and a balancing of the hardships of plaintiff and defendant/the public in plaintiff's favor in order to succeed. We should also note that in the case of a preliminary injunction it is appropriate to provide a bond, such that if a preliminary injunction is inappropriately awarded, the defendant can be compensated for the time in which he was precluded from acting in a particular way/possessing a particular good. We will assess each element below in turn.

Likelihood of success on the merits. See section (3) on declaratory relief.

Likelihood of irreparable injury if preliminary injunction not granted. Here, there is an increased chance of irreparable injury if the injunction is not granted, because the reality of litigation/trial is that the process is lengthy. The likelihood is that litigation will exceed 8 weeks of preparation and trial. Again, the ambiguity of the fire marshal's statement is pertinent. If they intend to ramp up ordinance enforcement when the 8 weeks end, then the likelihood of irreparable injury via the closing down of the church is significant. We should also note that the manner of enforcement of the ordinance is rather extreme. Rather than fining a church, they will be shut down. Shutting down surely gives rise to an inference of irreparable injury--even if the ordinance is later declared unconstitutional and the church is permitted to reopen, there is a likelihood that congregation members

will have gone elsewhere and the ability of the church to attract new members will have been greatly diminished. Because of the widened time scope of the preliminary injunction, likelihood of irreparable injury is probably satisfied here.

Balance of hardships between plaintiff/defendant and public. Here we must assess how the ordinance and its enforcement affect parties on either side of the case. If the ordinance is not enforced, the hardship imposed on the defendant and public is that occasionally a church (potentially) burns down. (Note that fire investigators weren't even sure if this was the cause of the church burning down.) While the loss of a church to a community is likely impactful, the fact remains that CC is home to 50 churches, so the public and the city are unlikely to be devastated by the loss of one. By contrast, to the plaintiff--an actual church--the potential for them to be shut down as a result of burning a candle imposes a significant hardship. This is so because of the likelihood of irreparable injury as discussed above (loss of congregation members, inability to attract new members). The balance of hardships thus comes out strongly in favor of plaintiff. Because we aren't given facts about SC's financial situation, I will presume that they could afford to post the appropriate bond.

The likelihood of SC's success in obtaining a preliminary injunction is thus high.

(3) Obtaining Declaratory Relief

The issue here is whether declaratory relief is appropriate. Declaratory relief is that relief provided by a court that does not change the rights of a party but merely delineates those rights. Declaratory relief is an appropriate way to handle the question of whether

or not an ordinance is constitutional, and is especially appropriate in the context of a municipality because it does not run into any 11th amendment state sovereign immunity issues that might be implicated by a damages analysis.

To determine whether declaratory relief is appropriate, we must assess the merits of the constitutional challenge to the ordinance. Here, the challenge is that the ordinance violates the First Amendment. There are at least two ways in which this could violate the First Amendment under freedom of religion and potentially one under freedom of speech--regulation of symbolic conduct.

It should be noted that here the municipality is a government actor whose actions might be violating the First Amendment.

Freedom of Religion - Free Exercise Clause

The issue here is whether the ordinance inappropriately restricts SC's ability to freely exercise their religion. Under free exercise jurisprudence, a general statute of neutral applicability is valid even if it incidentally burdens religion. However, where it appears to regulate only religion, then the governmental conduct in question must pass strict scrutiny. Strict scrutiny requires the government to show that the law in question was necessary to achieve a compelling governmental purpose, and that there was no less restrictive alternative available.

Here, the law in question does not appear to be neutral and general. Rather, it is directed toward religious entities (churches) alone. As such, it must pass strict scrutiny. One could argue that there is a compelling purpose here in ensuring that churches are not burnt down. (This may not be an appropriate governmental purpose, as it could be argued under the Establishment Clause/*Lemon* test that this constitutes inappropriate

excessive entanglement of government and religion.) Another potential purpose the government could put forward is fire suppression/prevention for the health, safety, and welfare of their residents. Assuming *arguendo* that this is considered an appropriate government compelling purpose, then we must ask whether it was *necessary*--that is, whether it was the least restrictive means for accomplishing that purpose. CC is very unlikely to be able to fulfill this burden, because there are a variety of other ways a church could undertake to ensure its candles didn't lead to its burning down. Increased fire safety measures, the installation of sprinklers, the placement of fire extinguishers within the church, repositioning of candles in un-flammable areas, etc.--there are a variety of less restrictive alternatives as compared to shutting a church down entirely.

The ordinance probably violates the free exercise clause.

Freedom of Religion - Establishment Clause

The issue here is whether the ordinance inappropriately establishes or interferes with a religion. Generally, the Establishment Clause analysis proceeds by consideration of the Lemon test, which asks: (1) Was there a secular, non-religious purpose in enacting the law? (2) Was the primary effect of the law to advance or inhibit religion? (3) Was there excessive entanglement between the government and religion? Here, there was clearly a secular purpose in enacting the law--prevention of loss of churches through accidental burning down from unattended candles. This is not religious in nature merely because the place in which the government seeks to stop burning buildings is candles. There is probably a general compelling governmental interest in fire suppression/prevention for the health, safety, and welfare of its constituents.

The primary effect of the law, however, probably inhibits religion. Because a common

religious practice, burning candles, is here being prohibited by the government upon pain of being shut down entirely, the law seems to be overbroad in attempting to achieve its legitimate non-secular purpose. Because if the law were fully enforced many churches would be shut down, there is probably a failure on prong 2.

Third asks whether there is excessive entanglement between government and religion. This is a close call. It is possible that there is excessive entanglement here because the fire marshal seems to have an inordinate amount of discretion in deciding whether he is going to issue a warning or shut the church down entirely. For example, if the churches issued warnings were Catholic, but future Lutheran churches were immediately shut down, this would appear to be excessive entanglement of government and religion because it seems to send a message about the content of church services. This makes exercise of discretion very dangerous. Presuming that the fire marshal is going to strictly enforce the law going forward and decline to exercise discretion, this prong is probably not problematic, but from the fact pattern, the conclusion is unclear.

Because the second prong of the Lemon test is failed, the ordinance is probably improper under the Establishment Clause as well.

Freedom of Speech Issue - Symbolic Conduct

The issue here is whether the ordinance is permissible governmental regulation of conduct speech. This is probably permissible governmental regulation of conduct speech. The test for permissible conduct speech is a hybrid test closest in nature to intermediate scrutiny. It requires that the regulation of speech not be overbroad; that the purpose for regulating the speech not be purely to regulate the speech content, but for another unrelated governmental purpose; that the government have an important

purpose in regulating the speech; and that the regulation be narrowly tailored; and that it directly advance the government purpose.

Here, the regulation of symbolic speech--prohibiting candle burning--is not merely to regulate the content the speech communicates (signifying spiritual light in the world), but to prevent buildings within a municipality from burning down. The interest in fire suppression/prevention is probably an important government purpose because it affects the health, safety, and welfare of its residents. The question of whether the regulation is narrowly tailored is arguable--again, the enforcement mechanism seems somewhat strict--but it seems appropriate as it merely prevents open flame within the church while the point of the regulation is to prevent fires. Because of this, the regulation is probably not overbroad, though its enforcement mechanisms may be. The government purpose of fire suppression is probably directly advanced by eliminating the most likely source of flame/fire within the buildings in question.

The ordinance probably does not constitute a violation of the freedom of speech with regard to regulation of speech by conduct.

It is likely that SC will be successful in obtaining declaratory relief in its favor under a first amendment freedom of religion theory. The best theory for SC is probably a violation of the free exercise clause as strict scrutiny is extremely unlikely to be satisfied here. An establishment clause argument would probably also succeed. A first amendment freedom of speech argument would probably not succeed, so one of the other two should be used.

QUESTION 2: SELECTED ANSWER B

Whether Clear City Spiritual Church ("SC") is Entitled to a TRO to enjoin Clear City ("CC") from enforcing ordinance

Standing

The first issue is whether SC has standing to bring an action against CC. A party meets the elements of constitutional standing by showing (a) injury in fact (b) causation, and (c) redressability.

Injury in fact

Injury in fact means that the injury is concrete, not abstract, and is particularized. In other words, the plaintiff must show that *they* were actually harmed.

Here, SC can likely argue that it has suffered injury in fact. SC's practice is to burn candles during Sunday services to signify spiritual light in the world. CC is effectively trying to put that light out by prohibiting burning candles in any church. This has a concrete effect on SC in particular. This element is met.

Causation

But for CC's ordinance, SC would not be in a position where they are afraid to engage in one of their regular religious practices. This element is met.

Redressability

If the court prevents SC from enforcing the ordinance and eventually overturns the ordinance, it will provide SC with exactly the relief it seeks, allowing SC's members to continue lighting candles. Redressability is met.

Organizational Standing

CC might argue that SC's members are required to bring the action rather than SC. Indeed, it is SC's members who burn the candles. However, even if it were true that SC's members are the ones that suffer harm, SC likely has organizational standing here.

An organization has standing to bring a suit on behalf of its members where the members can be adequately defined and the organization can show that it adequately represents the members' interests. Here, the members are SC's churchgoers, and, as SC is the organization that leads the congregational worship and oversees Sunday services where candle burning takes place, it can represent the interests of its churchgoers effectively. SC has organizational standing.

Ripeness

A court may only hear a live case or controversy. That is, there must be an actual dispute over the rights and obligations of parties, such that resolution will clarify those rights and obligations. A court may not issue advisory opinions. Ripeness may exist even if one party voluntarily curtails their conduct where there is the ongoing possibility of a violation.

Here, CC argues that there is no controversy, likely because it is not currently enforcing the ordinance. The facts show that due to a lack of personnel, random visits to enforce the ordinance are delayed "at least eight weeks." Nonetheless, the ordinance is still in effect, and it is highly likely that at some point in the near future, SC will be paid a "visit" by the fire marshal. SC's argument holds considerable weight in light of the public statements made by the Mayor and fire marshal. The Mayor told the press that CC

would "vigorously enforce the ordinance," and the fire marshal announced that churches will likely no longer get the benefit of a warning if caught violating the ordinances. Accordingly, while SC may not have to worry about a fire marshal "visit" for at least eight weeks, the concern is still very much live. Furthermore, there is nothing to say that the fire marshal is true to his word. The Mayor's announcement to the press suggests that the CC has almost an inquisition-like desire to shut down churches burning candles. There's nothing to suggest that the fire marshal may gain personnel to start the sweeps earlier.

Accordingly, there is a live case or controversy such that ripeness exists.

Entitlement to a TRO

A temporary restraining order ("TRO") is a form of injunctive relief that a party may obtain with or without notice, which, if granted, immediately enjoins a party from taking a contested action until the parties can be heard on a preliminary injunction motion. In essence, TROs and PIs are designed to preserve the status quo during the pendency of an action. When a court grants a TRO, it will generally set the preliminary injunction hearing shortly thereafter (usually within 10 days). TROs are obtained ex parte upon a showing that giving notice to a party is likely to frustrate enforcement. Here, the TRO appears to be with notice as SC gave notice to CC's attorney that it would seek a TRO.

A TRO is only granted upon a showing of immediate harm. In determining whether to grant a TRO, the court looks at (i) whether the party will suffer irreparable or immeasurable harm if injunctive relief is not granted, (ii) the likelihood of success on the merits, (iii) the balance of the harm to the movant if the TRO is not granted against the burden to the nonmoving party in complying with the injunction, (iv) the public interest in

granting a TRO.

i. Irreparable harm

SC can meet this element because it is not seeking monetary relief, but rather declaratory relief declaring that the ordinance violates their First Amendment rights. A monetary value cannot be placed on the harm SC will suffer if its members are prohibited from practicing their religious beliefs. This element is met.

ii. Likelihood of success on the merits

This factor is explained below in the discussion of declaratory relief. The short answer is that this element will be met because CC would be considered a state actor, and has passed a law that facially discriminates against religion, and does not meet strict scrutiny.

iii. The balance of harms

This factor also favors SC. The harm SC will suffer due to a violation of the free exercise clause is profound, as its members would have to give up one of their regular religious practices, or otherwise practice secretly, in fear of government intervention, which evokes Soviet Union-type concerns. On the other hand, CC would be prohibited from enforcing an ordinance that may be unconstitutional, and even if it is not, the harm is small. Indeed, SC can point to the fact that the fire marshal has already explained that they will have to postpone random visits due to lack of personnel. If enforcement of the ordinance was that important to the city, then CC would find another way to continue enforcement, such as moving over personnel from other departments.

iv. Public interest

The public interest in allowing persons in the United States to exercise their First Amendment rights is paramount. On the other hand, there is no interest in allowing a government actor to enforce a questionable ordinance.

Immediacy of harm

While SC will easily satisfy the four-factor test for injunctions, the court may still refuse to grant the TRO because SC may not be able to show a risk of immediate harm. The fire marshal's announcement that random visits will not resume for at least eight weeks means that there is plenty of time to seek a preliminary injunction prior to any harm befalling SC. If the court accepts CC's statement that they will not enforce the ordinance for at least eight weeks, then it will likely not grant a TRO.

Accordingly, while the factors for a TRO all favor SC, SC still may lose its TRO application based on a lack of immediacy of harm.

2. Whether SC is Entitled to PI to enjoin CC from enforcing ordinance

On the other hand, SC is likely entitled to a PI.

Courts use the same four-factor analysis in determining whether to grant a PI. Additionally, a PI does not require a showing of immediate harm; only a showing that the harm is likely to occur if an injunction is not granted during the pendency of the action.

For the reasons stated above, SC can meet the four-factor test. Furthermore, if CC begins its sweeps in the next eight weeks, then the risk of harm is likely to occur during the pendency of the action, such that the PI is necessary to preserve the status quo.

3. Whether SC is likely to obtain declaratory relief

Government Action

The First Amendment applies only to government action. The First Amendment is couched on *Congress* not making any law that violates a person's rights. It is extended to state and local government through the Fourteenth Amendment due process clause. Here, CC appears to be a state actor because it is a city. It has a Mayor, a fire marshal, and enacts ordinances that it seeks to enforce. The alleged First Amendment violation directly relates to one of those ordinances. Accordingly, government action has occurred raising First Amendment issues.

Free Exercise

A person has the absolute right to their religious beliefs, but religious conduct may be limited in some circumstances. The government may pass laws that limit religious conduct, but they are more likely to be upheld where the laws only incidentally limit religious conduct. Where a law is facially neutral, such that the prohibited conduct applies equally to religious and secular conduct, absent a showing of discriminatory motive, the law must merely meet rational basis scrutiny. This requires the proponent to prove that the law is not rationally related to a legitimate government interest. On the other hand, where a law is facially discriminatory, such that it is aimed at tailoring religious conduct, it is subject to strict scrutiny. This requires the government to show that the law is narrowly tailored to meet a compelling government interest.

The ordinance is facially discriminatory

Here, the ordinance applies only to burning candles in *any church*. On its face, it appears to target religious conduct because it only affects churchgoers.

The city could argue that the ordinance is not aimed at religious conduct, but is instead aimed solely at regulating burning or candles. But if that's the case, then CC could have drafted the ordinance to say that. The ordinance could have applied to burning candles in any building, or any place where members of the public meet, or similar. It does not say that; rather, it applies only to burning candles in churches.

Because it is facially discriminatory, strict scrutiny applies. The government must show the law is narrowly tailored to meet a compelling government interest.

Compelling government interest

The government can likely meet this because CC is home to many churches, and one of those churches burned down earlier this year, with the suspected cause being a burning candle. It can be presumed that people go to these churches, and CC has a compelling interest in protecting the safety of its citizens. Accordingly, CC meets this element.

Narrowly tailored

CC will lose on this element because the ordinance is not narrowly tailored. To be narrowly tailored, the government generally must use the least restrictive means. Here, CC completely prohibits the use of candles, and has invoked draconian enforcement measures and sanctions to enforce the ordinance. CC could have regulated in a less restrictive way, such as by regulating where candles are placed in churches, or the type

of candle used, or required other safety measures, such as burning candles over a non-flammable service. CC instead issued a blanket prohibition. CC fails this element.

Accordingly, the law does not meet strict scrutiny.

Rational basis

On the chance that the law is considered facially neutral, it is more likely to be upheld. SC would have to show that the law is not rationally related to the legitimate government interest. Courts generally give the state wide discretion under rational basis scrutiny. Accordingly, the ordinance would likely survive on the unlikely chance that the ordinance is found to be facially neutral.

Establishment Clause

The First Amendment also prohibits the government from favoring one religion over others or favoring religion over non-religion. The government must show (1) the law has a secular purpose, (2) its primary aim is not to advance or inhibit religion, and (3) the law does not excessively entangle government with religion.

Here, even if the law has a secular purpose, and even if the primary aim is to not to advance or inhibit religion, the government would fail on the third factor because it excessively entangles government with religion. As mentioned above, these draconian sweeps are Soviet-Union like. Because the ordinance applies only to churches, the practical effect is that the government is engaging in random, chilling sweeps of churches and churchgoers. The government's willingness to crash Sunday services is strong evidence that the government is excessively entangled in religion.

Conclusion

For the foregoing reasons, SC is likely to succeed on its declaratory relief action because CC likely violated the First Amendment by passing and enforcing the ordinance.



ESSAY QUESTIONS AND SELECTED ANSWERS

OCTOBER 2020

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the October 2020 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Professional Responsibility
2.	Business Associations
3.	Real Property
4.	Criminal Law and Procedure
5.	Remedies

QUESTION 5

Daniel's house is for sale. In his living room are two valuable original paintings by Artist, one of the California coastline and the other of a field of Golden State wildflowers. Daniel recently refused an offer from Museum to purchase the paintings for \$10,000 each.

Pam went to Daniel's house hoping to buy it before she left on a business trip. As Pam, Daniel and his real estate broker, Bill, inspected the house, Pam noticed the paintings in the living room, commenting that they were beautiful and seemed designed to fit in the house. Pam then offered \$400,000 for the house and another \$50,000 if the sale included the two paintings. Daniel agreed and asked Bill to draft a contract for the sale of the house and the two paintings for \$450,000. Bill promised to have the contract ready before Pam left town the next day.

Bill drafted a written contract, which Daniel signed even though he noticed that Bill had mistakenly omitted from the sale the painting of the California coastline.

Daniel met Pam at the train station, as her train was about to depart. Daniel gave the contract to Pam, telling her, "This is what we agreed to and I've already signed it." Pam's train started to move, so she quickly signed the contract without reading it and jumped on board the train.

When Pam returned from her trip, she was horrified to find that the California coastline painting was not in the house. She immediately telephoned Daniel to ask about the painting, but he told her, "That's what the contract we signed provides," and hung up.

Six months after Pam moved into the house, she noticed in a local newspaper advertisement that Daniel was offering to sell the Artist painting of the California coastline to the highest bidder at an auction two weeks later.

1. What remedy or remedies can Pam reasonably obtain against Daniel? Discuss.
2. What defense or defenses can Daniel reasonably raise? Discuss.

QUESTION 5: SELECTED ANSWER A

I. REMEDIES AVAILABLE TO PAM AGAINST DANIEL

In order for Pam successfully to seek a remedy against Daniel, she must first demonstrate that he was in breach of a valid contract.

Governing Law

Contracts for goods, that is, tangible moveable items, are governed by Article II of the Uniform Commercial Code. All other contracts, including contracts for the sale of real property, are governed by the common law. Where a contract covers both goods and real property, courts look at the primary purpose of the contract to determine whether the UCC or the common law applies. Here, the primary purpose of the contract was the sale of Daniel's home. Accordingly, this contract will be governed by the common law.

Formation

A valid contract requires mutual assent, in the form of an offer and acceptance, and bargained for consideration.

Offer

Here, when Pam went to inspect Daniel's home, she offered to purchase Daniel's home for \$400,000 and the paintings for \$50,000. To be valid, an offer must be directed to a particular offeree and contain the essential terms of the deal. Under the common law, the essential terms are the parties, the subject matter, the quantity, and the price. Pam's offer to purchase the home with the paintings at a total of \$450,000 constituted a valid offer because it was made to an identifiable offeree, Daniel, and it contained the

essential terms of the deal, including the subject matter (the home and paintings), price (\$400,000 + \$50,000), parties (Pam and Daniel), and quantity (1 home and 2 paintings).

Acceptance

A party accepts an offer by objectively manifesting an intent to be bound by the terms of the offer. Here, when Pam made the offer, Daniel agreed to it and asked his real estate broker, Bill, to draft a contract in accordance with the parties' agreement. By taking these actions, Dan manifested intent to be bound by the terms of Pam's offer and, thus, there was an acceptance.

Consideration

Consideration is bargained for legal benefit or detriment. Courts do not typically look to the value of the consideration. Here, Pam offered consideration in the form of \$450,000: \$400,000 for the home and \$50,000 for the paintings. Daniel offered consideration in the form of conveying Pam the home and the paintings.

Because there was an offer, acceptance, and consideration, the parties formed a contract.

Terms of the Contract

The issue is what the terms of the contract are. Even though the parties orally agreed that Daniel would provide the home with the two paintings, the written terms of the contract omitted the requirement that Daniel convey the painting of the California Coastline. It is the written contract that the parties signed.

Remedy for Unilateral Mistake - Reformation of Contract

Where a contract is based on the mistake of one party, sometimes the party may seek reformation of the contract to correct the mistake. Thus, if Pam can demonstrate the required elements of unilateral mistake, then she may seek the remedy of reformation.

To persuade a court to reform a contract based on a unilateral mistake, the plaintiff must show the following: (1) that the plaintiff was mistaken about the terms of the contract; (2) that the mistake went to a material term that was a basic assumption of the contract; (3) that the defendant-party knew of the plaintiff's mistake; and (4) the defendant failed to correct the mistake or even took advantage of the mistake.

Plaintiff Was Mistaken

Here, Pam mistakenly believed that the written contract conformed to the terms orally agreed to, specifically, that the contract conveyed to Pam both the painting of the California coastline and the painting of the field of Golden State wildflowers.

Material Term

This mistake was a material term of the contract. To be material, the mistake must be about an issue that affected whether the parties would agree to enter into the contract. Here, Pam made clear that she thought the paintings were beautiful and were a perfect fit for the design of the home. Indeed, she was "horrified," when she saw that the California coastline painting was missing. Moreover, she was willing to pay an extra \$50,000 to have the two paintings. Without the paintings, she would have paid much less for the home. Accordingly, this was a material term.

Defendant Knew of the Mistake and Took Advantage of It

The next issue is whether Daniel knew of and took advantage of Pam's mistake. Here, the facts show that Dan noticed Bill's drafting mistake. When Dan met Pam at the train station, he assured her that the contract reflected the terms Daniel and Pam had agreed to. Thus, not only was he aware of the mistake, Daniel told Pam that the mistake did not exist. He likely told her this in order to obtain her signature on the contract and avoid having to convey the painting of the coastline. Indeed, Dan took advantage of the fact that Pam was in a hurry to get on a train that was about to depart. The fact that her train was about to depart made Pam feel as though she needed to sign quickly without reading, and Dan took advantage of this situation and told Pam the contract conformed to their oral discussion.

Conclusion

Because Dan took advantage of Pam's unilateral mistake and that mistake went to a basic assumption of the contract, Pam can seek reformation of the written contract as a remedy.

Reformation

Reformation is an equitable remedy that courts provide when a party has shown the elements of unilateral mistake. When a party successfully seeks reformation, the court will re-write a contract in order to conform to the parties' intent sans the mistake. Thus, based on the foregoing discussion of unilateral mistake, Pam may seek a court order reforming the contract to convey the house with both paintings.

Mutual Mistake

It should be briefly noted that Pam would not be able to base a claim on mutual mistake. The elements of a mutual mistake claim are similar to those of a unilateral mistake, except that both parties must be mistaken. Here, the facts make clear that Dan was not mistaken. Accordingly, there was no mutual mistake.

Fraud

Pam might also be able to show that Dan committed fraud. A party commits fraud when, with scienter, he lies about a material term of a contract in order to induce reliance on that lie. Here, as discussed above, Dan knowingly told Pam that the contract contained the terms in accordance with their oral discussion even though he knew this was not true, and he did so with the intent to induce Pam to sign the written agreement. Accordingly, Pam might succeed in showing that Daniel committed fraud. As discussed above, one remedy for fraud would be reformation.

Specific Performance

Pam might seek specific performance of her contract with Dan, including that he convey both paintings. To demonstrate entitlement to specific performance, a plaintiff must show as follows: (1) that the subject of the contract is unique; (2) that legal damages would not suffice to remedy any breach of the contract; (3) that the conditions triggering the defendant's performance have been met; (4) that there are no defenses to formation; and (5) that the court can reasonably enforce the order of specific performance.

Unique Contract Subject Matter

Courts will almost always hold that land sales contracts are unique. The question is whether the paintings are also unique.

Here, the paintings are valuable. Indeed, Daniel recently refused to sell them to a museum at a price of \$10,000 a piece, and Pam valued them at a total cost of \$50,000, or \$25,000 a piece. Moreover, demonstrating their uniqueness, Pam commented on the paintings' beauty and the fact that they seemed as if they were designed to fit in the house. Thus, they provide a unique design fit for the home. Accordingly, the paintings are unique.

Damages Are Not Sufficient

Next, Pam would need to show that money damages would not suffice to remedy her injury. Given the uniqueness of the paintings and the fact that these paintings seem specifically well-suited for the design of her home, this element is met.

Conditions for Performance Satisfied

The conditions to require Dan's performance were satisfied. Specifically, the contract was executed and Pam has presumably begun making payments towards the agreed-upon price of \$450,000.

No Defenses to Formation

Defenses to formation are discussed below, in the answer pertaining to Dan's defenses. For reasons explained below, Dan will not likely succeed on any defenses to formation.

Court Can Reasonably Enforce Order of Specific Performance

The last factor is whether a court could reasonably enforce an order requiring Dan to specifically perform the contract. Factors courts consider are whether the order would require ongoing supervision and whether it is a subject matter that is complex to oversee.

Here, performance would be simple. All that would be required is that Dan give Pam the painting. Accordingly, this requirement is satisfied.

Conclusion - Specific Performance

Because the requirements for specific performance have been met, provided that Pam can show that there are no defenses to contract formation (which is discussed in Part II below), Pam could seek specific performance.

Temporary Restraining Order

Pam found out that Dan is planning to auction off the painting in two weeks. To prevent this from happening, Pam should seek a temporary restraining order ("TRO"). The requirements of a TRO are as follows: (1) the plaintiff must show irreparable harm absent a TRO; (2) the plaintiff must demonstrate a likelihood of success on the merits; (3) the plaintiffs must demonstrate that the equities weigh in her favor against the defendant; and (4) the plaintiff must demonstrate that the TRO is in the public's best interest. A plaintiff should seek to notify the defendant that she is seeking a TRO, rather than proceed ex parte. If the plaintiff cannot reasonably contact the defendant first, she must certify to the court that she has made reasonable efforts to contact the defendant or that she would be injured by contacting the defendant.

Irreparable Harm

Here, Pam can show irreparable harm because if Daniel auctions the painting to a bona fide purchaser for value, it is unlikely that Pam will ever be able to obtain the painting. And, as described above, this painting is unique.

Balancing of Equities

Pam can show that the equities weigh in her favor, and not Dan's. Pam signed the contract innocently. Although she should have done her due diligence and read the contract before signing, she signed relying on Dan's representation that the contract conformed to their oral agreement. Dan, on the other hand, caused Pam to be mistaken about a material element of the contract and he took advantage of her mistake. Accordingly, the equities weigh in Pam's favor.

Likelihood of Success on the Merits

The inquiry of whether a plaintiff is likely to succeed on the merits at the TRO stage is lower than at later stages in the litigation, such as whether she should receive a preliminary injunction. Here, Pam will likely succeed on the merits because, for reasons explained above, she can show that Dan caused a unilateral mistake or even fraudulently induced her to sign the contract.

Public's Interest

The public has an interest in contracts being enforced fairly and according to the terms that the parties assented to. The public also has an interest in preventing fraud. Accordingly, Pam can meet this element.

Notice to Defendant

Although, as explained above, it is not always required, Pam should seek to give Dan notice of her application for a TRO so that he can be heard, unless she can show that he might try to get rid of the painting if he is aware of her application for a TRO, which would cause irreparable harm.

Length of TRO

TRO's typically can only last for fourteen days. The auction is 14 days away. Accordingly, Pam should also seek a preliminary injunction.

Preliminary Injunction

Pam should seek a preliminary injunction, which can last for the duration of the litigation. The requirements are similar to that of a TRO. The difference is that Dan must be given notice and an opportunity to be heard. For reasons described above, Pam is likely to obtain a preliminary injunction.

Permanent Injunction

The difference between the requirements for a preliminary injunction and a permanent injunction is that the plaintiff must actually succeed on the merits. Because Pam will likely succeed on her fraud and undue influences, a court should order a permanent injunction against the sale of the painting at an auction.

Damages

If, for some reason, the court finds that the painting is not unique and that damages would suffice, Pam should seek damages.

Restitution

One form of damages P could seek is restitution. Restitution gives back a plaintiff the value she conferred on a defendant. Here, that amount is \$25,000, which represents the value of one painting.

Consequential Damages

In lieu of restitution, she can seek consequential damages.

II. DAN'S DEFENSES

Statute of Frauds

Under the Common law, contracts for the conveyance of real property must be in writing, signed by the party to be charged, and must contain all essential terms of the deal. If this contract were governed by the UCC, the UCC requires that any conveyance of goods for over \$500 must also satisfy the Statute of Frauds. Here, the paintings were valued by the parties at \$25,000 each. Thus, regardless of the governing law, the contract must satisfy the statute of frauds.

The contract is in writing and signed by the party to be charged, Dan. However, the essential term of the deal at issue here, the conveyance of the coastline painting, is not included. Dan will thus argue that this term does not meet the Statute of Frauds.

Exceptions to Statute of Frauds - Partial Performance

However, there are some exceptions to the Statute of Frauds. One is partial performance. In a sale of real estate, courts usually require two of the following three types of partial performance: (1) payment for the property; (2) possession of the property; and (3) making improvements to the property. Here, the disputed portion of

the contract pertains to a painting, not real estate. Pam will argue that by paying the price for the paintings, she has fully performed and thus, the exception to the Statute of Frauds has been met. Moreover, she has moved into the house and has taken possession of one of the paintings. However, she has not yet taken possession of the coastline painting. Thus, this is a close call, and a court might find for Dan if it finds that Pam's performance is not sufficient to trigger this exception to the Statute of Frauds.

Exceptions to the Statute of Frauds - Unique Goods

There is an exception to the Statute of Frauds for unique goods. Here, the paintings were unique and the price paid for the goods supports a reasonable inference that Pam paid for two of the paintings. Moreover, depending on the character of the paintings, it may appear that they were painted as a set that would reasonably be bought and sold together.

However, this exception to the Statute of Frauds typically only applies when the unique goods were manufactured for the buyer. Here, Pam purchased the goods well after the paintings had been created, and this exception is unlikely to apply.

Parol Evidence Rule

Dan might also argue that the parol evidence rule ("PER") bars any external evidence of the terms of the contract. For the PER to ban all external evidence, there must be a fully integrated writing. Where there is a partially integrated writing, courts will consider external evidence that supplements the contract. Here, it is not clear whether there was a "merger clause" stating that the writing was fully integrated or whether the contract contained all of the necessary terms, which might lead a court to conclude that it was fully integrated.

Pam will argue that the contract was only partially integrated and that the conveyance of the coastline painting is only an additional term that merely supplements the contract. Courts usually make this determination with reference to the four corners of the agreement, asking whether the disputed term is one that would naturally be left out of the agreement. It is unlikely that the conveyance of the coastline painting would naturally be left out of the agreement, as it is a material term. Thus, the contract is likely fully integrated. But, to satisfactorily make this determination, we would need to know more about the contents of the written contract.

However, courts will consider evidence that the parties did not actually make a contract because there was no meeting of the minds, or that the contract as written does not conform to the mutual meeting of the minds. Thus, courts will consider evidence of fraud in the inducement of a contract or unilateral mistake because this is a defense to formation, that is, fraud and unilateral mistake are an argument that the contract is not valid as written because there was no meeting of the minds. Accordingly, a court is likely to hear evidence of the agreement that Daniel convey the painting of the coastline.

Laches

The defense of laches applies when a plaintiff who seeks relief in equity has delayed bringing her cause of action in such a substantial fashion that it causes prejudice to the defendant.

Here, Pam learned of the fact that Dan kept the coastline payment six months before she saw Dan's newspaper advertisement. Dan will argue that Pam waited so long that he now has relied on her not pursuing an action and has set up an auction in reliance

on that fact.

However, having to cancel an auction is not likely to amount to serious prejudice to Daniel because, if Daniel were to win on the contract claim, he could simply hold an auction later. And while Pam probably should have brought the action sooner, six months is not an unreasonably long time.

Accordingly, Dan's defense of laches will not succeed.

QUESTION 5: SELECTED ANSWER B

GOVERNING LAW

The UCC governs contracts for the sale of goods, while all other contracts are governed by the common law. When a contract is mixed, the law that governs is based on the predominant purpose of the contract. If the predominant purpose of the contract is a sale of property, the common law governs, for example.

Here, the contract between Daniel and Pam included both goods (the paintings) and property (the house). However, it appears that the predominant purpose of the contract was the house, as Pam went to the house with the purpose of buying it and only happened to notice the paintings. Thus, the common law governs this contract.

PAM'S REMEDIES

Pam and Daniel signed a contract which, by its terms, only contained the sale of the house and the artwork of the Golden State wildflowers. Thus, Daniel was bound to deliver possession of those things to Pam. The facts imply that he did so, as Pam was in the house when she discovered the California coastline painting wasn't there.

However, Pam will argue that the contract also included the California coastline painting, even though it was not in the writing. Pam will likely posit two theories as to why the California coastline painting should be included in the contract: mistake and misrepresentation.

Mistake

Contracting parties can obtain remedies on a contract such as rescission or reformation if they show that the contract as written does not embody the full, actual terms of the agreement. To prevail on mistake, a party must be able to show either a mutual mistake or a unilateral mistake. A mutual mistake occurs when both parties were mistaken as to a material fact of the underlying subject matter of the contract, or the parties themselves. In addition, the party suing on mistake must not have assumed the risk of the mistake. Mistakes as to collateral facts will not support reformation or rescission of a contract.

Here, no mutual mistake was made. Daniel was not mistaken as to the contents of the contract, he knew that the contract did not include the California coastline painting.

Pam, on the other hand, did not. Thus, this is not a mutual mistake.

Traditionally, a unilateral mistake, even to a material term of the contract, did not allow for relief. However, if the other party knew or should have known of the mistake then a unilateral mistake provides sufficient cause for relief--as long as the mistaken party did not assume the risk of mistake. To be clear, if reformation is sought as a remedy, the non-mistaken party must have known that the other side was mistaken; but for rescission, the non-mistaken party can either have known or should have known of the mistake.

Here, there was a unilateral mistake. Pam believed that the contract included the California coastline painting -- a material mistake as to the subject matter of the contract. But, according to the facts, Daniel knew of the mistake but did nothing to

prevent it. Furthermore, nothing in the facts tends to show that Pam assumed the risk of the mistake as that was not bargained for by the parties and she took no other actions showing that she assumed the risk -- her negligence in not reading the contract is not sufficient to show assumption of the risk of mistake (see immediately below).

Additionally, it should be noted most courts will not find that a party's negligence in failing to read a contract will void their argument of unilateral mistake. Thus, the fact that Pam did not read the contract carefully before signing will not affect her argument for mistake.

Given that a sufficient unilateral mistake exists here, one that Daniel **knew** about, Pam will be entitled to multiple remedies such as reformation, rescission, and specific performance.

Misrepresentation

Contracting parties can also obtain remedies like reformation and rescission where one party made a material misrepresentation to another, such as altering a contract so that it does not contain the same language as was originally agreed upon. Although usually mere nondisclosure of a material fact is not enough to rise to the level of actionable misrepresentation, affirmatively altering a contract and representing it as unaltered is sufficient for actionable misrepresentation.

Here, although the omission of the California coastline painting was originally accidental, Daniel's knowledge of that fact and subsequent representation that nothing had changed in the contract likely rises to the level of an actionable misrepresentation. Daniel's statement that "This is what we agreed to" lends further credence to Pam's

argument that the misrepresentation was intentional and more than just a mere omission.

Thus, although not as clear of a case as the "mistake" analysis above, a court would likely find that Pam could also obtain remedies like reformation, rescission, and specific performance on a misrepresentation theory

Preliminary Injunction

Since Daniel is attempting to sell the California coastline painting in two weeks, Pam should attempt to obtain a preliminary injunction against the sale of the painting.

Preliminary injunctions are meant to keep the status quo in place while the merits of the case are adjudicated. Pam could request a Temporary Restraining Order (TRO) which has the same requirements as the preliminary injunction but can issue quickly and last for two weeks (in federal court). The TRO can be obtained ex parte if the lawyer for Pam shows that he attempted in good faith to notify Daniel of the TRO or that notice wasn't practicable in this case.

To obtain a preliminary injunction, a plaintiff must show (1) irreparable harm if the injunction isn't issued, and (2) a likelihood of success on the merits. Courts usually require the plaintiff to post a bond to cover costs for the defendant if the preliminary injunction was wrongfully issued. Courts will also often balance the hardships between defendant and plaintiff, weighing the costs of the injunction to the defendant and the public, against the benefits of the injunction to the plaintiff.

Here, Pam will likely be able to show irreparable harm since the piece of art she is seeking to obtain from Daniel is unique. The facts aren't too specific on this point,

however the fact that a museum is attempting to buy the two paintings suggests that they in high demand. It is unlikely that just awarding Pam damages will allow her to obtain the painting or a substitute painting, since this painting is an original, as stated in the facts. However, there is a small chance that if Pam was awarded enough damages that she would be able to buy the painting from the person that won it at Daniel's auction. Practically speaking, this is an incredibly small chance as the buyer at the auction is not likely to part with it so soon. On balance, the hardships clearly favor Pam as she will lose the painting if the injunction doesn't issue, while Daniel will only lose the opportunity to sell the painting immediately, as opposed to after the case has been settled.

Pam must also show a likelihood of success on the merits. Here, Pam has a clear argument for mistake and a possible argument for misrepresentation. Either way, she is almost certainly entitled to the painting under the contract. See analysis above. Thus, she is likely to convince a court that she will succeed on the merits in showing that the California coastline painting was part of the original contract.

Thus, if Pam is able to post a bond covering the cost of issuing a mistaken injunction, she will likely prevail in obtaining a preliminary injunction barring Daniel from selling the painting at auction until the merits of the case are resolved.

Reformation

A contracting party can obtain reformation based on mistake if an enforceable contract existed first, but that did not include the entirety of what the parties agreed to because of a mistake in typing up the contract. Usually a contract is reformed in such cases

when there is a mutual mistake but can be reformed when there is a unilateral mistake that the non-mistaken party **knew** about and did nothing to prevent.

Here, the contract between Pam and Daniel was enforceable as written but did not include the entirety of the bargain. Pam's unilateral mistake as to the California coastline painting is sufficient to allow for reformation of the contract to include the painting since the facts show that the California coastline painting was clearly a part of the original agreement between the parties and was only left out by a mistake in transcribing the contract.

Thus, Pam can reasonably obtain reformation of the contract to include the California Coastline painting.

However, once that is included in the contract, she must be able to claim the property itself. She can do this by either specific performance or replevy.

Specific Performance of Reformed Contract

To obtain specific performance, a contracting party must show five factors: certain, valid and definite terms, the plaintiffs contract conditions are fulfilled, inadequacy of legal remedies, feasibility of enforcement, and lack of defenses.

Certain, Valid and Definite Terms

To allow for specific performance the court needs to be able to understand the exact terms of the contract in order to be able to issue orders as to how the contract is to be carried out. Thus, the contract must have terms that are more certain than what is required in a case for damages.

Here, the contract between Pam and Daniel, as reformed, clearly states the amount of

consideration, the parties, and the pieces of property at stake, including the California coastline painting. Thus, the court should have no problem in ordering specific performance based on these terms.

Plaintiff's contract conditions fulfilled

A plaintiff must show that she is either ready and willing to perform, has already performed, or is excused from performing.

Here, the facts imply that Pam has already tendered her payment since she is in the house that used to be Daniel's. However, even if she has not tendered performance, she is clearly willing and able to do so based on these facts.

Inadequacy of Legal Remedies

A plaintiff must show that compensatory damages are not enough to remedy her injury.

Here, since the property -- the painting -- is original and apparently unique, as well as being sought after (as shown by the museum's prior bid to Daniel) it is unlikely that compensatory damages will suffice since it is very unlikely that Pam would be able to take her monetary award and purchase the exact same painting on the market.

Feasibility of Enforcement

Although mandatory injunctions, as would be the case here, can present enforcement problems since they are requiring a person to do something, such problems likely won't be present here. Daniel is likely under the personal jurisdiction of a court with contempt power and thus can be forced by the court to transfer the painting to Pam without much effort.

Defenses

Defenses to specific performance include unclean hands, laches, Statute of Frauds, and hardship/sharp practices. None of these equitable defenses really apply here. The contract is in writing and signed by the party to be charged, as required by the Statute of Frauds. Pam has taken no wrong actions towards Daniel with respect to this transaction as to constitute unclean hands. Pam has not unreasonably delayed in bringing a suit so as to prejudice Daniel and give rise to a claim of laches. Finally, sharp practices and hardship usually require an unconscionable contract coupled with inadequate consideration. Neither of those things are present here.

Thus, given that Pam can easily fulfill all five factors for specific performance, a court will likely grant her specific performance of the reformed contract between her and Daniel, forcing Daniel to transfer Pam the California Coastline painting.

DAN'S DEFENSES

Pam's Negligence

Dan will likely raise the defense of negligence on the part of Pam for failing to read the contract. He will argue that Pam should be charged with the knowledge of whatever contracts she signs and therefore, her mistake in thinking that the contract included the California coastline painting is only attributable to her own negligence. Additionally, he will argue that Pam was not forced to sign the contract right then as the train was leaving but could have read it and then returned it to him later, and that she was negligent to not do so.

This defense is unlikely to succeed. As mentioned above, most courts find that for

mistakes and misrepresentations entitled to reformation and other remedies, a plaintiff's failure to read the contract does not prevent them from obtaining remedies like reformation.

Parol Evidence Rule

Daniel will also likely assert the parol evidence rule as a defense. The parol evidence rule bars introduction of evidence of prior or contemporaneous oral or written statements that were not included in a fully integrated contract.

Daniel will argue that the written contract was fully integrated since he told Pam that it included what "we agreed to" and both parties signed it. However, firstly, a court would be unlikely to find that this contract was a fully integrated agreement since it was hastily written down and forced on Pam as she was leaving on a train.

More importantly, however, the parol evidence rule does not apply to cases where a mistake in the transcription of the contract allows for reformation.

Here, the mistake of Bill in transcribing the original agreement between Pam and Daniel -- which included the California coastline painting -- was the sole cause of it not being included in the contract. This allowed for reformation and also precluded the parol evidence rule from applying. If the parol evidence rule was allowed to apply in cases like this, no contracts could ever be modified for mistake or misrepresentation since the parol evidence rule would bar the evidence of the original agreement. Thankfully, this is not how the parol evidence rule is applied by the courts.

Therefore, Daniel's defense of the parol evidence rule will fail here.

Daniel's other possible equitable defenses to specific performance were discussed

above.

Since Daniel has no viable defenses to reformation or to specific performance, a court will most likely reform the written contract between Pam and Daniel to include the California coastline painting, and force Daniel to perform by transferring the painting to Pam.



**ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2021 CALIFORNIA BAR EXAMINATION**

This publication contains the five essay questions from the February 2021 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number	Subject
1.	Evidence
2.	Contracts/Remedies
3.	Community Property
4.	Professional Responsibility

QUESTION 2

Bright Earth Solutions (“Bright”), an agricultural services business that employed 10 people and had over 100 clients, purchased a new commercial tractor mower (not suitable for personal, family or household purposes) from Stercutus Mowers (“SM”) for \$15,000. In concluding the sale, SM presented a one-page contract that contained the following language:

SM undertakes, affirms and agrees that this mower is free of defects in material and workmanship at the time of its delivery to the buyer. If the mower or one of its component parts fails within one year of delivery to the buyer because the mower or its component part was defective when installed, SM shall repair or replace at its sole option any such mower or component part at its own cost or expense. Other remedies are excluded.

The contract also stated in bold, 12-point font:

THERE ARE NO WARRANTIES EXPRESSED OR IMPLIED AND PARTICULARLY, THERE ARE NO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE MADE BY SM IN CONNECTION WITH THE SALE OF THIS MOWER.

Authorized representatives of Bright and SM signed the contract and Bright took delivery of the mower.

Over the next six months, Bright experienced numerous problems with the mower. The bolt holding the mower blade in place broke five times under normal usage. The steering system was faulty, causing unsightly and uneven lines in mowing jobs. The gas tank installation was defective, causing intermittent gas leaks. Several times the mower would not start due to various electrical faults and Bright had to cancel planned jobs. As a result, Bright lost clients and \$5,000 in profits.

Bright took the mower to SM each time it malfunctioned. SM effected repairs and the mower would work for a while and then malfunction again. Sometimes the replacement part would fail, other times a different part would fail. The mower was returned to SM for repairs 12 times in the first six months after purchase.

At the beginning of the seventh month after purchase, the mower's steering wheel came off during a job. At that point, Bright communicated to SM that it wished to return the mower and be refunded the purchase price. SM refused, pointing to the clauses above in the original contract. Bright then sued SM for breach of contract and warranty.

1. Is Bright likely to prevail in its suit against SM? Discuss.
2. If Bright prevails, what remedies, if any, would likely be available? Discuss.

QUESTION 2: SELECTED ANSWER A

1. Success of Bright in its suit against SM

Governing Law

Contracts for the sale of goods are governed by Article 2 of the UCC. All other contracts are governed by the common law. Goods are things moveable when identified in the contract. Here, we have a contract for the sale of a commercial tractor mower, which is moveable. Because the tractor is a good, the contract is governed by Article 2.

Statute of Frauds

While contracts generally need not be evidenced by a writing, some contracts require a writing if they fall within the Statute of Frauds. A contract for the sale of a good over \$500 falls within the Statute of Frauds and requires a writing signed by the party against whom enforcement is sought, and expressing the quantity involved.

Here, the contract is for the sale of one \$15,000 commercial tractor mower. The contract is in writing and signed by both parties, so it complies with the formalities of the Statute of Frauds.

Breach of Contract

A contract for the sale of goods (governed by Article 2) requires that the seller of goods tender perfect goods. This means that goods have to be exactly what the buyer contracted to purchase under the terms of the contract. If the seller fails to tender perfect goods, the buyer is entitled to not accept delivery of the defective goods. However, once acceptance is made, a buyer cannot revoke the acceptance unless

there is a latent defect later arising (whereby the defect was not easily identified, but with subsequent use becomes clear).

Here, the contract is for a commercial mower, and the mower has to run perfectly and like an ordinary good of that type operates. After the contract was signed, Bright took delivery of the mower. The assumption would be that the mower, at first glance, seemed to conform to the good that was purchased and as such it was accepted.

However, over the next six months, Bright experienced numerous problems with it. The bolt holding the mower blade broke five times under normal usage, the steering system was faulty, the gas tank installation was defective, and on several occasions the mower failed to start due to electrical faults.

Because these defects were latent and could not have easily been discovered the buyer, Bright, is entitled to revoke its acceptance of this nonconforming good by stating that the defect was a breach of the contract.

With this type of defect and breach, Bright would be entitled to a refund of the full contract price of the mower - \$15,000.

Express Warranty and its Disclaimer

Moreover, Bright will be able to argue that the contract included an express warranty which stated, "this mower is free of defects in material and workmanship at the time of its delivery to the buyer." An express warranty is one which sits on the face of the contract and entitles the buyer to rely on such warranty. Express warranties cannot be disclaimed by a subsequent statement in the contract saying that there "are no warranties expressed or implied."

Here, SM made an express warranty in promising that it would be free of defects at the time of delivery and failure to abide by such warranty will subject SM to damages.

There is no direct evidence that mower was defective at its delivery but it is unlikely that all the problems that arose were a result of negligence on the part of Bright (especially given that it malfunctioned under "normal usage"). Rather the logical inference is that the mower was defective at delivery and SM will be liable for violating the express warranty - the disclaimer will be irrelevant.

SM might argue that the express warranty was specific to defects in material and workmanship and not related to defects in the component parts or in installation.

However, where there are vague terms in express warranties, they will be read in favor of the non-breaching party and as such, Bright will win in arguing that the types of defects that occurred were a result of defects in material and workmanship - in breach of the express warranty.

** Note: SM's disclaimer of an implied warranty of merchantability or fitness for a particular purpose was likely proper. It was in bold and on the same page as other contractual terms.

Limits to Relief

While disclaiming express warranties is improper, SM was able to limit the relief that could be sought if the mower was not defective upon delivery. Here, a term of the contract stated that in bold 12 point font that "If the mower or one of its parts fails within one year of delivery to the buyer because the mower or its component part was defective when installed, **SM shall repair or replace at its sole option any such**

mower or component at its own cost or expense. Other remedies excluded."

Accordingly, SM properly limited Bright's relief to repairs or replacement at its sole discretion.

The facts state that Bright took the mower to SM each time it malfunctioned and SM effected repairs. Thus, SM would argue that it was abiding by its contractual duty to repair the mower and was under no obligation to replace the mower or offer a refund. Further, SM would argue that the fact that the mower would work for a while and then malfunction again is of no relevance, because SM was willing to repair each time as evidenced by the fact that the mower was returned to SM for repairs 12 times in the first six months after purchase and repairs were made each time.

Note: If the suit was for personal injuries sustained by the defective condition, then the limit to relief would not be abided by and the plaintiff would be entitled to damages for his/her injuries. Here, the suit is not for personal injuries so the limit to relief would have been proper but for the express warranty saying the mower would be free from defects.

Conclusion

Bright will be successful in its suit against SM both on a contractual and express warranty suit. Contractually, SM breached by failing to tender perfect goods, and under the express warranty by failing to deliver a mower free of defects in material and workmanship.

2. Remedies available for Bright

Damages

Compensatory Damages

Bright is entitled to recover the purchase price of the defective mower. The mower was purchased for \$15,000 and based on the breach of contract, Bright will argue that he is entitled to a full refund of the purchase price. Assuming the court finds that SM did in fact breach by providing a defective product, then the breach will entitle Bright to a refund of the purchase price plus any other damages sustained as a result of the breach.

Incidental Damages

Bright will also be able to recover any incidental damages that resulted from SM's breach. Incidental damages are those that arise in dealing with the breach. Here, Bright took the mower to get repaired a total of 12 times. He will be able to recover any costs associated with taking the mower to get repaired such as the cost of the salary for the employee who had to go take it in or the gas money spent, etc.

Consequential

Bright will also argue he is entitled to consequential damages for the lost profits he sustained as a result of the breach. Consequential damages will be awarded if both parties (especially the breaching party) was aware of the lost profits that would be incurred as a result of a breach and that those losses were foreseeable.

Here, as a result of the mower being so defective (that sometimes it wouldn't even start), Bright had to cancel planned jobs and lost both clients and \$5,000 in profits. Bright has a good claim here because SM knew that Bright was an agricultural services provider and that if the mower failed consistently it would cause Bright to lose both

clients and profits. As such, the court should award the consequential damages. SM will argue that it was not foreseeable that the losses would be incurred as a result of the breach because it was not foreseeable that Bright would not have other mowers it could use while the mower they purchased was being repaired. Assuming it was clear that this is the only mower Bright owned, the consequential damages will be awarded at least in the amount of \$5,000.

Conclusion

Bright will likely be able to recover the initial purchase price, anything expended as incidental damages, and at least the \$5,000 in consequential damages.

Defenses

SM might argue that Bright is not entitled to the tender of perfect good because it was a contract for goods not suitable for personal, family or household purposes. However, this argument will fail because nothing indicates that the goods were made specifically for Bright.

Additionally, SM might say that Bright consented to the repairs or took too long to demand refund. Also fails.

QUESTION 2: SELECTED ANSWER B

Governing law is UCC Art. 2

Where a contract is for a sale of goods, Article 2 of the UCC applies. For all other types of contracts, the common law applies. Here, the contract was for Bright Earth Solutions (B) to purchase a commercial tractor mower from SM. This is a contract for a sale of goods, therefore Art. 2 of the UCC applies to the contractual analysis set out below.

1. Is B likely to prevail in its suit against SM?

The issue here is whether B has a claim against SM for breach of contract and breach of warranty.

Valid contract

The Statute of Frauds requires that any contract for the sale of goods worth more than \$500 be in writing and signed by the party against whom it is sought to be enforced, and UCC Article 2 requires that the essential term of quantity be included. This is not an issue here as a contract was entered into in writing and signed by both representatives of B and SM and it referenced "this mower", being the particular mower that B purchased from SM. There is, thus, a valid written contract for SOF and UCC purposes.

Breach of contract

Article 2 of the UCC requires a perfect tender where sale of goods is concerned; this means that the seller must tender the right number of conforming goods as required

under the contract. The standard for determining "conforming goods" is that they are fit for their ordinary purposes. Failure to deliver conforming goods entitles the buyer to reject all the goods, accept some and reject the rest, or accept all and sue for damages. However, Article 2 also permits a buyer to reject a good *after acceptance*, where there are defects that are subsequently discovered. Acceptance of defective goods does not preclude a buyer from subsequent rejection where (i) the defect could not have been discovered at the time of delivery and the buyer relied on the seller's assurance that there were no defects; or (ii) the defect was apparent but the buyer accepted in reliance on seller's assurance that the defect would be cured.

Here, B took delivery of the mower upon signing the contract and there is nothing on the facts to suggest that the mower was not conforming at the time of delivery.

However, B can argue that it was not possible to detect any defects at the time of delivery because of the nature of the good (i.e. that any defects could be discovered only after operating the mower for some time) and additionally that B relied on SM's undertaking that the mower was "free of defects in material and workmanship at the time of its delivery". In addition, B could argue that SM's undertaking to repair or replace any mower or component part that failed within 1 year of delivery constituted an assurance to cure a defect discovered after delivery. As such, B will be able to argue that the subsequent defect constituted a breach of the perfect tender rule thereby allowing it to remedies (discussed in part 2 below).

Breach of warranties

B may also argue that SM breached the express warranty set out in the contract.

Express warranty

An express warranty is a statement of fact, description of a good, or a sample or model relating to the quality of the product, where such statement, description, sample or model formed as part of the bargain into and made at such time that the buyer could have relied on the same when entering into the bargain. Here, B will argue that the statement in the contract where SM affirmed that the mower was "free of defects in material and workmanship at the time of its delivery" constituted an express warranty, that was breached when the mower subsequently broke down multiple times over the next 6 months. It is clear that this statement constituted an express warranty. On the other hand, SM will argue that the contract also contained a disclaimer that "there are no warranties express or implied...in connection with the sale of this mower", which precluded B from being able to sue on the express warranty. However, SM's argument is likely to fail. The general rule is that it is very difficult to disclaim express warranties because of the nature of the inconsistency between the disclaimer clause and the express warranty, and the court is likely to construe the interpretation of both in favor of B, the consumer who acted in reliance on the express warranty by entering into the agreement.

As such, B will be able to sue for breach of the warranty if it can be shown that the numerous problems experienced were a result of a defect in material and workmanship at the time of delivery. On the facts, it is stated that the bolt holding the blade in place broke 5 times under normal usage, the steering system was faulty, and that the gas tank installation was defective. It will be for a trier of fact to determine if this evidence shows that the defects existed at delivery, but on balance it seems like this is the case

here such.

Implied warranties

B may also sue for breach of implied warranties of merchantability and fitness for particular purpose. A warranty of merchantability is provided by a commercial seller of the goods in question and warrants that the goods are fit for their ordinary purpose. A warranty of fitness for particular purpose can be provided by any seller and provides that the goods are fit for the particular purpose of the buyer, where the seller knew of the buyer's purpose and that buyer was relying on the seller to help select a suitable good. Here, SM is a commercial seller of mowers and thus can provide both types of implied warranties. B will argue that on the facts, the mower was not fit for ordinary purpose (given that the blade broke down 5 times on normal use, as well as the gas leaks and steering issues). B will also argue that it was not fit for the particular purpose which was for B to use on customers' lawns which required that the mowing lines be satisfactory, since the steering system was faulty and caused unsightly and uneven lines in mowing jobs) and that SM knew of B's particular purpose as B was an agricultural services business.

However, SM will likely be able to succeed that the implied warranties were validly disclaimed by the language. The rule is that a disclaimer must be fair and in conspicuous font and writing so that it is clear to the buyer. Here, the disclaimer clause was stated in bold and 12- point font and will likely meet this requirement. As such, B is unlikely to succeed in arguing breach of implied warranty.

2. B's remedies

If B prevails, it might be entitled to damages or rescission, provided it can argue against the validity of the disclaimer clause.

Validity of limitation of remedies clause:

A commercial contract may include a clause limiting the remedies available, provided that such clause is not unconscionable. A limitation clause may not purport to limit remedies for personal injury or operate in such a way where it limits the remedy to a one that is essentially unworkable under the circumstances. Here, the contract seeks to limit B's remedies to repair or replacement by SM, at its sole option, any mower or component part. However, B can show that the mower simply could not be repaired; on the facts, the mower was returned to SM for repairs 12 times in the first 6 months after purchase and finally that at the beginning of the 7th month, the steering wheel came off during a job, As such, B can argue that the limitation of remedies clause was unfair and should not be enforceable to limit the types of remedies available to B.

Damages

As B can demonstrate breach of contract and express warranty (discussed above), B can sue for damages, namely expectation damages, consequential damages, and any incidental damages. The expectation damages are to place B in a place it would be in had the contract been properly performed (i.e. receiving a mower that functions for ordinary purposes) and would be the cost of cover or market cost of a functioning mower. In addition, B can sue for any consequential damages (the lost \$5000 in profits) as it was reasonably foreseeable to SM that any defect in its mower would cause a loss

in business to B (being an agricultural services company) and lost profits. Finally, B can sue for any incidental damages such as the cost of sending the mower back and forth to SM for repair.

Rescission

B may also look to sue for rescission and obtain its money back. To succeed, B will need to show grounds for rescission such as mistake, misrepresentation, undue influence, duress and further that SM has no valid defenses such as laches, unclean hands etc. Here, B may argue that there was a misrepresentation of statement by SM as to the mower being free of defects. Misrepresentation is an untrue statement of fact regarding the product, that the buyer was objectively justified in relying on and actually relied on. If the statement was made intentionally to induce the buyer's reliance, then it is intentional misrepresentation. Here, B can show that it was justified in relying on SM's statement regarding the defect free nature of the mower and did actually do so. This serves as grounds for rescission. In addition, SM has no valid defenses in equity such as laches (e.g. that B did not sue within a reasonable time thereby causing prejudice to SM) or that B had unclean hands (i.e. acted wrongfully in relation to the matter at hand). As such, B can sue for rescission of the contract, which would entitle it to unwind the contract as if it had not been entered into, and to obtain a refund of the purchase price paid.



ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2022

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the February 2022 California Bar Examination and two selected answers for each question.

The selected answers are not to be considered “model” or perfect answers. The answers were assigned high grades and were written by applicants who passed the examination after the First Read. They are reproduced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. These answers were written by actual applicants under time constraints without access to outside resources. As such, they do not always correctly identify or respond to all issues raised by the question, and they may contain some extraneous or incorrect information. The answers are published here with the consent of the authors.

<u>Question Number</u>	<u>Subject</u>
1.	Criminal Law and Procedure
2.	Community Property
3.	Torts / Remedies
4.	Evidence / Professional Responsibility
5.	Business Associations / Remedies

QUESTION 3

Thirty years ago, Diana built a large open-air theater to provide an outdoor multi-use entertainment venue. On weekdays, Diana rents the venue to the local dance companies. On weekend evenings, Diana hosts rock concerts at the theater. Revenue from the rock concerts funds most of the operating costs of the venue. The theater employs about 200 people and has been a focus of the city's cultural scene. When built, its location was near the edge of the city. As time went by, city development expanded to include housing in the vicinity of the theater.

Pedro recently purchased a house in a subdivision located adjacent to the theater. Although Pedro knew about the theater when he bought his house, he thought that the new house was a perfect place to raise a family.

As soon as Pedro moved into his new house, he was horrified by the noise and vibration coming from the theater during rock concerts. He could feel the floor shake and could not have a normal conversation because of the loud noise. Pedro later learned that his neighbors complained to Diana about the noise and vibration, that they were unsuccessful in obtaining relief, and that they decided to live with it in the end.

Pedro approached Diana. She explained that she had already taken steps to mitigate the negative impact by requiring that all concerts end by 11:00 p.m. and setting a maximum noise level. Diana explained that the facility could not survive economically without rock concerts and that rock concerts were, by their nature, loud.

A few days later, in an effort to find out if she might be able to relieve Pedro of some of his discomfort, Diana went to his house to determine whether sound-deadening materials might be added. She forgot to tell Pedro that she was coming. Diana let herself into Pedro's backyard, took some measurements, and left without disturbing anything.

Pedro intends to sue Diana.

1. What claims may Pedro reasonably assert against Diana? Discuss.
2. What remedies may Pedro reasonably seek? Discuss.

QUESTION 3: SELECTED ANSWER A

Pedro v. Diana

1. Pedro's Claims Against Diana

The issue is which claims that Pedro may assert against Diana.

Private Nuisance

The issue is whether Pedro may assert a claim for private nuisance against Diana due to the excessive noise and vibration from the open-air theater. A claim for private nuisance can be established by demonstrating that the defendant is causing a substantial and unreasonable interference with the plaintiff's use and enjoyment of the property. Interference is considered substantial when a reasonable person would find that there has been a significant deprivation of his or her ability to enjoy the property. A plaintiff's hyper-sensitivities are ignored when a court is adjudicating whether a nuisance exists.

Here, the facts describe the noise level coming from the rock concerts as "horrific." The floor shakes and Pedro is precluded from having even a normal conversation in his own home. Pedro purchased the home because he thought it was going to be a perfect place to raise a family. Much to his horror, the loud noise from the rock concerts coming from the open-air theater constitute a substantial and unreasonable interference with his use and enjoyment of his residence. Pedro does not appear to be hypersensitive to the noise, given that his neighbors have also complained to Diana about the noise level on the property. Further, a reasonable person would find a substantial and unreasonable interference with the enjoyment of his or her own home if the floor was shaking every weekend and conversations could not be had. Diana may argue that no reasonable

person would see this as a substantial interference because she has taken steps to mitigate the noise and resulting inconvenience as a result of the rock concerts (e.g., she only hosts rock concerts on weekends, the concerts must be done by 11:00 p.m., and she has set a maximum noise level). Diana also appears to be considering installing sound-deadening equipment as evidenced by her taking measurements in Pedro's backyard. But Diana's arguments are not likely to be availing given the significance of the disruption that Pedro is suffering.

Thus, Pedro can assert a viable claim for private nuisance against Diana.

Public Nuisance

The issue is whether Pedro may assert a claim for public nuisance against Diana. A claim for public nuisance can be established by an unreasonable interference with the health, safety, and morals of the community at large. To recover under a theory of public nuisance, the plaintiff must suffer unique damages.

Here, Pedro will argue that the public health and safety is being threatened by horrific loud noise coming from the rock concerts at the theater every weekend. However, Pedro's claim for a public nuisance suffers because he cannot identify that he has suffered unique damages. In particular, Pedro's neighbors have already complained about the noise. Pedro also lives in a subdivision located adjacent to the theater.

Pedro's interest as a homeowner of one home in this subdivision that is experiencing noise is not unique as compared against to any other member of the residential community. Further, Diana will likely entirely contest that the theater is a public nuisance at all because the community thrives upon the inclusion of the theater; it is a cornerstone of the community and a focus of the cultural scene.

Thus, Pedro is not likely to assert a viable claim against Diana for public nuisance.

Trespass to Land

The issue is whether Pedro may assert a claim for trespass to land against Diana. A trespass to land is an intentional tort. Trespass to land requires the showing of: (i) an intentional act on the part of the defendant, (ii) a physical invasion of real property, and (iii) causation, meaning that the defendant's conduct was a substantial factor in causing the injury.

Here, Diana went to Pedro's house without his permission. She intended to come onto Pedro's property to determine whether sound-deadening materials might be added. She then voluntarily let herself into Pedro's backyard, which constituted a physical invasion of Pedro's real property. Moreover, Diana caused the action to occur because her letting herself into the backyard was the substantial factor in causing the trespass.

Thus, Pedro can reasonably assert a claim against Diana for trespass to land.

Conclusion

Therefore, Pedro can assert claims for private nuisance, public nuisance, and trespass to land against Diana.

2. Remedies that Pedro May Seek

The issue is which remedies Pedro may seek against Diana.

Compensatory Damages

The issue is whether Pedro may obtain compensatory damages from Diana for the nuisance claims. Compensatory damages are meant to compensate the plaintiff for foreseeable losses and may be pecuniary or non-pecuniary (such as pain and suffering). Compensatory damages must also be certain and unavoidable. Traditionally,

the method of damages calculation for a nuisance claim is the loss of use and enjoyment of the property plus any costs incurred while attempting to abate the nuisance. Courts will also offer an additional award to the plaintiff for the discomfort incurred as a result of the nuisance. Modernly, some courts are applying the doctrine of "permanent nuisance" when calculating a damages award in order to reduce the multiplicity of lawsuits that are being filed. Under this damages model, the plaintiff is entitled to recover as damages the diminution in value of his or her land.

Here, if the court applies a traditional damages calculation, Pedro will be entitled to his loss of use and enjoyment in his residence. The facts do not indicate that Pedro incurred any costs in an attempt to abate the nuisance. In fact, the only action that he took to abate the nuisance was when he approached Diana and explained to her the complaints about the nuisance. Pedro did not incur any costs as a result of having this conversation. The court will make a reasonable award of damages to compensate Pedro for the discomfort caused. Diana may argue that Pedro's damages award should be reduced by his knowing purchase of a residence in close proximity to a theater that is known to host rock concerts.

If the court applies the "permanent nuisance" doctrine, then Pedro will be entitled to recover the value of the diminution in his land as a result of the rock concerts. Diana will similarly argue that Pedro's recovery will need to be reduced by virtue of his assumption of the risk of coming to the nuisance.

Thus, Pedro can recover compensatory damages under either of the models above.

Nominal Damages

The issue is whether Pedro may obtain nominal damages from Diana for the trespass to

land. Nominal damages are those that are obtainable by a plaintiff when no harm was actually suffered (as in a simple trespass to land case).

Here, Pedro did not suffer any damages as a result of Diana entering his property without his permission. The facts indicate that Diana left without disturbing anything in the backyard; thus nothing was damages as a result of Diana's conduct. Pedro can only be entitled to nominal damages from Diana for the trespass to land.

Thus, Pedro can recover nominal damages from Diana for her trespass to land.

Punitive Damages

The issue is whether Pedro may seek punitive damages against Diana. Punitive damages are designed to punish a defendant for intentional conduct arising out of an intentional tort. Here, Pedro will not likely be able to recover punitive damages from Diana because she has acted in good faith by establishing reasonable parameters to confine the impact of the noise from the rock concerts. Thus, Pedro will not be able to seek punitive damages from Diana.

Permanent Injunction

The issue is whether Pedro may obtain a permanent injunction against Diana enjoining rock concerts at the open-air theater. An injunction is an equitable remedy. A permanent injunction will last for the amount of time imposed by the court. A negative injunction enjoins the defendant from engaging in a specified activity. A mandatory injunction orders the defendant to perform an affirmative act. The elements of a permanent injunction are (1) inadequate remedy at law, (2) the injunction is feasible, (3) the balancing of hardships weighs in favor of granting the injunction, and (4) no defenses apply. Each element will be discussed in turn below.

Inadequate Remedy at Law

The issue is whether there is an adequate remedy at law. If a violation is continuing, a court will deem that there is no adequate remedy at law.

Here, the nuisance is continuing. In fact, on weekend evenings, Diana hosts rock concerts at the theater. The theater is a large open-air theater and Diana explained that the loud rock concerts will need to continue.

Thus, there is no adequate remedy at law.

Feasibility of Enforcement

The issue is whether an injunction is feasible. The feasibility of enforcement turns on whether the injunction will be mandatory or negative. See above for the definitions of mandatory and negative injunctions. There are no feasibility issues with negative injunctions because the court can merely exercise its contempt power and hold the defendant in contempt of court if the defendant commits an act that it is enjoined from engaging. There are feasibility issues with a mandatory injunction, however, because it requires the court to supervise the defendant in ensuring that the defendant is complying with the injunction. Generally, the scarcity of judicial resources precludes courts from acting as supervisors to enforce mandatory injunctions.

Here, Pedro will request a negative injunction in that the theater be enjoined from hosting further rock concerts. This will be feasible to enforce because the court can simply hold Diana in contempt of court if it learns that she sponsors a rock concert in violation of the injunction order.

Thus, enforcement of the injunction is feasible because it will be a negative injunction.

Balance of Hardships

The issue is whether the balance of hardships will favor the granting of injunctive relief. In effectuating the balancing test, the court will balance the interests of the plaintiff in obtaining the injunction against the interests of the defendant and the public. If the burden to the defendant and the public outweighs the benefit to the plaintiff, then damages will be deemed an adequate remedy and an injunction will not be proper. Here, Pedro will argue that the balance of hardships tip in his favor because the noise from the rock concert is horrific and causing the floor to shake. Pedro cannot even maintain a conversation in his home due to the severe noise. Moreover, Pedro will argue that the public interest weighs in his favor because Pedro's neighbors have complained to Diana about the noise and vibration, and they received no meaningful response from Diana. Further, the theater is also rented to local dance companies during the week and generates revenue that way; it cannot be said that the theater is wholly dependent upon rock concerts for revenue generation.

On the contrary, Diana will argue that her interests and the public interests will be significantly burdened if an injunction is issued against her. With respect to Diana, she has owned the facility for 30 years; in fact, she built it. At the time that she built the facility, it was near the edge of the city, and it was only as time went by that the city development expanded to include housing in the vicinity of the theater. The theater cannot survive economically without rock concerts and thus Diana's financial interests could be wholly, negatively impacted. Moreover, Diana will argue that the public interest will lie against granting injunctive relief because the theater employs 200 people and has been a focus of the city's cultural scene for many years. Without the rock concerts, the theater will become bankrupt, and 200 citizens will be out of work.

Moreover, Diana has already taken steps that will work to mitigate the amount of the nuisance. Not only are rock concerts only on the weekend, but she requires that all concerts end by 11:00 p.m.; Diana also set a maximum noise level. Pedro's neighbors further dropped their complaints about the noise and Diana is taking reasonable measures to ensure that the nearby housing is only minimally impacted by the nuisance.

In consideration of all of this evidence, a court will likely side with Diana in concluding that the public interest and her interests outweigh the burden on Pedro. An injunction would have an overall negative impact of the economy and the culture of the community, force numerous people out of jobs, forfeit revenue brought in by the rock concerts, and cause the theater to close its doors.

Thus, on balance, the balance of hardships weighs against granting a permanent injunction.

Defense - "Coming to the Nuisance"

The issue is whether Diana can raise the defense of "coming to the nuisance" in precluding Pedro from obtaining injunctive relief. "Coming to the nuisance" means that the plaintiff voluntarily encountered the nuisance and decided to live near the nuisance anyway. "Coming to the nuisance" is generally not a defense to equitable relief.

Here, Diana may argue that Pedro came to the nuisance and thus assumed the risk because he knew about the theater when he purchased the house. But that will not be a successful defense in the injunction action. (Diana could assert this in response to the damages award so that Pedro's damages can be mitigated by those that would have been avoidable.)

Thus, "coming to the nuisance" is not a defense to the injunction.

Conclusion

Thus, it is likely that Pedro may reasonably seek a permanent injunction from Diana, but it will likely be denied on the basis of hardship.

Overall Conclusion

Therefore, Pedro may reasonably seek injunctive relief and damages remedies against Diana.

QUESTION 3: SELECTED ANSWER B

I. PEDRO'S CLAIMS AGAINST DIANA

Trespass to land

Trespass to land is intentional physical invasion of the land of another. Knowledge of legal title or intent to legally invade is not necessary; only the intent to physically invade suffices.

Here, "A few days later, in an effort to find out if she might be able to relieve Pedro of some of his discomfort, Diana went to his house to determine whether sound-deadening materials might be added. She forgot to tell Pedro that she was coming. Diana let herself into Pedro's backyard, took some measurements, and left without disturbing anything." As such, D physically entered P's backyard, which is P's land, without consent. Although D did not intend to interfere with P's rights, D intended in fact to enter P's backyard physically. This satisfies the intent requirement.

In conclusion, D committed trespass to land and is liable

Defense of consent or private necessity fails

Consent is a defense to trespass to land. Consent may be express or implied. Necessity is also a defense that exists when the action was justified because the trespass was done to prevent an imminent harm. Private necessity is when trespass was necessary to prevent harm to a private interest. Public necessity applies when the imminent or threatened harm was to the public. Public necessity is immune to damages caused by trespass. Private necessity claimant is still responsible for damages caused by trespass.

Here, D may raise the defense of consent or private necessity. Consent defense fails

because D did not seek P's consent expressly. Further, the mere owning of land does not imply consent to let others enter the backyard, even if they seek to enter to help the landowner. Further, any private necessity argument is weak. D could argue that it was necessary for D to measure P's land to help P. However, D could simply have asked P before entering. Since D forgot, D could have called P or returned at some other time. Since D simply entered P's backyard without seeking any form of consent, and since D had alternatives available and no imminent threat existed to make D's immediate entrance necessary, D will not establish these defenses.

Only nominal damages available

A physical trespass presumes that harm existed, and as such P does not have to prove that P suffered a specific pecuniary harm. However, based on the facts, D did not disturb anything and so it is unlikely P suffered any significant pecuniary damages. P will likely recover nominal damages, which are little amounts of damages that are awarded to vindicate the plaintiff's rights when not much harm was incurred in fact.

Conclusion

In conclusion, D committed trespass to land against P, and is liable. However, P can recover nominal damages, but will likely *only* recover nominal damages unless P can prove that P suffered some facts that indicated in the facts.

Pedro approached Diana. she explained that she had already taken steps to mitigate the negative impact by requiring that all concerts end by 11:00 p.m. and setting a maximum noise level. Diana explained that the facility could not survive economically without rock concerts and that rock concerts were, by their nature, loud.

Pedro intends to sue Diana

Private nuisance

Private nuisance occurs when the defendant substantially and unreasonably interfered with another private person's possession or use of private property. An interference is substantial when it would be offensive to a reasonable person. A hardened plaintiff who is subjectively not bothered by the interference can still recover if that interference is "substantial." An interference is unreasonable when the harm it causes is outweighed by the value it provides.

Whether interference is substantial

Here, "As soon as Pedro moved into his new house, he was horrified by the noise and vibration coming from the theater during rock concerts. He could feel the floor shake and could not have a normal conversation because of the loud noise." It appears that the shaking is physical as P can feel the vibrations of the sound. This likely offends reasonable persons because although whether loud noise by itself offends a reasonable person is arguable, when the sound physically vibrates and causes movement the reasonable person is likely to be offended by it and be annoyed by it, and the reasonable person's life will be interfered by it and their enjoyment of their home is likely reduced, possibly significantly. Further, "Pedro later learned that his neighbors complained to Diana about the noise and vibration, that they were unsuccessful in obtaining relief, and that they decided to live with it in the end." As such, it appears that people other than Pedro were in fact offended by the noises and vibrations to the point that they instituted a good faith lawsuit. D will highlight that they decided to live with it, and this shows that the interference is not substantial. Had it been substantial, D will argue, then the neighbors could objectively not decide to live with it. Although whether

interference is substantial is a fact intensive inquiry, given the fact that the venue is surrounded by residences and the noise physically vibrates and quakes the neighbors, the court will likely deem the noise and vibrations substantial and offensive to a reasonable person.

Whether interference is unreasonable

Here, "D operates a large open-air theater. "On weekdays, Diana rents the venue to the local dance companies. On weekend evenings, Diana hosts rock concerts at the theater. Revenue from the rock concerts funds most of the operating costs of the venue. The theater employs about 200 people and has been a focus of the city's cultural scene." As such, it appears that D produces a lot of value to the community. Local dance companies likely need D's venue to do their performances and make their living. Further, rock and culture are important benefits to the community. It appears that culture is a major economic driver for the city. Further, the theater employs 200 people, which is a great benefit and contribution to the community. D will highlight that D's venue allows 200 people to make a livelihood while promoting the city's culture and fostering social ties and community bonds through art. Although P will counter that the harm is significant because it makes the lives of people around the venue difficult to live, to sleep, etc., D will counter that the very fact that the neighbors can decide to live with the noises attest to the fact that the harm is not significant, especially considering the great magnitude of value to the community - 200 jobs, cultural focus, tourism, economy, dancers, and musicians, etc.

Conclusion

In conclusion, the court can rule either way, if this were a case of first impression and

preclusion was not a consideration. Although it appears that the interference is substantial, it also appears that an organized group of people can decide to live with it. Also, it appears that the venue provides a great amount of value to the public that cannot be denied. As such, the court may legitimately determine that the interference is not unreasonable and thus there is no private nuisance here.

Coming to the nuisance is not a defense

Coming to the nuisance is typically not a defense. Such consideration only is a defense when a party intentionally comes to the nuisance for the sole purpose of harassing or instituting a lawsuit. In general, coming to the nuisance is one of many factors considered in the overall analysis.

Here, "Thirty years ago, Diana built a large open-air theater to provide an outdoor multi-use entertainment venue." Then, "Pedro recently purchased a house in a subdivision located adjacent to the theater. Although Pedro knew about the theater when he bought his house, he thought that the new house was a perfect place to raise a family." As such, it appears that P not only came to it, P knew of the theater and its potential consequences and P did not investigate at all. Since the neighbors had already brought a lawsuit before, a simple asking of questions around would likely give P notice of the theater's activities. As such, it appears that P was on inquiry notice to inquire into the theater's activities but failed to do so. However, coming to the nuisance is not dispositive in any way because P did not come to the nuisance solely to harass with a lawsuit; P genuinely came in good faith because P believed that it was a perfect place to raise a family. As such, the court will not outright dismiss P's private nuisance. However, the court may use the fact that P came to the nuisance and the fact that P

failed to inquire at all into the theater's activities to conclude on the substantial/unreasonableness analysis in favor of D.

Neighborhood creeping into D's venue

Another factor is the neighborhood's creeping into D's venue. As mentioned above with P's coming to nuisance, the "neighborhood" coming to the nuisance will not be a dispositive factor and may merely be one of many other factors. However, it appears that the court should at least give some weight to the fact that "When built, its location was near the edge of the city. As time went by, city development expanded to include housing in the vicinity of the theater." As such, D was operating D's venue in good faith.

Conclusion

In conclusion, the court will likely side with D based on the totality of circumstances and find that the value of D's operation outweighs harms that apparently were accepted to by the neighbors. Further preclusion may or may not be a consideration as discussed below.

Public nuisance

Public nuisance is substantial and unreasonable interference with health, safety, morals, or other rights of the community. When a private party seeks to bring a lawsuit for public nuisance, that party must have suffered a harm distinct from the harm suffered by the community.

Here, the harm as mentioned above might be ruled not unreasonable. Further, P has not suffered any harm from the noise or vibration that is unique from the harm suffered by other neighbors. P suffered the same exact harm that everyone around P suffers. As such, P cannot bring a public nuisance claim.

Preclusion

Preclusion bars the re-litigation of issues already litigated. Claim preclusion and issue preclusion exist.

Claim preclusion

Claim preclusion bars re litigation of same claims when there is a final valid judgment on the merits, asserted by same parties in same configuration, and the claims are the same.

Here, the parties are different because P was not part of the earlier lawsuit for relief. As such, claim preclusion does not apply.

Issue preclusion

Issue preclusion bars re-litigation of same issues when 1) in a final valid judgment on the merits exist; 2) the issues was necessarily determined; 3) the issue was essential to the judgment; and 4) no mutuality problems exist.

Here, the prior parties were unsuccessful in obtaining relief, and they decided to live with it. As such, the prior lawsuit likely ended, and the plaintiffs decided against appealing. As such, the decision is final. It appears that the claim was not unsuccessful because of personal jurisdiction or other issues, and so it appears that the prior lawsuit went into the merits. The vibrations and noise are the whole point of the prior lawsuit and of this lawsuit as well. As such, the issue was both necessarily determined and essential to prior judgment. Finally, mutuality problems must not exist. First, D was party to the prior action and had a chance to defend D's self. Further, P was not party to the prior action. However, in this case since D was successful in the prior action, D will seek to assert issue preclusion against P. Since P was not party to the prior action, P had no

chance to be heard. As such, D cannot assert issue preclusion against P.

Conclusion

In conclusion, D will not be able to assert issue preclusion against P. P will not want to assert preclusion because D prevailed (it appears) in the former action.

Negligent infliction of emotional distress

Defenses: defense (self, property, others); consent; arrest; necessity

Other torts (negligence, strict liability)

II. REMEDIES PEDRO CAN SEEK

Remedies for trespass to land was discussed earlier and is likely to be limited to nominal damages, especially since D will probably not come against and against and cause a multiplicity of suits problem. The remedies here will concern the case that P wins on the nuisance claim.

Money damages

Tort money damages are primarily "compensatory damages" which seeks to compensate the plaintiff put make the plaintiff whole. Sometimes there are "nominal" damages that seek to vindicate a plaintiff who basically has not been harmed, as discussed above. There are also "punitive" damages which will punish the defendant for willful and wanton conduct.

Here, punitive damages should not be available because D is not engaged in willful and wanton conduct to harm P or others. Rather, D is engaged in a legitimate business that benefits the entire community which happens to also harm nearby neighbors, who came to the nuisance because both the neighborhood crept towards D's venue and the neighbors decided to purchase the homes or rent the homes (in which case it would not

be that costly for them to relocate or move away).

Further, P was seeking to raise a family here and live a quiet life here with P's family.

However, the value of what P is unable to do this because of the noise and vibrations.

First, it is not certain that P will win damages because of reasons discussed above - no nuisance might exist. Second, even if P wins on the private nuisance claim, it is possible

that P did not suffer much pecuniary harm. Perhaps P actually got the land for a cheaper price because the seller reduced the price because of the noise and vibrations.

As such, P might not have suffered harm in decrease of land value (P might have *gotten*

the land cheaply to begin with). Third, it is possible that P will be culpable as well

because P failed to inquire at all, as described above, when a simple few questions would have revealed the problem, or even a visit on a weekend.

If P's land value did go down because of the noise and vibrations, then P may be entitled to the difference between the value of the land as P purchased it without the noise and vibration issues.

Temporary restraining order, preliminary injunction, permanent injunction

P may also seek equitable relief. Although P might go through temporary restraining orders and preliminary injunction, ultimately it is a permanent injunction that P would seek to try to enjoin D from having such loud noises.

Permanent injunction is appropriate when 1) legal damage is inadequate; 2) enforcement is feasible; 3) property right exists; 4) balance of harms and equities; 5) no defenses.

1) legal damage is inadequate

Legal damages might be inadequate when the conduct at issue might be repeated or

occur in the future; or when damages would be speculative or uncertain; or when the defendant is insolvent so a judgment would be meaningless.

Here, damages would be speculative because it would be difficult not only to measure the harm of constant noises and vibrations. Further, D seeks to play noises every weekend into possibly likely decades into the future. But D might stop the operation next year. As such, damages are speculative and uncertain. It can be argued that the decrease in value of land with the noises is a sufficiently certain measure of damages, however.

2) enforcement is feasible

A negative injunction prohibiting an action is easier to enforce than affirmative injunctions. One single act is easier to enforce than series of acts. An act requiring skills or personal taste is harder to enforce than objective acts. Involuntary servitudes are disfavored if not unconstitutional.

Here, the injunction sought is negative, which is not hard to enforce. Every time D engages in the making of noise, every neighbor would hear. As such, it would be noticed, and someone can make a complaint to the court and the court can issue contempt order. Further, since the land is in the state and city of the court, there are no jurisdictional issues and the injunction, and its enforcement is feasible.

3) property right exists

Traditionally, a protectible property right was needed. Modernly and in CA, property right is not necessary. Here, however, there is right in use and enjoyment of land property, quiet enjoyment, without the noise and vibrations. As such, this element would be satisfied.

4) balance of harms and equities

The harms and equities must be balanced, including benefit to the public. Here, the harm to public would be high because 200 people would lose their jobs. The harm to P would be high as well because on every weekend P would suffer loud noises and vibrations until 11pm, which is arguably very late and offensive to reasonable ordinary persons. The harm to D would be significant, although perhaps D can still operate during weekdays because dance performances seem not to be the issue, only rock concerts.

5) no defenses

It appears that P did not unduly delay and cause D prejudice (no laches). It also appears that P did not act in a culpable manner even if failure to inquire was a little neglectful (no unclean hands)

Conclusion

In conclusion, the analysis for permanent injunction does not appear to be one sided. As such, the court may likely refuse to grant it, as it did in the prior action by neighbors against the same D.

TROs and preliminary injunctions

The analysis for TROs and preliminary injunctions is similar to that for permanent injunctions. The major difference is that they require the necessity of maintaining status quo until a preliminary hearing can be held because of imminent harm (TRO) and until a full trial (preliminary injunction).

Here, it appears that neighbors can decide to live with the noise and vibrations. The neighbors had organized to file a lawsuit. As such, they would not merely decide to "live

with it" out of shyness, since they could commiserate with each other and feel free to complain and such feelings would avalanche and not be reduced. As such, it appears that there is no imminent irreparable harm that would justify TROs and preliminary injunctions.

Further based on the analysis above on private nuisance especially, likelihood of success does not appear to be great; It might be 60% at most.

other remedies

Other remedies such as constructive trust and equitable lien do not apply and are not relevant. Permanent injunction is the only relevant one and even that is unlikely.



ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2022

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the February 2022 California Bar Examination and two selected answers for each question.

The selected answers are not to be considered “model” or perfect answers. The answers were assigned high grades and were written by applicants who passed the examination after the First Read. They are reproduced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. These answers were written by actual applicants under time constraints without access to outside resources. As such, they do not always correctly identify or respond to all issues raised by the question, and they may contain some extraneous or incorrect information. The answers are published here with the consent of the authors.

<u>Question Number</u>	<u>Subject</u>
1.	Criminal Law and Procedure
2.	Community Property
3.	Torts / Remedies
4.	Evidence / Professional Responsibility
5.	Business Associations / Remedies

QUESTION 5

Arnold and Betty agreed to launch a business selling a durable paint that Arnold had developed and patented. They agreed to share all profits and to act as equal owners. Betty agreed to contribute \$100,000 to the business venture. Arnold agreed to contribute his patent for durable paint. Arnold told Betty that he thought the patent was worth \$100,000. He did not tell Betty that he had previously tried to sell the patent to several reputable paint companies but was never offered more than \$50,000. Arnold and Betty agreed that Betty would be responsible for market research and marketing and Arnold would be responsible for incorporating the business and taking care of any other steps needed to start the enterprise.

Arnold first located a building within which to operate the business, owned by Landlord Co., and entered into a one-year lease in the name of Durable Paint, Inc. Subsequently, after Arnold took the necessary steps, Durable Paint, Inc. was incorporated. At the corporation's first board of directors meeting, Arnold and Betty were named as sole directors and officers. During that meeting, Arnold and Betty voted for the corporation to assume all rights and liabilities for the lease and to accept assignment of Arnold's patent rights.

Over the next six months, Durable Paint, Inc. faced unforeseen and costly manufacturing and supply problems. At the end of the first six months, the corporation had exhausted all its capital and was two months behind on rent. To make matters worse, a competitor developed a far superior product, making Durable Paint, Inc.'s patent effectively worthless. Durable Paint, Inc. had no other assets.

Landlord Co. sued Arnold and Betty personally for damages for breach of the lease.

Betty sued Arnold.

1. On what theory or theories might Arnold be found personally liable for damages to Landlord Co.? Discuss.
2. On what theory or theories might Betty be found personally liable for damages to Landlord Co.? Discuss.
3. On what theory or theories might Arnold be found personally liable for damages to Betty? Discuss.

QUESTION 5: SELECTED ANSWER A

Arnold's Liability

There are multiple theories under which Landlord Co. can try to hold Arnold personally liable.

Corporation Formation - when did Arnold and Betty form a corporation?

De Jure Corporation

A corporation is a business entity which is separate from its legal owners (shareholders). This means that the shareholders of the business are not personally liable for the obligations and liabilities of the business. They are only liable to the extent of their investment (and for their own torts). In order to form a corporation (known as a de jure corporation if properly formed), articles of incorporation must be filed with the secretary of state following certain required procedures and including certain information.

Here, Arnold did not take the necessary steps to form Durable Paint, Inc. until after entering into the lease with Landlord Co. Accordingly, a de jure corporation was not formed when Arnold entered into the lease.

De Facto Corporation

If a corporation is *not* properly performed, the corporation still may be treated as a corporation for purposes of personal liability of its shareholders if there is a corporation formation statute, there is a good faith attempt to comply with the statute, and the corporation acts as if it is a corporation. In this situation, the incorporator must not know that it failed to form a corporation.

Here, Arnold did not form the corporation or attempt to form the corporation until *after*

the corporation entered into the one-year lease with durable Paint, Inc. Accordingly, Betty and Arnold cannot take advantage of the de facto corporation doctrine.

Promotor Liability

Promoter liability concerns a situation in which an individual enters into contracts on behalf of a corporation before the corporation is formed. In this scenario, the promoter is liable on the contract unless there is a later novation (between the corporation, third party and promoter) or the contract states that the promoter is not liable, in which case it is treated as a revocable offer for the corporation. The corporation is only liable on the contract if the corporation adopts the contract.

Here, while the corporation arguably adopted the contract, the facts do not state that there was a novation of Arnold or that the lease stated that Arnold was not liable for the lease. Accordingly, Arnold will be found personally liable on the lease as a promoter. The corporation, Landlord co. and the promoter would have been required to adopt a novation in order to release Arnold from the contract or the lease would have had to state that Arnold was not liable. Thus, Arnold will be found liable on the lease under the promoter theory (unless he is successful on his claim for corporation by estoppel).

Corporation by Estoppel

Corporation by estoppel is another doctrine which allows an entity that is not a corporation to be treated as a corporation for purposes of personal liability. This has been abolished in most states, but if applicable, it is applied when the entity has been treated as a corporation by a third party. In this scenario, the third party is estopped from arguing that the corporation is not a corporation. This applies in contract actions, but not in tort actions (because tort plaintiffs do not voluntarily enter into torts). This can

also prevent the incorporator from stating that the corporation was not formed as well. Here, Arnold entered into a one-year lease with Landlord Co. in the name of "Durable Paint, Inc.". Accordingly, Arnold held out the tenant of the lease as being a properly informed corporation. Thus, Arnold can argue that Landlord Co. had the opportunity to investigate Durable Paint, Inc. and see that it was not incorporated. If Arnold is successful in having the court apply this doctrine, Landlord Co. will be estopped from arguing that Durable Paint Inc. is *not* a corporation because it treated Durable Paint, Inc. as a corporation, in which case both *Arnold* and *Betty* would not be personally liable (unless Landlord Co. is successful in piercing the corporation veil, discussed below). However, since Arnold never tried to incorporate the entity before signing the lease, the court may be reluctant to assert this doctrine.

Betty's Liability

Partnership

Formation - did Arnold and Betty enter into a partnership before incorporating the business?

A partnership is an association of two or more persons to carry on a business for profits. Intent to carry on a business for profit is required, but intent to form a partnership is not. Sharing profits establishes a presumption that a business is a partnership. Equal management rights further add to such presumption. No formalities are required and there need be no written partnership agreement. A partnership is a separate entity from its partners; however, the partners are jointly and severally liable for all obligations and liabilities of the partnership. However, a person that is seeking remedies from the partnership must first extinguish all partnership assets before attempting to recover from

the partners personally.

Here, before the business was incorporated as a corporation, Arnold and Betty agreed to launch a business selling durable paint that Arnold had developed and patented.

They agreed to *share all profits* and act as *equal owners*. This created a presumption that they intended to carry on a business for profit. Accordingly, before Arnold and Betty entered into a corporation, they entered into a partnership. The fact that they "called" the partnership "Durable Paint, Inc." is irrelevant for purposes of establishing a partnership. Thus, Arnold and Betty were both personally liable for all obligations of the partnership

Authority - is the partnership liable for the lease?

A partner is an agent for the partnership and has the actual and apparent authority to enter into all ordinary business transactions on behalf of the partnership. Actual authority is authority the partner reasonably believes she has from the written partnership agreement or agreement of the partners. Apparent authority is authority a third party reasonably believes the third party has based on the manifestations of the principal. A partnership is liable for obligations and liabilities entered into by a partner acting with authority. Accordingly, the partners are personally liable for all such obligations and liabilities as well (see rules above).

Here, Betty and Arnold agreed that Betty would be responsible for market research and marketing and Arnold would be responsible for incorporating the business and "taking care of any other steps needed to start the enterprise." Accordingly, Betty had actual authority to conduct market research and market the business and Arnold had actual authority to incorporate the business and take care of its other startup needs. Betty will

argue that entering into a one-year lease is not a step need to start the enterprise and that, therefore, Arnold had no actual authority to enter into the lease and that the partnership was therefore not liable on the lease. Landlord co. will argue that entering into a one-year (short-term) lease is a normal step needed to start an enterprise for developing paint. Landlord co. is likely to succeed on this point. As to apparent authority, entering into a one-year office lease is the type of ordinary business transaction that a third could reasonably think that a partner was entering into on behalf of the partnership. Accordingly, under either an actual authority or apparent authority theory, Arnold likely had authority to bind the partnership to the lease.

Therefore, Betty would be personally liable for the obligations of the partnership - i.e., the entering into of the lease. However, Landlord co. would first have to exhaust partnership assets (and the assets are apparently already exhausted).

Betty will argue she is not liable on the lease because the partnership turned into a corporation. While the partnership was dissolved when it turned into a corporation, the lease was entered into while the business was still a partnership. She may be able to argue that the liability (failure to make payments) was not incurred until the partnership was a corporation. If this is the argument, Landlord. Co. can attempt to proceed on a piercing the corporate veil theory.

Corporation's Adoption of the Contract

As discussed above, a corporation can assume a contract entered into by a promoter by adopting the contract after formation. In order for a corporation to adopt a contract, the directors, who are in charge of the management of the corporation, must vote by a majority to adopt the contract.

Here, the facts state that Arnold and Betty assumed all rights and liabilities for the lease. Arnold and Betty were named as the sole directors, and they both voted to adopt the contract. Accordingly, the corporation validly adopted the contract.

Piercing the Corporate Veil

As discussed above, shareholders of a corporation are not ordinarily liable for the obligations of the corporation. However, they may be held liable when the court pierces the corporate veil to prevent fraud and abuse. This will occur (i) when the corporation does not observe corporate formalities (alter-ego theory), (ii) the corporation was undercapitalized, or (iii) to prevent a fraud.

Here, Landlord co. will argue the corporation was undercapitalized as Betty only contributed \$100,000 and Arnold contributed his patent. Landlord co. will argue that clearly the corporation was undercapitalized because it could not make payments on a one-year lease or take care of its startup costs. However, \$100,000 is not a minor amount, and the facts suggest that the manufacturing and supply problems were unforeseen. However, six months is a very fast amount of time to lose \$100,000.

Further, the rent may have been expensive if the lease was for manufacturing space. If the lease was for office space, the rent would be cheaper, and the capitalization amount may have been reasonable. Ultimately, this is a question for the court, but Betty is likely to succeed on this point. There are no facts to suggest corporate formalities were not formed as the corporation held a board of director's meeting where the directors were named, and no corporate funds are implied to have been used for private use. Further, there is no evidence of fraud.

Accordingly, Landlord Co. is probably unlikely to succeed on a claim for piercing the

corporate veil unless it can prove undercapitalization.

Arnold v. Betty

Contribution - Partnership

When a partner is held personally liable for an obligation of the partnership, such a partner may be entitled to sue the partner who is actually responsible for such liability for contribution if they violated an obligation to the partnership. Further, a partner is a fiduciary to the partnership and partners and owes a duty of care to act in the best interest of the partnership and with reasonable care.

Here, as discussed above, Betty may be found personally liable to Landlord Co. for damages for the unpaid rent. However, as discussed above, Arnold entered into the partnership lease with Landlord Co. However, he did so with authority of the partnership. Accordingly, Betty will probably not succeed against Arnold in an action for damages based on contribution under a partnership theory.

Betty can argue that Arnold breached his duty of care in failing to form the corporation before entering into the relationship with Landlord and in failing to properly "capitalize" the corporation with a patent. However, Arnold will argue that it was Betty's job to conduct market research, not Arnold, and she should have known about the competitor. She will likely not succeed on this argument, but she may succeed in arguing that Arnold failed to properly form the corporation since he violated his duty of care in doing so and thereby injured the partnership.

Fraudulent Misrepresentation

A person may be found liable for fraud when they make a material misstatement of past or present fact upon which a reasonable person would rely and upon which the person

does, in fact, rely to their detriment.

Here, Arnold agreed to contribute his patent for durable paint to the partnership. He told Betty that he thought the patent was worth \$100,000. However, he did not tell Betty that he had previously tried to sell the patent to several reputable paint companies but was never offered more than \$50,000. Accordingly, at worst, he had no reasonable basis to believe the paint was worth \$50,000, and at best, he failed to disclose a material fact. It is likely that Betty agreed to enter into the partnership and corporation with Arnold due to an equal share of investment and that this induced her to enter into such business. She then lost her investment and was held personally liable for an obligation of the business. Accordingly, she may be able to succeed against Arnold on a theory of fraudulent misrepresentation for his nondisclosure regarding the true worth of the patent.

Duty of Care - Corporation

A director owes a corporation the duty of care. Betty can sue Arnold on a derivative claim for violation of the duty of care in mismanagement of the corporation in causing it to financially exhaust its resources, but the damages would go to the corporation, and not to Betty. Further, Arnold can rely on the business judgment rule, which defers to the judgment of the directors so long as they act reasonably and in good faith without a conflict of interest.

QUESTION 5: SELECTED ANSWER B

ANSWER TO QUESTION 5

I. Arnold's Liability to Landlord Co.

A. Partnership Liability

The issue is whether Arnold can be held personally liable as a partner of Durable Paint, Inc.

i. Formation

The issue is whether Arnold and Betty formed a valid partnership.

A partnership is the carrying on of a business for profit by two or persons as co-owners.

There are three types of partnerships: general partnerships, limited partnerships, and limited liability partnerships. There are no formalities necessary to create a general partnership. A general partnership will be presumed where two parties share the profits of a business venture. The parties' subjective intentions are irrelevant when considering whether a partnership was formed. Where a partnership is formed, the partnership agreement will generally control the rights and liabilities of the partners, but where the agreement is silent, the provisions of the Uniform Partnership Act will control.

Here, Arnold and Betty agreed to launch a business selling a durable paint that Arnold had developed and patented. Thus, they entered into an agreement to carry on a business for profit. Moreover, Arnold and Betty agreed to share all profits and act as equal owners in the partnership. Even though Betty contributed \$100,000 as a capital investment and Arnold only contributed a patent worth \$50,000, the two will likely be considered to have entered into a general partnership where Betty would be responsible for market research and marketing and Arnold would be responsible for incorporating

the business and taking care of other steps to start the enterprise. They did not enter into a limited partnership or limited liability partnership, because each require filing for certification with the secretary of state.

Thus, Arnold and Betty were each general partners of a valid general partnership.

ii. The Partnership's Liability on the Lease Contract

The issue is whether the partnership is liable on the contract entered into with Landlord Co., and if so, whether Arnold can be found personally liable.

A general partner is considered an agent of the partnership when acting in the ordinary course of business. An agent has authority to bind the principal where they have been given express authorization to do so. They have implied authority to do what is necessary to carry out their responsibilities. If the agent has authority to enter into a contract, either express or implied, the principal will be bound by the agreement. The agent will not be personally liable unless they did not disclose the identity of the agent. Here, Arnold was an agent of the partnership and thus could act as its agent. The partners expressly agreed that he would be responsible for incorporating the business, but also in taking care of any other steps needed to start the enterprise. Arnold entered into a lease with for a building in which the Arnold and Betty would operate the business. Entering into the lease would be considered a "step needed" to start he enterprise, and thus Arnold was acting according to his actual express authority when he agreed to the lease. Because Arnold is a general partner of the partnership and acted under his authority to bind the partnership, the contract is binding on the partnership. Moreover, Arnold disclosed that he was entering into the lease on behalf of the partnership, which he named Durable Paint, Inc. Thus, Arnold is not personally

liable for the contract.

iii. Arnold's Liability as a General Partner

The issue is whether Arnold, as a general partner, is liable for the contracts.

General partners not in a limited liability partnership are personally liable for the obligations of the partnership. The general partners are jointly and severally liable and can seek contribution from any partners who do not pay their share. Absent any agreement otherwise, the partners are liable in the same proportions as they share in profits.

After six months, Durable Paint, Inc. breached the lease agreement. Arnold, as a general partner, would be personally liable for the breach by the partnership. However, though he is jointly and severally responsible to Landlord Co., the obligations of the partnership must be split equally between himself and Betty - which is the proportion in which they split profits. It is of no consequence that they contributed different amounts of capital investment. Thus, he can seek contribution from Betty for half of the debt.

B. Corporate Liability

The issue is whether Durable Paint, Inc. can be liable for the agreement.

Promoters are those who take the preliminary steps to set up a corporation and incorporate it. Promoters are not agents of the to-be corporation, and thus have no power to bind it in a contract. However, once incorporated, the corporation can adopt the agreement either expressly or impliedly. Adoption can be by a valid resolution of the board of directors, which requires a quorum (meaning a majority of directors must be present) and a majority of the quorum must approve the resolution. If they do so, both the corporation and the promoter are personally liable on the contract. If the corporation

instead executes a valid novation, replacing the promoter with itself on the contract, the promoter is no longer liable.

Here, Arnold entered into a lease with Landlord Co. on behalf of Durable Paint, Inc. At the time, Durable Paint Inc. was not yet a corporation because it had not yet been incorporated. Because Arnold was taking preliminary steps to incorporate it and set up the enterprise, he would be considered a promoter at the time he entered the lease. Thus, as a promoter, he was personally liable on the contract. However, the board, consisting of Arnold and Betty, then voted to "assume all rights and liabilities for the lease." The vote was unanimous and with all the directors present, and thus they had a quorum, and the resolution was approved by a majority of the quorum. Thus, the corporation expressly adopted the contract. It did not, however, execute a novation, as it didn't enter into an agreement with Landlord Co. to relieve Arnold of his liability.

Accordingly, both Arnold, as a promoter, and Durable Paint, Inc., by adoption, are liable on the contract.

Moreover, even if the adoption was invalid, the corporation would be estopped from denying liability. Under the doctrine of corporation by estoppel, an entity that enters a contract that was not yet properly incorporated will be stopped from asserting that as a defense to contractual liability where it would be unjust to the other party to do so. Here, Arnold entered into the contract and listed Durable Paint, Inc. as the lessee. The corporation will be estopped from asserting as a defense that the corporation was not yet an incorporation to avoid liability.

C. Piercing the Veil

The issue is whether Arnold can be held personally liable for the obligations of Durable

Paint, Inc., as a corporation.

Generally, shareholders and directors cannot be held personally liable for the obligations of the corporation. However, if necessary to avoid a substantial injustice, the court can pierce the corporate veil and attach personal liability to shareholder where (1) corporate formalities are not observed, (2) the corporation is undercapitalized, and (3) the corporation is nothing but an alter ego of the shareholders.

Here, Arnold is presumably a shareholder of the corporation as well as an officer and director. Though he would generally not be personally liable for the corporation's obligations, the court may be able to pierce the veil. The corporation exhausted all its capital in only six months and was thus likely undercapitalized. Moreover, the sole directors and officers of the corporation were Arnold and Betty, who are also presumably the shareholders. Thus, Durable Paint, Inc. is likely considered merely an alter ego of Arnold and Betty. Even though it's unclear to what extent Arnold and Betty did not observe corporate formalities, the court will likely find that it can pierce the veil and attach personal liability for the corporation's obligations to Arnold. This especially true considering that the corporation no longer had any capital, had no assets, and the patent rights that it was assigned for Arthur's patent effectively became worthless, and thus Landlord Co. likely could not recover anything from the corporation and would be without remedy for the breach.

Thus, Arnold will be personally liable for the obligations of the corporation.

II. Betty's Liability to Landlord Co.

The issue is whether Betty can be found personally liable to Landlord Co. for breach of

the lease.

A. Partnership Liability

The rules regarding partnerships are set forth above.

Just like Arnold, Betty was a general partner in the partnership that was formed prior to the incorporation. Thus, as a general partner, she is liable on the contract, as it was entered into while the enterprise was a partnership under the authority of the partnership.

Accordingly, like Arnold, Betty can be held personally liable for the debts of the partnership, which had no assets by which Landlord Co. could recover at the time of the breach.

B. Shareholder Liability

The rules regarding corporations and shareholder liability are set forth above.

For the reasons discussed above, like Arnold, Landlord Co. will likely be able to pierce the corporate veil to hold Betty, as a shareholder and director, personally liable for the obligation of Durable Paint, Inc.

III. Arnold's Liability to Betty

A. Duty of Care

The issue is whether Arnold is liable to Betty for breaching his fiduciary duties to the partnership and corporation.

Each general partner in a partnership owes a duty of care in how they conduct the business of the partnership, just as each director owes a duty of care to a corporation.

Partners and directors must act with the reasonable care that an ordinarily prudent

person would under the circumstances. As a director, this requires acting in good faith and with a reasonable belief that your actions are in the best interest of the corporation. Under the business judgment rule, a director is presumed to have acted in good faith, on an informed basis, and with an honest belief that the action is in the best interest of the corporation. If a partner or director breaches a duty, he can be liable for any damages that result from the breach.

At the inception of their enterprise, Arnold falsely told Betty that he thought his patent was worth \$100,000 when it was in fact worth only \$50,000. As a result, he was not required to contribute any capital investment in the enterprise, as Betty assumed that he had made a contribution equal to her \$100,000 capital investment. Thus, Arnold breached his duty of care by not acting in good faith when starting the business with Betty. However, there is no indication that Arnold breached any duty in incurring the obligation to Landlord Co. that would have caused any damages to the enterprise. Nor is it clear what damages his breach caused the enterprise.

Accordingly, even though he breached a duty, he would not be personally liable to the partnership or the corporation because it is unclear what damages, if any, resulted.

B. Misrepresentation

The issue is whether Arnold can be liable to Betty for misrepresentation.

Misrepresentation occurs when one knowingly makes a material representation of fact with the intent to mislead, and the other person reasonably relies on it.

It appears Arnold knowingly made a false misrepresentation to Betty regarding the worth of the patent, and he did so with the intent to induce a similar value capital contribution. Betty then reasonably relied on that misrepresentation to invest \$100,000

rather than a lesser amount, which is now lost.

Thus, Betty may be able to recover for an excess she invested compared to how much she would have if she knew the patent was worth only \$50,000.