Contract

California Bar Examination

Essay Questions and Selected Answers

February 2002

Question 2

Berelli Co., the largest single buyer of tomatoes in the area, manufactures several varieties of tomato-based pasta sauces. Berelli entered into a written contract with Grower to supply Berelli its requirements of the Tabor, the only type of tomato Berelli uses in its pasta sauces. The Tabor tomato is known for its distinctive flavor and color, and it is particularly desirable for making sauces. The parties agreed to a price of $100 per ton.

The contract, which was on Berelli's standard form, specified that Grower was to deliver to Berelli at the end of the growing season in August all Tabor tomatoes that Berelli might require. The contract also prohibited Grower from selling any excess Tabor tomatoes to a third party without Berelli's consent. At the time the contract was executed, Grower objected to that provision. A Berelli representative assured him that although the provision was standard in Berelli's contracts with its growers, Berelli had never attempted to enforce the provision. In fact, however, Berelli routinely sought to prevent growers from selling their surplus crop to third parties. The contract also stated that Berelli could reject Grower's tomatoes for any reason, even if they conformed to the contract.

On August 1, Berelli told Grower that it would need 40 tons of Tabor tomatoes at the end of August. Grower anticipated that he would harvest 65 tons of Tabor tomatoes commencing on August 30. Because of the generally poor growing season, Tabor tomatoes were in short supply. Another manufacturer, Tosca Co., offered Grower $250 per ton for his entire crop of Tabor tomatoes. On August 15, Grower accepted the Tosca offer and informed Berelli that he was repudiating the Berelli/Grower contract.

After Grower's repudiation, Berelli was able to contract for only 10 tons of Tabor tomatoes on the spot market at $200 per ton, but has been unable to procure any more. Other varieties of tomatoes are readily available at prices of $100 per ton or less on the open market, but Berelli is reluctant to switch to these other varieties. Berelli believes that Tabor tomatoes give its sauces a unique color, texture, and flavor. It is now August 20. Berelli demands that Grower fulfill their contract in all respects.

1. What remedies are available to Berelli to enforce the terms of its contract with Grower, what defenses might Grower reasonably assert, and what is the likely outcome on each remedy sought by Berelli? Discuss.

2. If Berelli elects to forgo enforcement of the contract and elects instead to sue for damages, what defenses might Grower reasonably assert, and what damages, if any, is Berelli likely to recover? Discuss.

ANSWER A TO ESSAY QUESTION 2

1. The contract between Berelli and Grower is a contract for the sale of goods, tomatoes. Accordingly, it is governed by Article 2 of the UCC. Because Berelli is a pasta sauce manufacturer and Grower is a commercial farmer, both parties are merchants and the UCC's special rules for merchants will apply. Additionally, because the contract calls for Grower to provide Berelli with all of the tomatoes it requires, the agreement is a requirements contract and the rules applicable to those particular types of agreements will also apply.

The parties appear to have made a valid contract, as it was in writing and reflected both the type of goods specified (Tabor tomatoes) and the price ($100/ton). Although the UCC ordinarily requires contracts to specify the quantity of goods to be provided, in a requirements contract it is sufficient that the buyer (Berelli) agrees to buy all its requirements from the Seller (Grower), to the limit of Seller's ability to provide goods of that type. That renders the contract sufficiently definite to be enforced under the UCC, as the Buyer's good faith in using Seller as its sole supplier, and its actual after-the-fact use of the goods contracted for, define the quantity of goods to be delivered. Here, Berelli's actual need for 40 tons of Tabor tomatoes supplies the requisite quantity under the contract.

While in this case Grower may have defenses to contract formation based on the doctrines of failure of consideration, unconscionability, misrepresentation and fraud, these will be discussed later.

If Berelli seeks to enforce the terms of the agreement with Grower, it may do so under the doctrines of replevin and specific performance, or seek an injunction prohibiting Grower from selling the tomatoes to Tosca.

Anticipatory Repudiation. The time for performance under the contract has not yet arisen, and won't arise for 10 more days. A party can ordinarily not sue under a contract until the time for performance has arisen. Where, however, a party unambiguously states to the other, before the time for performance has arisen, that it will not perform, the other party is entitled to treat that as an anticipatory repudiation that gives rise to an immediate right to sue for total breach of the contract, including the right to seek to cover its losses by purchasing replacement goods. Because Grower informed Berelli that it was repudiating the contract, Berelli is entitled to sue immediately and seek replevin or specific performance, or damages.

Replevin

Replevin. Replevin provides a remedy for a plaintiff to recover its goods prior to determination of a dispute, upon a judicial hearing to determine whether the plaintiff has title to the goods, and upon plaintiff's posting of a bond to secure any damages that may be owed to the defendant if the replevin is wrongful. Under the common law, to obtain

replevin a plaintiff must show that the defendant has possession of personal property that is owned by the plaintiff. Under the UCC, however, where goods have been "specifically identified" under a contract and the buyer is unable to cover by purchasing other goods, it has a right to replevy the goods in seller's possession, even though title to those goods has not yet passed. Here, the requirements for replevy are met. Because Berelli agreed to buy all of Grower's Tabor tomatoes, all the tomatoes actually grown by Grower have been specifically identified under the contract. And because Berelli has only been able to cover 10 of the 40 tons it needs, the second requirement is met. Accordingly, Berelli is entitled to replevy 30 tons of the Tabor tomatoes in Grower's possession, as well as recover damages for the excess price it paid for the 10 tons it was able to cover (as discussed in the next section).

While Grower does not have any defenses to Berelli's claim for replevin (because all elements of that claim are met), Grower will defend on grounds that the contract is invalid for failure of consideration and lack of mutuality, or voidable for fraud and unconscionability.

Failure of Consideration/Mutuality: A contract must be supported by consideration, which is a bargained for exchange of something of value. In addition, the promises must be mutual, with both parties required to perform a detriment in exchange for receiving a benefit. Here, Grower will contend that because Berelli had the right to reject conforming goods under the contract, it was not bound to purchase anything from Grower and, as a result, there is a failure of consideration under the contract.

Consideration is found in a requirements contract from the fact that the buyer is required to meet all its requirements from seller, despite the fact that, as stated above, the contract itself does not expressly require the buyer to buy any fixed quantity of goods. While a requirements contract will not fail for lack of consideration if the buyer in good faith has no requirement for the goods and therefore orders none on that basis, it will fail if the buyer has no real obligation to buy goods it needs, and can accept or reject without regard to its actual requirements for the goods. Here, that is precisely the case. As a result, there is no mutuality of obligation under the contract -- Berelli can buy if it pleases, whereas Grower is required to sell all its Tabor tomatoes only to Berelli. Accordingly, the contract is void for failure of consideration and Grower should succeed in defending against all of Berelli's claims on this basis.

Fraud/Misrepresentation. Where a party is induced to enter into a contract based upon the fraud or misrepresentation of another party, the contract may be voidable in whole or in part at the election of the defrauded party. Here, Berelli's standard form provided that Grower could not sell Tabor tomatoes to third parties without Berelli's consent. When Grower objected, Berelli's representative falsely stated that Berelli never enforced this provision, when in fact it regularly did. In reliance thereon, Grower went forward and signed the agreement. While Grower might argue that this provided it grounds for voiding the entire contract, this argument will likely be rejected because the term was not material to the bargain (as evidenced by the fact that it was just a clause in Berelli's standard form), and because Berelli had made no attempt to enforce it. Rather (as we shall see in the discussion of Berelli's right to injunctive relief), the

remedy will be to void the term, rather than the entire contract. This is also the result under the doctrine of estoppel and under the UCC battle of the forms rules. Having induced Grower not to formally object to the term based on the representation that it will not be enforced, Berelli will be estopped to do so. Moreover, under the UCC battle of forms rules pertaining to contracts between merchants, additional terms do not become part of the bargain when the other party objects within 10 days of receipt of the form, as Grower did here. Hence, the contract is not void for fraud.

Unconscionability. Grower will also argue that the contract is unconscionable because (i) Berelli is not bound to purchase anything, as explained above, while (ii) Berelli is prohibited from selling to third parties.

Changed Circumstances. Grower may also seek to challenge the validity of the contract under the doctrine of changed circumstances, contending that the poor growing season coupled with the unprecedented demand for scarce Tabor tomatoes was not foreseen by the parties such that performance should be excused on grounds of commercial impracticability. This defense will be rejected, however, because uncertain weather is always foreseeable at the time of contracting, and unanticipated market conditions will never support a challenge to the validity of a contract based upon commercial impracticability.

Specific Performance

Berelli will also seek to enforce the contract through a decree of specific performance. Specific performance is an equitable remedy that will be granted where: (1) the contract is valid, definite and certain; (2) mutuality is present; (3) the legal remedy is inadequate; and (4) the plaintiff has fully performed all of its obligations under the contract. A request for specific performance is subject to equitable defenses, including the defense of unclean hands.

Here, the contract is sufficiently definite and certain, as stated above, but could be found invalid for lack of consideration or mutuality, also as explained above. If these defenses are accepted, specific performance will not be granted. If the promises are found to be mutual and the consideration sufficient, however, then Berelli would be able to meet the elements required for specific performance. The legal remedy is inadequate because the subject matter of the contract is unique. Here, we are told that Tabor tomatoes are in short supply, they have a distinctive flavor that is critical to the Berelli sauce recipe, and the use of other types of tomatoes is inadequate. Hence, this would provide sufficient uniqueness to support a request for specific performance. In addition, Berelli performed all of its current obligations under the contract when it placed the order with Grower for all of its requirements, and stands ready and willing to perform its remaining obligation to pay for the goods when received. Hence, assuming the mutuality/consideration issues could be overcome, the other requirements necessary for specific performance would be met.

However, Grower could defend against such a decree on the doctrine of unclean hands. Equity will deny relief to a party with unclean hands, that is, one that has engaged in wrongful conduct with respect to the case at hand. Here, Berelli's fraud in inducing Grower to sign the contract based on its false assertion that the prohibition on third party sales was never enforced by Berelli, coupled with its insistence on terms that allowed it to reject Grower's goods without reason, could support such a defense.

Injunction

Berelli could also seek the Court's immediate assistance through the issuance of a Temporary Restraining Order, followed by a preliminary injunction and a permanent injunction. This relief will likely be denied, however, unless Berelli can show a right to replevin.

A TRO may be granted ex parte based on a showing of immediate and substantial hardship. Here, the fact that Tabor tomatoes are scarce and Grower is about to sell them to Tosca would be sufficient to support entry of a TRO. Berelli would have to make a good faith effort to provide Grower with notice of the hearing, but if it could not the TRO could be entered on an ex parte basis. The TRO would last for only 10 days, however, and then be automatically dissolved.

Berelli would thus have to seek a preliminary injunction before the 10 days expired. A preliminary injunction will be granted in order to preserve the status quo pending trial or otherwise avoid extreme hardship to a party, where the plaintiff can

demonstrate the likelihood of success on the merits and the balance of hardships favors entry of injunctive relief. Here, Berelli can meet the hardship test but will have difficulty establishing the likelihood that it will succeed on the merits, due to the failure of consideration/mutuality argument described above. Additionally, the fact that the tomatoes are perishable goods will make it impossible for the Court to preserve the status quo -- the tomatoes simply cannot be preserved in any useable form pending the outcome of a trial on the merits. If Berelli can overcome the problems described above and establish its immediate right to replevy the goods, this hardship could be avoided because the tomatoes would be immediately sent to Berelli. Hence, a preliminary injunction could be entered. If it cannot do so, an injunction would be denied on grounds that Berelli has not demonstrated it is likely to succeed on the merits, or the balance of hardships (spoiled rotten worthless tomatoes) favors Grower, or both.

While a permanent injunction is theoretically possible, it would be of no practical use because the tomatoes would spoil long before the injunction would be entered. However, to obtain such an injunction, Berelli would have to show that its legal remedy is inadequate, it has a property interest to protect, the injunction would be feasible to enforce, and the balance of hardships favors entry of the injunction. Here, the remedy is inadequate for the reasons explained above; Berelli has property interest in both the contract and, if specifically identified, the tomatoes; the injunction would be simple to enforce because it countenances just a single act, delivery of the goods; and (assuming, arguendo, the contract was enforceable) the balance of hardships would favor Berelli because it has an immediate need for and contractual right to the

tomatoes, whereas the hardship to Grower -- a lower contract price -- was entirely of its own making.

2. If Berelli elects to sue for damages, it can seek to recover compensatory damages, nominal damages, and restitutionary damages. Punitive damages would not be allowed because this is a breach of contract action. The defenses to contract enforcement described above would pertain to these claims as well. However, Berelli might be able to recover these damages under a theory of promissory estoppel, which provides that a party is estopped to deny the existence of an agreement where their promise can reasonably be expected to induce reliance in the other party, and the other party so relies to their detriment. Here, Berelli elected not to enter into a contract with other growers of Tabor tomatoes in reliance on Grower's promise to meet all its requirements. Hence, if the contract is invalid, Berelli may be able to claim damages under this alternate theory of relief.

To be recoverable, contract damages must be foreseeable at the time the contract was entered into, they must have been caused by the other parties (sic) breach, and the amount must be provable with certainty.

Compensatory damages aim to give each party the benefit of their bargain. The amount is the amount necessary to put them in the place they would have been in had the contract been performed. Here, Berelli can claim the right to recover the difference between the $200/ton it paid for the 10 tons of tomatoes it purchased on the open market, and the $100/ton contract price, or $1,000. Berelli will also be entitled to recover any incidental expenses it incurred in purchasing these goods, that it would not have incurred had the contract been performed. These damages were all foreseeable,

the amount is certain, and they were caused by the breach. Hence, Grower would have no defense (other than the defenses to contract validity described above).

With respect to the other 30 tons, Berelli could seek to recover the lost profits it would have realized on the pasta sauce made from these tomatoes, or may seek to recover restitutionary damages in the amount by which Grower was enriched by refusing to perform its contract with Berelli. Lost profits would be defended by Grower on grounds that they are speculative and uncertain. However, here, Berelli's past sales and manufacturing records could be adequate to demonstrate how much sauce could be made from 30 tons of tomatoes, how much would be sold, and what the anticipated profit would have been. On the restitutionary side, Berelli would simply argue that Grower has been unjustly enriched by being allowed to sell the tomatoes to Tosca for $250/ton, and therefore should be liable to return the excess $150/ton to Berelli.

Both claims would be subject to Berelli's duty to mitigate; and Grower could successfully argue that Berelli must try to make sauce with other tomatoes to mitigate its damages, and then be limited to recovering the amount by which its sales were lowered due to using worse types of tomatoes.

ANSWER B TO ESSAY QUESTION 2

I. VALIDITY OF THE CONTRACT

This is a requirements contract for a sale of goods of over $500. The UCC applies, and the writing requirement appears to be satisfied.

CONSIDERATION: Grower will argue that there was no consideration for its promise to supply Berelli's tomato requirements because Berelli could reject the tomatoes for any reason, even if they conformed to the contract. Thus, Grower would argue, Berelli's promise is illusory. This is probably not a good argument because Berelli still has an obligation to try in good faith to be satisfied with the shipment. Although the terms are harsh, there probably is consideration here.

II. CONTRACT TERMS

Grower would argue that the contract terms should reflect the oral "agreement" from the Berelli's representative that the prohibition on sales to third parties would not be enforced. Berelli would successfully raise the PAROLE EVIDENCE RULE which states that where the parties have reduced their agreement to final written for form (sic), evidence of prior or contemporaneous agreements varying the contract are inadmissible. Here, the supposed promise by Berelli that a part of the contract would not be enforced clearly varies the agreement, so this evidence would not be admitted. The terms of the writing will be applied.

Grower might argue that the parole evidence rule does not ban evidence that the agreement was induced by FRAUD. Grower would argue that Berelli committed fraud by knowingly misrepresenting Berelli's practices regarding enforcement of the clause forbidding sales to 3rd parties.

III. GROWER'S BREACH

Anticipatory Breach: When Grower informed Berelli on August 15 that it would not perform, this was a breach of the contract. Berelli could either sue for damages immediately or choose to treat the contract as still in force.

Frustration of Purpose: Grower would argue (unsuccessfully) that its duty to perform was excused by frustration of purpose because of the unexpected rise in tomato prices. This is not a valid argument because a change in market price is generally a foreseeable risk allocated by the parties under the terms of the contract.

1. BERELLI'S REMEDIES IF HE CHOOSES TO ENFORCE THE CONTRACT.

A. SPECIFIC PERFORMANCE: Specific performance is an equitable remedy which will be allowed only if money damages are inadequate (typically because the goods are unique), if the terms of the contract are clear and definite and if no equitable defenses apply.

Here, Berelli will argue that money damages are inadequate because the Tabor tomatoes are very distinctive and that using inferior tomatoes would cause irreparable harm to Berelli's high reputation. The facts also state that Berelli is unable to get Tabor tomatoes elsewhere, and this indicates that money damages would be inadequate because there is no opportunity to cover. The written terms of the contract terms are also clear and definite, so the court would likely grant specific performance if no defenses apply.

B. BERELLI WOULD ALSO SEEK A PRELIMINARY INJUNCTION TO STOP GROWER FROM SELLING THE CROP TO TOSCA.

The purpose of the preliminary injunction is to maintain the status quo between the parties pending outcome of the merits of the suit. Berelli must show irreparable harm, likelihood of success on the merits, and that a balancing of interests favors Berelli.

Here, Berelli appears to have a valid claim on the merits or the breach of contract. Moreover, Berelli would suffer irreparable harm if Grower were to sell the Tabor tomatoes elsewhere because these are the only tomatoes Berelli uses and they are not available elsewhere. The balancing of interests is a fairly close case here. A court of equity might be influenced by the very harsh terms of the contract and look to the hardship suffered by Grower in being unable to sell his tomatoes elsewhere. On the other hand the hardship to Berelli would be very great because there are no other tomatoes available and use of inferior tomatoes would damage Berelli's trade reputation. Moreover, if the court grants specific performance, clearly the sale of the entire tomato crop to Tosca must be halted, or performance of the contract will no longer be possible.

C. GROWER'S DEFENSES

Specific Performance and Preliminary Injunction are both equitable remedies. Thus Grower would raise several equitable defenses.

UNCLEAN HANDS: Grower would assert that Berelli acted wrongfully in relation to the very contract which Berelli seeks to enforce because Berelli's representative made misrepresentation to Grower during contract negotiations. Also, the generally harsh terms of the contract indicate possible overreaching by Berelli. This argument probably will not prevail because there is nothing wrong with hard bargaining. There appears to be no outright wrongdoing here, hence, the defense of unclean hands does not apply.

ESTOPPEL: Grower will argue that he relied to his detriment on Berelli's oral promise that Grower would be allowed to sell his excess tomatoes elsewhere. The reliance was Grower's act of entering into the contract. This is probably a good argument, so Berelli

would be estopped from preventing Grower from selling the excess tomatoes to Tosca. Thus, if this defense applies, Grower will still have to sell 40 tons to Berelli but may sell the excess 15,000 tons to another buyer.

UNCONSCIONABILITY: Grower would argue that the terms of the contract are unconscionable: the writing was Berelli's standard form contract. The terms themselves are oppressive (preventing Grower from selling elsewhere) and Berelli is the largest single buyer of tomatoes, so there may be a great difference in bargaining power. This is probably a convincing argument, given all these factors.

Under the UCC the court may refuse to enforce the contract or limit the effect of the unconscionable terms. Thus the prohibition on selling elsewhere probably would not be enforced.

2. Berelli's Legal Damages.

As the aggrieved buyer, Berelli may seek either the difference between the contract price and the market price at the time he learned of the breach, or he may make a reasonable "cover" of substitute goods and sue for the difference between the cover price and the contract price plus incidental and consequential damages.

Here, Berelli can partially cover on the spot market per ton. The difference in price is ten tons times 100, so $1,000. Berelli is entitled to damages for the remaining 30 tons which it is entitled to under the contract. The damages there would be the difference in market price and contract price at the time of the breach. Berelli will argue that the market price is 250, since that is what Tosca was willing to pay. Grower would argue that the cover price is only 200 per ton because that is the price on the "spot market."

Berelli would also seek incidental and consequential damages such as damage to its reputation and customer goodwill because of being forced to use inferior tomatoes. Any possible delay might also result in consequential damages to Berelli.

B. BERELLI'S DEFENSES

UNFORESEEABILITY: Contract Damages will only be awarded if they were foreseeable at the time the parties entered into the contract, (Hadley v. Baxendale). Here, the money damages are clearly foreseeable, but Grower would argue that damage to reputation was not foreseeable, and thus should not be awarded. However, damage to trade reputation is probably foreseeable here because both parties appear to be aware of the uniquely excellent qualities of the Tabor tomatoes.

FAILURE TO MITIGATE: Grower will also argue that Berelli cannot collect damage it failed to mitigate. Here, Berelli could have mitigated its damages by buying inferior tomatoes, and this would at least allow Berelli to continue production. This argument is probably not convincing because Berelli has no obligation to "cover" with inferior tomatoes.

Berelli probably can obtain money damages for Grower's breach.

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2002 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2002 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.

QUESTION 4

Travelco ran a promotional advertisement which included a contest, promising to fly the contest winner to Scotland for a one-week vacation. Travelco's advertisement stated: "The winner's name will be picked at random from the telephone book for this trip to 'Golfer's Heaven.' If you're in the book, you will be eligible for this dream vacation!"

After reading Travelco's advertisement, Polly had the telephone company change her unlisted number to a listed one just in time for it to appear in the telephone book that Travelco used to select the winner. Luckily for Polly, her name was picked, and Travelco notified her. That night Polly celebrated her good fortune by buying and drinking an expensive bottle of champagne.

The next day Polly bought new luggage and costly new golfing clothes for the trip. When her boss refused to give her a week's unpaid leave so she could take the trip, she quit, thinking that she could look for a new job when she returned from Scotland.

After it was too late for Polly to retract her job resignation, Travelco advised her that it was no longer financially able to award the free trip that it had promised.

Polly sues for breach of contract and seeks to recover damages for the following: (1) cost of listing her telephone number; (2) the champagne; (3) the luggage and clothing; (4) loss of her job; and (5) the value of the trip to Scotland.

1. What defenses should Travelco assert on the merits of Polly's breach of contract claim, and what is the likely outcome? Discuss.

2. Which items of damages, if any, is Polly likely to recover? Discuss.

ANSWER A TO ESSAY QUESTION 4

1. What defenses should Travelco assert on the merits of P's breach of contract claim, and what is the likely outcome?

First, Travelco should defend on the grounds that no valid contract was formed.

Formation – Offer, acceptance, consideration.

First, Travelco ("T") will argue that the promotional ad was not an offer at all. Usually, ads are a mere invitation to deal; an offer requires, on the other hand, a manifestation of an intent to commit, communication, and definite terms—ads don't usually show an intent to commit. However, this ad could be construed as an offer to enter into a unilateral contract ("K")—it is like a "first come, first served" ad—where even if the offeree is not named, there can still be a binding offer; here, the language you will be eligible if you're in the book expresses enough intent to be bound for the ad to constitute an offer.

Next, T should argue that even if they made an offer, offers are generally revocable until accepted and that T validly revoked. Offers are revocable before acceptance unless supported by consideration; also, in a unilateral K, which is an offer that can only be accepted by performance, once performance is begun the offer is to be held open for a reasonable time. T's argument here will probably fail, because T notified Polly ("P") before revoking the offer, so P probably had already accepted.

Consideration

T should argue that there was no contract because there was no consideration. Contracts require some mutuality of obligation, a bargained for exchange, to be enforceable. Some courts require a bargained for legal detriment, and others allow a bargained for benefit. T will argue that the ad was a gratuitous promise, and that P cannot enforce against T because P was not mutually bound—P did not give up anything. P may argue that getting listed in the phone book was consideration, but this is not a good argument because that did not confer any benefit on Travelco (unless Travelco owns the phone book company…). In fact, there is no consideration supporting this agreement because P is not bound to do or give up anything.

Promissory Estoppel/Detrimental Reliance

If T defends on the grounds of no enforceable contract, T will have to defend against P's claim of detrimental reliance. Even when an agreement also lacks consideration, it may still be enforceable if P foreseeable and reasonably detrimentally relied on the agreement. Here, P did detrimentally rely — she spent money by buying new luggage and clothes, and quitting her job, after being notified by T she had won.

T will argue that P's reliance was unforeseeable and unreasonable. However, things like buying luggage and clothes, for a vacation you have won, is reasonable, and T should have foreseen P's change in position in reliance on T's notification she had won the trip.

T will correctly argue that P's quitting her job was not foreseeable (see below); but because the luggage, clothes, champagne were foreseeable, P can enforce the contracts, and T will raise this in the damages phase.

Statute of Frauds

The facts don't indicate whether the contract was in writing; but regardless, SOF is not a good defense to formation because this agreement, (not for the sale of goods, can be performed within one year…) is not required to be in writing. Also, P's reliance would wipe out this defense.

Impossibility

T will argue that they are excused from performance by impossibility. This is judged from an objective standard, and applies when because of unforeseen events judged at formation, there is truly no way at all that T could perform. T is nolonger financially able to perform. However, mere difficulty in paying is unlikely to rise to the level of impossibility so this defense is unlikely to work.

Impracticability

This defense applies where circumstances unforeseeable at formation would cause T severe economic hardship if T had to perform. Here, there is no indication how severe the hardship would be to T; also, the short time between the ad and breach make it look like T should have foreseen financial difficulty.

Frustration of Purpose

This applies where changed circumstances unforeseeable at formation completely wipe out the purpose, known to both parties, of the contract. This defense will not work for T, because P still wants a trip; it has merely become financially difficult/impossible for T to pay.

Mistake

T may try to argue their unilateral mistake in their solvency should void the contract. However, unilateral mistake is not a good defense unless P knew of T's mistake, where here, P did not.

Good Faith

Because it appears that T's breach may be in bad faith—that they placed the ad to drum up business, never expecting to award the trip—they may have to defend on good faith—this will not relieve them of their underlying of obligations, however.

Therefore, T is liable because their K became enforceable on P's foreseeable detrimental reliance; or because there was a valid unilateral contract supported by P's putting her name in the telephone book.

2. Damages

Generally, for breach of K, P will be entitled to her expectancy—the benefit of the bargain—plus any consequentials not unduly speculative reasonably foreseeable to T. Punitive damages are generally disallowed in breach of K.

(1) The cost of listing her phone number:

This took place before any K was formed, and may even be viewed as P's consideration for the deal. There was no K until P actually won the trip, so she won't collect this.

(2) The champagne:

P will argue that the cost of the champagne is recoverable as a consequential—it was not part of the K, but it was foreseeable that some one would buy champagne after winning—basically, she will argue reliance damages.

T will argue that buying costly champagne was unforeseeable, thus not recoverable.

P will recover if the court takes a reliance view, but possibly not on a benefit-of-the bargain view.

Probably she will recover because champagne is foreseeable.

(3) Luggage and Clothing

P and T will make the same arguments as above; the luggage was probably a foreseeable consequential, but the clothes may not have been, if they were too "costly".

(4) Loss of her Job

T will not be liable for the loss of P's job, because under either a reliance or expectancy theory, it was unreasonable and unforeseeable that P would quit her job just to take a vacation. Also, P would have a duty to mitigate, by searching for comparable employment, which she probably will be able to find, since she thought she could look for a new job when she returned.

(5) Value of Trip

If the court takes a pure reliance approach, based on promissory estoppel, P will not be awarded the cost of the trip.

But under the standard breech of K expectancy, which is the standard measure of K damages, P is entitled to what she would have gotten absent T's breach, which is the value of the trip.

Note that restitutionary damages are not available, because T has not been unjustly enriched.

ANSWER B TO ESSAY QUESTION 4

TRAVELCO'S DEFENSES

No Valid Contract was Formed: Lack of Consideration, Promissory Estoppel

The first defense that Travelco will assert is that there is no valid contract for them to breach. The issue is whether there was consideration for Travelco's promised prize. For a valid contract to form, there must be a bargained for exchange. The court will not look into the sufficiency of the consideration, whether it was a fair exchange, only if there was some legal detriment exchanged by the parties. Here, Travelco will assert that they made a gratuitous promise to award a travel prize at random to someone listed in the phone book. The winner did not have to give anything in exchange for the promise, therefore there was no consideration given by the winner for the promised prize. Without consideration, Travelco will assert that there was not valid contract, and therefore they could not be in breach of the contract.

Polly will respond with two arguments. First, she will try to assert that being listed in the phone book was the consideration required. The Travelco prize stated that a person must be listed in the phone book to be eligible. Polly took the step of changing her unlisted number to a listed one in order to qualify for the contest. While this is not a significant legal detriment on Polly's part, she was not required to list her number, and therefore it would qualify as consideration. As mentioned, the court will not examine the amount of consideration. Travelco will respond that there was no bargained for exchange because the advertisement was not asking for persons to be listed in the phone book in exchange for the prize. Had the advertisement been run by the phone company, the situation may be characterized as an exchange. However, here the advertisement was run by what appears to be a travel agency. Therefore, it appears that Travelco has the better argument, and there was no bargained for exchange. Without the exchange, lack of consideration means that no valid contract was formed unless there is a consideration substitute.

Polly's second argument is that even though there was no consideration for the promise, she can claim contract rights by promissory estoppel. Here, the issue is whether Polly detrimentally relied on Travelco's promise to award a trip in a reasonable matter that would make it unjust for Travelco not to honor their promise. Polly can assert that she detrimentally relied on the promise in several ways. First, she listed her number in the phone book. Polly will claim that

changing her number from unlisted to listed was a detrimental reliance. The detriment is that she will now be more likely to receive unwanted phone calls. Her second claim is that purchase of champagne. Her reliance will be the cost of the champagne. Third, she purchased golf clothes and luggage. Again, the lost purchase price is her reliance. Finally, she quit her job. Clearly this is a detrimental reliance.

Travelco will respond that the changing of the phone number is not sufficient because it was done before the awarding of the prize, not in response to it. And even if it was in response to their ad it was not a foreseeable result of running the ad and it is not a sufficient detriment to require equity to award a week long trip. They will assert the same argument concerning the bottle of champagne, clothes, luggage and quitting the job: not a foreseeable response, and/or it is not sufficient to warrant requiring that they comply with their promise.

The court should find that there was sufficient foreseeable detrimental reliance to warrant enforcement of the promise by promissory estoppel. While Travelco may be right concerning the listing of the phone number, the actions taken by Polly after the prize was awarded are sufficient. It is clearly foreseeable that someone would celebrate winning a prize as well as purchase clothing and luggage for the trip. Whether this is sufficient to warrant equitable enforcement of the promise depends on the cost of the trip and the price of the purchased items. It appears to be sufficient. The quitting of the job will not be considered because it is not a foreseeable response to winning a 1 week trip. However, given Polly's other actions, the promise should be enforced by promissory estoppel.

Impossibility

Travelco's next defense will be that they no longer able to perform their promise because they are not financially able to do so. Whether this excuse will be accepted depends on whether there is true impossibility, or if it is simply financially difficult. If in fact Travelco has gone broke or will be forced into bankruptcy in awarding the trip, they may be excused. However, this seems unlikely, and the court will probably reject this claim.

POLLY'S DAMAGES RECOVERY

The purpose of damages is to put the plaintiff in the position they would have been in had the other party not breached. Damages include the compensatory,

as well as incidental and consequential damages. Consequential damages must be foreseeable by the party at the time the contract was formed. Punitive damages are not typically awarded in contract cases unless the breach can be characterized as a tort (e.g. fraud or misrepresentation) and then punitive damages may be appropriate if the breach was intentional.

Phone Listing

Polly wishes to claim the cost of listing her number in the phone book. The question is whether this cost is something that Polly would have had to bear had Travelco performed as promised, because listing her number was not in response to the promised prize, but was instead a cost that Polly had to incur to be eligible, she should not recover this cost. If the court awards this cost, Travelco will argue that this is a cost Polly would have borne, and should not be recovered if she is awarded the value of the trip. (See below).

Champagne

Here, the question is whether that purchase of an expensive bottle of champagne is a foreseeable respond to the awarding of the prize. It appears to be a reasonable response, since it could be expected that a person would celebrate. Therefore, Polly should recover this cost. Travelco will argue that this is a cost Polly would have borne, and should not be recovered if she is awarded the value of the trip. (See below).

Luggage, Clothing

As with the champagne, this is a foreseeable cost that would be incurred in response to the awarding of the prize, and therefore will be recovered as a consequential damage. Travelco will argue that this is a cost Polly would have borne, and should not be recovered if she is awarded the value of trip. (See below).

Loss of Job

Travelco will argue that this is not reasonable cost in response to the awarding of a 1 week vacation. They will claim that at the time they awarded the prize, they could not have foreseen that someone would quit their job to take a one week vacation. Polly will respond that it is a foreseeable response, and therefore she should recover as a consequential damage. The court is likely to agree with

Travelco, that this is not a foreseeable result of the promise of the vacation. Therefore, Polly should not be able to recover damages for the loss of her job.

The Price of the Vacation

Here, Polly will argue that she should be awarded the cost of the promised vacation. This is the purpose of compensatory damages, to put Polly in the position she would have been in had Travelco not breached. The court will therefore award Polly the value of the vacation. Because money damages are sufficient in this case, and there is no indication that Polly sought specific performance anyway, the court will not force Travelco to actually award the trip.

Travelco will try to argue that because Polly is being awarded the value of the trip, she should not be awarded damages for the phone, champagne, clothes, or luggage. To award these damages and the trip would put Polly in a better position than she would have been had Travelco performed. Had Travelco awarded the trip as promised, the cost of these items would have been borne by Polly, not Travelco. Therefore, Polly should either be able to recover the value of the trip and not these other damages, or alternatively, Polly should recover these damages and not the trip. The latter solution would put Polly in the position she would have been in before the promise was made (except for the job, which is not recoverable because it was not reasonable or foreseeable).

The court should find Travelco's argument persuasive. Therefore it will award Polly only the value of the trip, or alternatively, it will award Polly damages for the champagne, luggage, clothing, and possibly the phone listing.

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2005 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2005 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.

Question 2

PC manufactures computers. Mart operates electronics stores.

On August 1, after some preliminary discussions, PC sent a fax on PC letterhead to Mart stating:

> We agree to fill any orders during the next six months for our Model X computer (maximum of 4,000 units) at $1,500 each.

On August 10, Mart responded with a fax stating:

> We're pleased to accept your proposal. Our stores will conduct an advertising campaign to introduce the Model X computer to our customers.

On September 10, Mart mailed an order to PC for 1,000 Model X computers. PC subsequently delivered them. Mart arranged with local newspapers for advertisements touting the Model X. The advertising was effective, and the 1,000 units were sold by the end of October.

On November 2, Mart mailed a letter to PC stating:

> Business is excellent. Pursuant to our agreement, we order 2,000 more units.

On November 3, before receiving Mart's November 2 letter, PC sent the following fax to Mart:

> We have named Wholesaler as our exclusive distributor. All orders must now be negotiated through Wholesaler.

After Mart received the fax from PC, it contacted Wholesaler to determine the status of its order. Wholesaler responded that it would supply Mart with all the Model X computers that Mart wanted, but at a price of $1,700 each.

On November 15, Mart sent a fax to PC stating:

> We insist on delivery of our November 2 order for 2,000 units of Model X at the contract price of $1,500 each. We also hereby exercise our right to purchase the remaining 1,000 units of Model X at that contract price.

PC continues to insist that all orders must be negotiated through Wholesaler, which still refuses to sell the Model X computers for less than $1,700 each.

1. If Mart buys the 2,000 Model X computers ordered on November 2 from Wholesaler for $1,700 each, can it recover the $200 per unit price differential from PC? Discuss.

2. Is Mart entitled to buy the 1,000 Model X computers ordered on November 15 for $1,500 each? Discuss.

Answer A to Question 2

2)

Uniform Commercial Code

All contracts for the sale of goods, defined by 2-105 as those things identifiable at the time of contract, are governed by the UCC.

This is a contract for the sale of computers, goods movable and identifiable at the time of contract, and it is therefore governed by UCC rather than the Common Law.

Merchants

Merchants, defined by 2-104 as those who deal in goods of that kind sold, are held to a higher standard of good faith.

PC manufactures computers, and Mart retails those computers, so both deal in the computers and are therefore merchants as that term is used in the UCC.

If a contract exists, it is a contract for goods under the UCC, and both parties are merchants.

Offer

An outward manifestation of present contractual intent, communicated to the offeree in such a way as to make the offeree reasonably believe that the offeror is willing to enter into a contract.

The facts state that PC and Mart had been engaged [in] "preliminary discussions" prior to August 1. Because of these preliminary negotiations, PC's fax was probably not a general advertisement sent out to possible retailers (advertisements are generally not offers). The August 1 fax on letterhead from PC to Mart, based on those discussions, was probably an offer. Although it did not state a specific quantity (up to 4000), it did indicate the identity of the parties, subject matter of the contract, and price, and the time of performance would be implied as a reasonable time. The limitation that no more than 4000 computers could be ordered makes the offer sufficiently definite to be enforced. Although the specific quantity of goods is required by 2-201, the statute of frauds, it is not necessary for formation, so this is apparently a valid offer.

Although PC would argue that there was no intent to be bound, in which case Mart would have made the offer on September 10, the court would probably disagree. Because PC delivered the goods without further communication, the court would probably conclude that it was not receiving offers, but had made an offer, to which it was bound.

PC's fax to Mart was probably a valid offer.

Merchant's Firm Offer Rule

Under 2-205, a merchant who promises to hold an offer open with "words of firmness" will not be permitted to revoke the offer for the time stated, but in no case will the offer be irrevocable for longer than three months.

PC's fax was a firm offer from one merchant to another. PC specifically stated that they "agreed to fill any offers during the next six months." Although this offer would only remain irrevocable during the next three months (through November 1), it would remain in effect unless revoked until the end of the six months.

PC's fax was a merchants' [sic] firm offer, irrevocable prior to November 1, and though revocable at that time, in the absence of revocation it was valid under the six months expired.

Acceptance

An outward manifestation of assent to the terms of the offer.

Mart's fax of August 10 was not an acceptance. Although it manifested some assent, it did not indicate a quantity of computers accepted, but only a general agreement to sell computers, and this alone was not sufficient to form a contract.

On September 10, Mart mailed an order for 1,000 computers to PC. This was sufficiently definite in quantity and indicated an intent to be bound. It was therefore a valid acceptance.

Similarly, Mart's November 2 letter was an appropriate acceptance. Though sent by letter rather than by fax, it was effective, since under the UCC an offer may be accepted by any reasonable means. The letter communicated assent to the proposed terms, and specified a quantity (200). This was therefore a valid acceptance of PC's offer. Under the Mailbox Rule, an acceptance if [sic] effective upon dispatch, though a revocation is only effective upon receipt. Mart's letter was sent before PC's revocation was receive[d], and it is therefore effective.

Although the November 15th fax similarly stated an intent to be bound on 1000 more computers, the offer had been properly revoked prior to that time, as discussed below, and Mart therefore could not accept it. This attempted acceptance would be invalid as an acceptance, and would instead be merely an offer, which PC summarily declined to accept.

Mart's November 2 letter was a valid acceptance.

Revocation

A revocation is a statement that an offer may no longer be accepted. It is effective upon receipt by the offeree.

Mart received PC's fax on November 3, and it was therefore effective from that date forward. However, it would have no effect prior to that date, and therefore would not affect the validity of Mart's purported November 2 acceptance of the offer.

Because a revocation is not effective until received, PC's letter would not accept Mart's ability to accept the contract until November 3, and thus would not affect the outcome of this case, although it would prevent any further acceptance.

Consideration

Bargained[-]for exchange of legal detriment

PC promised to sell and Mart promised to buy 2000 computers at $1500 each. This was valid and sufficient consideration.

Because there was a valid offer, accepted and supported by consideration, PC and Mart have a contract.

Statute of Frauds - Defense to Enforcement

The statute of Frauds (2-201) requires that all contracts for the sale of goods be in writing.

Although PC[']s original offer was on letterhead, they did not respond to the acceptance and no integrated contract was signed. The court would probably find, though, and Mart's letter of November 2, was a valid written confirmation, which would allow the contract to be enforced against both parties, although it might find that PC's refusal to agree that there was a contract was sufficient objection within ten days.

The court will probably find that the Statute of Frauds was satisfied by Mart's acceptance under the exception for a written confirmation, unless PC properly objected within ten days.

Material Breach

A refusal to perform under the contract which goes to the heart of the promised performance.

PC refused to tender the 1000 computers ordered by Mart. This was material breach of the contract, since the purpose of the contract was the delivery of those computers. If PC and Mart had an enforceable contract, PC's refusal to tender them was an anticipatory

material breach, and Mart could immediately consider the contract breached (rather than waiting to see if PC would actually perform), and pursue remedies.

PC's refusal to deliver the computers to Mart was probably a material breach.

Remedies

Cover

Under the UCC, a buyer can purchase replacement goods on the market at the time of the breach and recover the difference between the contract price and the price of cover, plus incidental costs.

Mart has a duty to mitigate its damages, which probably means they should buy computers, even at a higher price, rather than completely lose the business. Although generally a party may wait until performance is due, where there is a complete repudiation of the contract by the other party prior to that time, there is probably a duty to mitigate damages. If Mart did purchase replacement computers, from Wholesaler or any other seller, they would [be] entitled to recover the difference between the price they were forced to pay and the price they had agreed on with PC as the cost of cover from PC. Any attempt to cover, however, must be exercised in good faith.

Mart will be able to recover the cost of Cover from PC.

I. Whether Mart will be able to recover the extra $200 purchase if it buys the computers from Wholesaler?

Because PC and Mart apparently had a valid contract, and it was probably enforceable under the Statute of Frauds because of Mart's written confirmation, Mart can probably recover the cost of cover from PC, so long as it acts in good faith. For 2000 computers with an additional cost of $200 each, Mart would probably recover $400,000, plus costs incidental to cover.

If the cover found that the Statute of Frauds was not satisfied, Mart would not be able to enforce the contract, and would recover nothing.

II. Whether Mart can enforce a contract based on the Nov. 15 fax for 1000 final computers?

Because PC properly revoked its offer to Mart on November 3, Mart no longer had the power to accept that offer on November 15, and it has no enforceable rights against PC for the 1000 computers offered on that date.

Answer B to Question 2

Mart vs. PC

UCC Applies

The UCC applies to all contracts for the sale of goods. Here, the agreement between Mart and PC relates to the Model X computer, a good, so the UCC applies.

In addition, under the UCC, there are sometimes special rules governing agreements between merchants. Merchants are entities that regularly buy, sell and/or trade on the good at issue. Here, both PC and Mart are merchants under the UCC because PC manufactures and sells computers and Mart operates electronics stores that buy and sell computers.

Contract Formation

In order for the agreement between PC and Mart to be enforceable, there must be ①an offer, ②a valid acceptance[,] and ③ consideration.

Offer

An offer must demonstrate a present intent to be bound and must recite the necessary terms with appropriate specificity.

PC's August 1 Fax

PC'S August 1 Fax to Mart likely satisfies the requirements of an offer. In that fax, PC "agree[s] to fill any orders", thereby demonstrating the requisite present intent to be bound. The August 1 Fax also recites the subject matter (the Model X computer), the price ($1,500 each) and the parties (PC and Mart). While the August 1 Fax does not recite a specific quantity of Model X computers to be purchased, it specifies any quantity ordered by Mart within the next six months up to a maximum of 4,000 units. This is an offer for a kind of requirements contract, wherein PC would be obligated to sell Mart however many Model X computers Mart requires up to a maximum of 4,000. Therefore, the August 1 Fax constitutes a valid offer.

Acceptance

An acceptance must be an acceptance of the terms in the offer before termination of the offer.

August 10 Fax from Mart

Here, the August 10 fax from Mart is a valid acceptance. While the August 1 Faxed offer from PC was still open, Mart responded that Mart "accept[ed] [PC's] proposal". Mart did not seek to change the terms of the offer or add any conditions or additional terms. Thus, the August 10 fax from Mart is a valid acceptance.

Consideration

To be enforceable, a contract must include valid consideration. Consideration is a promise with value or detriment.

Here, PC provided consideration in that PC promised to sell up to 4,000 Model X computers to Mart over the next six months. However, the issue is whether Mart provided sufficient consideration. Mart promised to pay $1,500 for any Model X computers it purchased, but Mart was not obligated to purchase any Model X computers. While Mart stated that it was going to conduct an advertising campaign, it is not clear whether that was a promise by Mart or simply a gratuitous statement of a present intent to place ads that is [sic] was not bound to place. It the statement about advertising were found to bind Mart, the contract would be effective as of Mart's August 10 fax.

However, the better result is that there was not a binding contract until September 10, when Mart placed its first order for 1,000 Model Xs. As of September 10, Mart's consideration was its promise to buy 1,000 Model X computers at $1,500 each and PC's consideration was its promise to sell those computers to Mart.

Defense to Formation/the Statute of Frauds

The Statute of Frauds requires that any agreement for the sale of goods exceeding $500 must be in writing to be enforceable. Here, the August 1 fax, the August 10 fax[,] and the September 10 order would likely constitute a sufficient writing to satisfy the Statute of Frauds.

There do not appear to be any other applicable defenses to formation (such as duress, illegality, fraud[,] etc.).

① Can Mart recover $200 per unit from PC if Mart buys 2,000 Model X computers from Wholesaler?

The primary issue here is whether PC's November 3 fax to Mart purporting to terminate its agreement with Mart excuses or discharges PC's obligation to sell Mart up to 4,000 Model X computers before the six month period expires. The issue is also whether Mart's November 2 order for 2,000 Model X's, that was sent without knowledge of PC's November 3 purported revocation [sic].

Thus, the ultimate issue is whether Mart's November 2 letter ordering 2,000 more

units is effective when mailed (Nov. 2) or when received by PC. I believe the Mailbox Rule applies and provides that the acceptance/order of Nov. 2 was effective when mailed or sent. In other words, Mart's November 2 order is effective as of November 2 - the day before PC's purported revocation. Thus, PC is obligated to sell Mart the 2,000 Model Xs ordered on November 2.

Because PC is in breach of the contract by refusing to perform - i.e., to sell Mart the 2,000 Model X's ordered Nov. 2, PC is liable to Mart for damages.

Mart's Remedies

As noted in the question, one of Mart's available remedies is to buy the 2,000 Model X computers from Wholesaler for $1,700 each and then sue PC for damages. In that situation, Mart would be entitled to expectation damages. Expectation damages are those damages sufficient to put Mart in the position they would have been in if PC had not breached – namely, Mart would have purchased 2,000 Model X computers for $1,500 each. Thus, PC is liable to Mart for $200 per unit ($1,700 - $1,500) multiplied by 2,000 units. Mart could also recover any incidental damages it incurred in procuring the computers from Wholesaler. For example, if Wholesaler was further away and therefore shipping costs were more expensive then [sic] when Mart bought from PC, PC would be liable for the incremental increase in the shipping costs.

2. Is Mart entitled to buy the 1,000 Model X Computers Ordered on November 15 for 1,500 each?

By November 15, when Mart ordered the additional 1,000 computers, Mart knew that PC had revoked its offer to sell up to 4,000 units in that 6 month period or, in other words, had anticipatorily repudiated its obligation to sell Mart the full 4,000 units. Thus, Mart is not entitled to by [sic] the 1,000 Model X's under a contract theory.

Quasi-Contract/Unjust Enrichment

Rather, if Mart is found to be entitled to by [sic] the 1,000 computers it will be because Mart told PC (as far back as August 10 & September 10) that, in reliance on their contract, Mart was going to spend money to place ads for the Model X. Thus, Mart relied to its detriment on PC's promise to sell 4,000 units, so Mart may be able to buy the final 1,000 units under a theory of quasi-contract based upon detrimental reliance.

Even if Model X [sic] is not entitled to actually buy the 1,000 computers from PC, Mart should be able to recover restitutionary damages from PC because PC has been unjustly enriched by Mart's advertising efforts.

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2005 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2005 California Bar Examination and two selected answers to each question.

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Question 2

Developer acquired a large tract of undeveloped land, subdivided the tract into ten lots, and advertised the lots for sale as "Secure, Gated Luxury Home Sites." Developer then entered into a ten-year, written contract with Ace Security, Inc. ("ASI") to provide security for the subdivision in return for an annual fee of $6,000.

Developer sold the first lot to Cora and quickly sold the remaining nine. Developer had inserted the following clause in each deed:

> Purchaser(s) hereby covenant and agree on their own behalf and on behalf of their heirs, successors, and assigns to pay an annual fee of $600 for 10 years to Ace Security, Inc. for the maintenance of security within the subdivision.

Developer promptly and properly recorded all ten deeds.

One year later, ASI assigned all its rights and obligations under the security contract with Developer to Modern Protection, Inc. ("MPI"), another security service. About the same time, Cora's next-door neighbor, Seller, sold the property to Buyer. Seller's deed to Buyer did not contain the above-quoted clause. Buyer steadfastly refuses to pay any fee to MPI.

MPI threatens to suspend its security services to the entire subdivision unless it receives assurance that it will be paid the full $6,000 each year for the balance of the contract. Cora wants to ensure that she will not be required to pay more than $600 a year.

On what theories might Cora reasonably sue Buyer for his refusal to pay the annual $600 fee to MPI, what defenses might Buyer reasonably assert, and what is the likely outcome on each of Cora's theories and Buyer's defenses? Discuss.

Answer A to Question 2

2)

Question 2

Cora (C) will assert three different theories: (1) that there was a covenant, the burden of which ran to Buyer (B), and the benefit of which runs to C, (2) that there was an equitable servitude, the burden of which runs to B, and the benefit of which runs to C, and (3) that a negative reciprocal servitude can be implied from a common scheme initiated by Developer (D). C will sue under a covenant theory to obtain damages in the form of the series of $600 payments, or will sue under an equitable servitude theory to require B to pay the $600.

C will assert that he had no notice of either the covenant, equitable servitude or common scheme, and therefore should not have to pay. He will also allege that even if he did have notice, that the assignment of the contractual rights from Ace Security (ASI) to Modern Protection[,] Inc. (MPI) extinguished any obligation he had or notice of an obligation to pay for maintenance of security services.

Cora's Theories of Recovery

1. Covenant

Cora will assert that the original deed between Developer and Seller created a covenant, the burden of which ran to B, and the benefit of which ran to C. A covenant is a non-possessory interest in land, that obligates the holder to either do something or refrain from doing something related to his land. For the burden of the covenant to run, there must be (1) a writing that satisfies the statute of frauds, (2) intent of the original contrac[t]ing parties that the covenant bind successors, (3) Horizontal privity between the original parties, (4) Vertical privity between the succeeding parties, (5) the covenant must touch and concern the burdened land [,] 5 [sic] Notice to the burdened party. For the benefit of the covenant to run, there must be (1) a writing satisfying the statute of frauds, (2) intent of the original parties, (3) the benefit must touch and concern the benefitted land, and (4) there must be vertical privity between the parties.

Running of the burden

Writing

For the burden to run to B, there must be a writing that satisfies the statute of frauds. Here, the original deed was properly written and recorded. Developer inserted the clause covenanting payment in all of the deeds given to the original 10 purchasers. Therefore, there is a writing satisfying the statute of frauds.

Intent

For the burden to run, the original contracting parties must have intended that the benefit run to successor in interest to the land. Here, the deed on its face evidences an intent that the burden run. It specifically says that the "heirs, successors and assigns" of the deed will be bound to pay the security fees. Therefore the[re] is an intent that the successors– such as B – be bound by the covenant.

Horizon[t]al Privity

For the burden of a covenant to run, there must be horizontal privity between the parties. This requires that the parties be successors in interest – typically this is satisfied by a landlord-tenant, grantor-grantee, or devisor-devisee relationship. Here, the relationship is one of seller-buyer. D was the original seller of the land, and S was the purchaser. S was a successor in interest in the land of D. Therefore there was horizontal privity between the original contracting parties.

Vertical Privity

Vertical privity requires that there be a non-hostile nexus between the original covenanting party and a later purchaser. It is not satisfied in cases in which title is acquired by adverse possession or in some other hostile way. Here, however, S sold the property to B. A sale relationship is a non-hostile nexus, and therefore the requirement of vertical privity is met.

Touch and Concern

Defense by C: B may argue that the covenant here does not touch and concern the land. For the burden to run to a party, the covenant must touch and concern the land, that is, it must burden the holder, and benefit another party in the use and enjoyment of their own land. C will argue that this is not the case here.

B will argue that personal safety of house occupants is not necessarily related to the land. Contracts for security services often are used in matters outside of the home. However, this argument will likely fail. C can argue that the safety services are needed to keep the neighborhood safe. In fact, C and others specifically bought homes in the community because of representations that there would be security services available to keep the land safe. The use an[d] enjoyment of the land would be difficult, if not impossible, without the knowledge that the parties will be safe in their homes. Therefore, C can show that the covenant does in fact touch and concern the land.

Notice

Defense by C: B's primary defense will be that he was not given notice of the covenant. The burden of a covenant may not run unless the party to be burdened has notice of the

covenant. Notice may be (1) Actual, (2) by inquiry, or (3) By Record. The latter two types of notice are types of constructive notice.

–Actual Notice

B will argue that he did not have actual notice of the covenant. Actual notice occurs where the substance of the covenant is actually communicated to the party to be burdened, either by words or in writing. Here, there is no indication that B was told of the covenant in the deed. Therefore, he did not have actual notice.

–Inquiry Notice

A party may be held to be on inquiry notice, if it would be apparent from a reasonable inspection of the community that a covenant applies. C will argue that B was on inquiry notice of the covenant. However, this argument will likely fail.

A reasonable inspection of the community would not have revealed the covenant to pay $600. B might have discovered that the community was protected. There were advertisements claiming that the community was gated and secure. There were probably fences or other signage. However, this notice would be inadequate to tell B that the homeowners themselves were obligated to pay for the security service. The payments for security services may have simply been imputed to the home price, or the funds may have come from elsewhere. Either way, a reasonable inquiry would not have informed B of the existence of the covenant.

–Record Notice

C will argue that B was on record notice of the covenant. Record notice applies where a deed is recorded containing covenants. The burdened party is said to have constructive notice of the covenant that is recorded in his chain of title.

B will argue that he is not on record notice because the covenant was not in his specific deed. This argument will probably fail. A party taking an interest in land, or an agent of theirs, will typically perform a title search. Therefore, they will be held to be on constructive notice of any covenants, easements or other obligations. A simple title search by B would have revealed that the deed from P to S contained a covenant binding successors to pay for the security services.

Therefore, B was on record notice of the existence of the easement.

Running of the Benefit

For the benefit of the covenant to run, there must be (1) a writing satisfying the statute of frauds, (2) intent of the original parties, (3) the benefit must touch and concern the benefitted land, and (4) there must be vertical privity between the parties.

The analysis here will be the same as for the running of the burden, except that horizontal privity will not be required (even though it is present). The original agreement was in writing. The original contracting parties intended that the benefit run. The benefit arguably touches and concerns the land. Furthermore, D and C were in a non-hostile nexus, therefore the requirement of vertical privity is satisfied.

Conclusion: Because the requirements for running of the burden and running of the benefit are present, C can enforce the covenant against B, and will be entitled to damages for B's failure to pay for the security services.

2. Equitable Servitude

C may also attempt to enforce the requirement in the deed as an equitable servitude against B. The requirements for an equitable servitude are less stringent than those required for a covenant – for the burden of an equitable servitude to run, there must be (1) a writing satisfying the statute of frauds, (2) intent of the original parties to bind successors, (3) the servitude must touch and concern the land, and (4) notice to the party to whom the covenant is being enforced. If the equitable servitude is enforced, it will allow the party enforcing it to obtain a mandatory injunction. In this case, enforcement of the servitude would require B to make the $600 payments to MPI.

The analysis for an equitable servitude will be the same as that for the running of the burden of a covenant. There was a writing, there was intent by the original parties, the servitude touches and concerns the land, and arguably, there was notice to B. Therefore, given the forgoing [sic] analysis, C will be able to enforce an equitable servitude against B, and obtain a court order compelling him to pay the fees (subject to any defenses: see below).

3. Reciprocal Servitude Implied from Common Scheme

C may also attempt to enforce the payment of the security fees as a reciprocal servitude based on the original common scheme. A reciprocal negative servitude can be implied from a developer's actions where a developer develops a number of plots of land with a common scheme apparent from the development, and where the development party is on notice of the requirement.

C can argue that there was a common scheme to create a secure and gated community. There were advertisements at the time that the land was developed indicating that a major selling point of the development was that the development would be secure. To that end, the developer entered into a contract with ASI. It is apparent from developer's actions that a common scheme, including maintenance of security in the development, was intended.

The analysis for notice of the common scheme is the same as above – it may have been predicated on actual or constructive notice. Here, B was on record notice of the scheme. Therefore, C can successfully hold B to payment of the security fees on an implied

reciprocal servitude theory as well.

Buyer's Defenses

Notice

As noted above, one of B's primary defenses will be that he was not given notice of any covenant or servitude. This argument will fail in most courts, because of the fact that B was on record notice of the covenant, based on a deed in his chain of title.

Touch and Concern

As noted above, B may argue that the covenant at issue does not touch and concern that land. This argument will fail, because the security arrangement will clearly benefit the homeowners in their use and "peace of mind" concerning their homes and personal safety.

Assignment of the Contract from ASI to MPI

B will allege that even if he was obligated to pay ASI based on notice in his deed, he was under no obligation to pay MPI, because of the assignment of the contract. This argument will fail.

Here, ASI has engaged in both an assignment of rights and a delegation of duties. All contract duties are delegable, if they do not change the nature of the services to be received by the benefitted party (here, B). Unless B can show that the security services received from MPI will be materially different from those he would receive from ASI, then he cannot allege that the delegation and assignment excuses his duty to pay. There is no reason to think that MPI is any less capable of performing security services than MPI.

Furthermore, once contract rights are assigned and delegated, a party must pay the new party to the contract once he receives notice of the assignment. B knows that he has to pay MPI, therefore he cannot allege that he is not making payments because he doesn't know who to pay.

Answer B to Question 2

2)

What theories might Cora sue Buyer for his refusal to pay the annual $600 fee to MPI, what defenses could Buyer raise, and what is the likely outcome on each theory?

Cora will argue that the Buyer is bound by a covenant that runs with the land. Cora will further argue that this covenant requires Buyer to pay MCI the $600 per year.

Covenants

A covenant is a promise relating to land that will be enforce[d] at law. Enforcement at law usually gives rise to money damages. Equitable servitudes, which will be discussed later, are enforceable in equity, which often means with an injunction.

Cora will argue that a valid covenant was created when each lot owner signed the deed with Developer that contained the clause that each purchaser, including heirs, successors, and assigns, will have to pay an annual fee of $600 to Ace Security. This covenant was in writing[;] Developer recorded all the deeds.

Will the burden of the covenant run?

Cora will argue that even though Seller was the person who initially signed the deed containing the covenant, the burden of the covenant should run to Buyer. The burden of a covenant will run to a successor in interest if 1) the initial covenant was in writing, 2) there was intent from the initial people creating the covenant that it would run to successors, 3) the covenant touches and concerns land, 4) there exists horizontal and vertical privity, and 5) the successor in interest had notice of the existence of the covenant.

Writing:

The initial covenant was in writing because it was included in the deed that each lot purchaser signed in the contract with Developer. Therefor, this requirement has been met.

Intent:

There also appears to be intent that the covenant bind successors in interest. This is because the deed which Developer and Seller signed contained the phrase “hereby agree on their own behalf and on behalf of their heirs, successors, and assigns.” This is clear evidence that the original parties intended the burden to run.

Touch and Concern:

A covenant will be considered to touch and concern land if it relates to the land and affects each covenant holder as landowners. Here, the covenant was to provide security and maintenance within the subdivision. This probably will be considered to touch and concern land because the safety and maintenance of the subdivision has a clear impact on each landowner's use and enjoyment of his or her lot. The covenant was not to provide personal security to the landowners, but rather to secure the land that was conveyed in the deed. Therefore, the covenant likely will be considered to touch and concern land.

Horizontal and Vertical Privity:

There must also be horizontal and vertical privity in order for a successor in interest to be bound by the burden of a covenant. Horizontal equity deals with the relationship between the original parties. Here, the original parties are Developer and Seller. There must be some connection in this relationship, such as landlord-tenant, grantor-grantee, etc. Here, Developer owned the large tract of undeveloped land that was eventually turned into the ten lots. Then, Developer conveyed one of the lots that it owned to Seller. This will satisfy the requirement of horizontal privity.

Vertical privity relates to the relationship between the original party and the successor who may be bound by the covenant. Vertical privity will usually be satisfied so long as the relationship between the two parties is not hostile, such as when the new owner has acquired ownership by adverse possession. Here, Seller sold the property to Buyer. Therefore, this will satisfy the vertical privity requirement.

Notice:

The final requirement for the burden of a covenant to run to successors is notice to the successor in interest. A successor will be deemed to be on notice of the covenant if there is 1) actual, 2) inquiry, or 3) record notice of the covenant. Actual notice is if the successor was actually aware of the covenant. Inquiry notice is where the successor would have discovered the existence of the covenant had she inspected the land as a reasonable person would have. Record notice occurs when the successor would have discovered the covenant if an inspection of the records had taken place.

Here, there is no evidence that Buyer had actual notice of the covenant at the time that she bought the land from Seller. Also, it is unclear whether Buyer was on inquiry notice. If Buyer had inspected the land prior to purchase, Buyer may have noticed that the land was being maintained and secured by a company. If Buyer had seen this, she should have also probably concluded that each landowner was partially paying for this maintenance and security service. Therefore, Buyer may be deemed to be on inquiry notice.

Even if Buyer did not have actual or inquiry notice, Buyer clearly had record notice of the covenant. This is because the covenant was in writing and was included in the deed of

each of the original purchasers from Developer. Furthermore, Developer promptly recorded all of these deeds. Therefore, if [B]uyer had went [sic] to the record office and looked up the land that she was buying, she would have discovered the covenant.

Therefore, Buyer will be considered to be on notice of the covenant.

Buyer's possible defenses to enforcement of the covenant:

Buyer may argue that [s]he should not be bound by the covenant because the covenant does not touch and concern land, she was not on notice of the covenant, and that she should be excused from performing under the covenant because of Ace Security's assignment to MPI.

Touch and concern:

As discussed earlier, the covenant will likely be considered to touch and concern land. Buyer may argue that the duty to provide security to the landowners is primarily there to protect the landowners personally rather than to protect the actual land. Buyer will further argue that because the covenant relates to personal protection of the landowners, it does not relate to land and therefore should not be deemed to touch and concern land. If the covenant is deemed not to touch and concern land, the covenant will not bind successors in interest.

However, because the contract with Ace Security was for the security and maintenance of the subdivision, Buyer's claim will likely be rejected. Even if Buyer can convince the court that the Ace Security had promised to protect the individual landowners rather than the land, Ace Security's promise to maintain the property clearly related to land. It would not make sense for Buyer to argue that Ace Security's duty to maintain relates to maintenance of the landowners rather than maintenance of the land.

Therefore, Buyer's argument that the covenant does not touch and concern land will be rejected.

No Notice:

As discussed earlier, Buyer may argue that she did not have notice of the covenant and, therefore, should not be bound by the covenant. Buyer will point to the fact that the deed between Seller and Buyer did not mention the covenant to pay for security services. However, this argument will fail because Devel[o]per properly recorded each of the deeds which contained the covenants. As a result, if Buyer would have checked the records she would have discovered the covenant.

Thus, this argument by Buyer will also fail.

Contract Defenses:

Buyer may also make some contract arguments.

What law governs?

The contract between Developer and Ace Security will be governed by the common law because it is a contract for services, not goods. Even though the contract cannot be performed within 1 year (because the contract is for 10 years) the statue of frauds has been satisfied because the contract was in writing between Developer and Ace Security.

Third Party Beneficiary

Cora can claim that he [sic] is a third party beneficiary of the original contract between Devel[o]per and Ace Security. Cora will point out that in the initial contract between Devel[o]per and Ace Security, it was clearly Developer's intent that performance of the security services go to the purchasers of the land rather than to Developer. He will also claim that his rights under the contract has [sic] vested because he has sued to enforce the contract. Because Cora can show that all of the landowners are third party beneficiaries, Cora will have the ability to use under the contract.

Invalid Assignment to MPI:

Buyer may also argue that even if the original covenant runs to her, she should no longer be bound by the covenant because of Ace Security's assignment of the contract to MPI.

An assignment can include all of the rights and obligations of the original contracting party. In general, an assignment and/or delegation will be valid unless 1) the original contract specifically says that all attempted assignments or delegations will be void, or 2) the assignment or delegation materially changes the risks or benefits associated with the original contract.

Here, there is nothing in the original contract between Developer and Ace Security that states that assignments will be void. Furthermore, there is nothing in the covenant that Seller signed with Developer that limits the covenant only to performance by Ace Security. Therefore, this will not be a valid reason for invalidating the assignment and excusing Buyer's need for performance.

Also, it does not appear that Ace Security's assignment to MPI will in any way impact that obligations [sic] to Buyer or the benefits that Buyer will receive. Ace Security was originally required to provide security and maintenance for the subdivision. This is not a personal service that only Ace Security can effectively provide. Rather, security service is a task that any competent security company can handle. Therefore, the fact that performance will now be coming from MPI rather than Ace Security will not negatively impact Buyer's benefits from the contract.

Moreover, the assignment will not effect [sic] Buyer's obligations under the contract either. Under the initial contract with Ace Security, Buyer was required to pay $600 per year. After the assignment to MPI, Buyer is still required to pay only $600 per year. Therefore, Buyer's obligations after the assignment will not be changed in any way. Therefore, the assignment from Ace to MPI will be considered valid and Buyer will not be excused from performing as a result of this assignment.

MPI's threat to suspect [sic] service unless it receives assurances that it will be paid the full $6,000 each year for the balance of the contract

Buyer may also argue that even if they are bound by the covenant, MPI is not entitled to assurances that it will be paid the entire value of the contract for the remainder of the contract term. As common law, a suit for breach of contract could not be brought until the date for performance has passed. Cora will argue, on behalf of MPI, that they are entitled to assurances of future performance because of Buyer's anticipatory repudiation.

Anticipatory Repudiation

Generally, a suit for breach of contract can only be brought when the date for performance has passed. However, is [sic] a party to a contract unambiguously states that he cannot or will not perform under the contract, a suit may be brought immediately for breach of contract.

Here, Buyer has steadfastly refused to pay any fee to MPI. It is unclear whether the time has passed in which Buyer was required to pay MPI. Regardless, Buyer's clear statement that it will not pay MPI will be considered an anticipatory repudiation. Thus, Buyer will be able to immediately bring suit.

Also, because of the anticipatory repudiation, Cora or MPI would be entitled to immediately bring suit. Because they could immediately sue Buyer if they so chose, it only makes sense to allow MPI to seek assurances that Buyer and the other landowners will continue to perform under the contract.

Equitable servitude

An equitable servitude is much like a covenant except that an equitable servitude is enforceable in equity, rather than at law. Here, Cora may prefer to have the court declare an equitable servitude, so that the court will enjoin Buyer to pay the $600 each year for the 10 year length of the contract. This will ensure that Cora will not have to pay more than $600 in any year.

In order for the burden of an equitable servitude to run with the land, there must be 1) a writing, 2) intent, 3) touch and convern[sic], and 4) notice to the successor in interest. All of these have been discussed earlier and have been satisfied. Therefore, this could be

considered to be an equitable servitude.

Cora may wish to get an injunction requiring Buyer to pay $600 per year for the 10 year length of the contract. Cora will first need to show that Buyer has breached his obligations under the contract.

Under an equitable servitude, the court may require Buyer to pay $600 per year for the remainder of the contract.

Buyer's defenses

Buyer could make the same defenses as in the covenant situation. As stated earlier, all of these defenses will likely be rejected.

Common Scheme Doctrine

Even if Cora's other attempts to enforce a covenant or equitable servitude fail, Cora may be able to show that Buyer should be bound by the common scheme doctrine. Cora would need to show that the original developer had a common scheme for the entire subdivision and that this scheme was clear to anyone who inspected the area and the records. Cora's argument may succeed because of the fact that Developer recorded the covenant between all of the original purchases from Developer.

Conclusion/Likely Outcome:

Cora will likely succeed in showing that there was a covenant between all of the original landowners. Cora will also be able to show that the burden of this covenant should run to Buyer. Cora will also be likely able to show the existence of an equitable servitude.

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.

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 promissee 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 promissee[,] 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 advice [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.

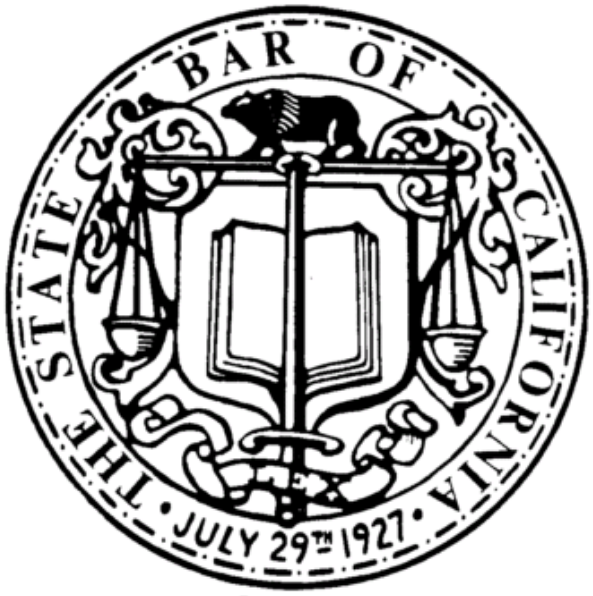
This rule may not apply here because Larry was not representing Marla at the time of the business transaction, at least as far as the limited facts [are] known. Furthermore, Larry did properly separate his law practice and his SS business. It is in a separate office and [there is] no indication the two 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 respec[t] 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 Statue 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[in]g 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 a[r]gue 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. Morever, 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 mitigiate 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 2008
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2008 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.

Question 3

On May 1, Owner asked Builder to give her an estimate for the cost of building a wooden fence around her back yard. Builder gave Owner signed written estimates of $4,000, consisting of $2,500 for labor and $1,500 for materials for a cedar fence, and of $7,000, consisting of $2,500 for labor and $4,500 for materials for a redwood fence. He said, however, that he would have to verify that the redwood was available.

Owner said she liked the idea of a redwood fence but wanted to think about it before making a decision. In any case, she said she wanted the fence completed by June 1 because she was planning an important event in her back yard for a local charity. Builder said he would check with redwood suppliers and get back to her within two days.

On May 2, Builder telephoned Owner. Owner's phone was answered by her voice-message machine, which informed callers that she had been called away until about May 25 but would be checking her messages daily and would return calls as soon as she could. Builder left a message stating, "I've found the redwood, and I can build the redwood fence for $7,000, as we agreed. Please give me a call, as I will otherwise buy the redwood, which is in short supply, and start the work within a few days." Owner heard the message, but because the charity event she had planned had been cancelled and there was no longer any urgency about getting the fence erected, she decided to wait until she returned to speak to Builder.

By May 14, Builder had still not heard from Owner. He was concerned that the supply of redwood might not hold and that if he did not start work immediately he would not be able to finish by June 1. Thus, he bought the redwood and completed construction of the fence on May 24.

When Owner returned on May 25, she saw the completed fence and sent Builder a letter stating, "You did a great job, but I never agreed to go ahead with the fence, and I certainly hadn't decided on redwood. Besides, the charity event that I had planned got cancelled. You should have waited until I got back. But, to avoid a dispute with you, I'll offer to split the difference – I'll pay you $5,500."

Builder received the letter on May 26. He telephoned Owner and said, "When I first read your letter, I was going to get a lawyer and sue you, but I decided to let it go and I do accept your offer of $5,500." Owner replied, "Well, you're too late. I've changed my mind. I don't think I owe you anything."

May Builder recover all or any part of $7,000 from Owner on a contractual or other basis? Discuss.

Answer A to Question 3

Applicable Law

This contract will be governed by general common law contract principles. Contracts for the sale of goods are governed by Article 2 of the Uniform Commercial Code. All other contracts are governed by general common law contract principles. The contract at issue, assuming there is one, involves personal services: building a fence. Although Builder may also supply materials such as the wood, that does not convert it into a contract for the sale of goods because the materials are collateral to the primary purpose of the agreement, which is to provide the service of fence building.

Formation

There was no enforceable contract between the parties, because they never had a meeting of the minds. For a contract to come into formation, there must be an offer, followed by a manifestation of assent to the offer. The parties must objectively agree to a bargained-for exchange.

Offer - May 1 Estimates

Builder (B) may argue that the estimates he provided on May 1, were offers. An offer is a communication of definite terms of the agreement which creates a power of acceptance in the offeree. The estimate for the redwood fence was not an offer, however, because B did not objectively manifest an intent to be bound if Owner (O) accepted right there. B said that he would have to verify that redwood was available. This suggests that he did not intend to be bound to the terms of these estimates until he verified the supply of the redwood. The estimate for the cedar fence was not similarly conditioned, and so it may be construed as an offer. Since he withheld the power to accept with regard to the redwood fence, that estimate was a mere invitation to make an offer.

Offer – May 2 Message

The May 2 voicemail message from B does qualify as an offer for the redwood fence. In the message he referred to their earlier discussion, and said that he would be willing to build the redwood fence for $7,000. Furthermore, he expressly granted O the power to accept by calling him back or that he would start the work in a few days if he did not hear from her. Since he created power of acceptance, this message was an offer to build the redwood fence for $7,000.

Offers have no effect, however, unless actually communicated. B reasonably expected that his message would be heard by O since her message said that she would be checking her messages daily. Owner did in fact hear the message. Once she heard the message, the offer was effective.

Acceptance by Silence

The general rule is that the offeree must objectively manifest assent to the offer to be bound. As a corollary, silence on the part of the offeree is not generally an objective

manifestation of assent. There are exceptions to this general rule where the parties have a prior history of dealing on such a basis. There is no indication that B and O have any such history. Although B attempted to create a power of acceptance by O's silence, she will not be bound by silence unless it is objectively assent.

B would argue that under the circumstances, O's silence should be construed as assent. O had already told him that she needed the fence to be completed by June 1. She had not informed him that the charity event scheduled for June 1 had been cancelled. B was under the impression that O need[ed] the fence done on time. Furthermore, her message said that she would be checking her messages daily, but would return calls as soon as she could. Given this, B was reasonable in believing that she heard the message but was too busy to respond. Since he told her he would start in a few days unless he heard back from her, it may have been objectively reasonable to believe that her silence meant that she wanted him to start but was too busy to respond.

On the other hand, O would argue that it would be unfair to hold her to an agreement that she had not assented to. After all, at the time, there were two outstanding offers: one for the cedar fence, and another for the redwood fence. Moreover, on their last communication, O had told B that she liked the idea of a redwood fence, but wanted to think about it before making a decision. Given that she could have decided on either, it was not objectively reasonable to interpret her silence as assent to the building of the redwood fence. O has the better argument here, particularly because courts are loathe to enforce an agreement where one party has not affirmatively manifested assent. Thus, O is not bound to the contract by her silence.

Consideration

There are no issues of consideration here. For a contract to be binding, there must be a bargained-for exchange whereby each party incurs some legal detriment. In this case, B would be obligated to build a fence, and O would be obligated to pay.

Remedies

Compensatory Damages

If there is no enforceable contract then B may not recover the $7,000 from Owner. If there is a contract, however, then B would be entitled to recover the entire $7,000. In California, the measure of compensatory damages is the expectancy interest. In other words, the law seeks to place the parties in the monetary position they would have been in had the contract been fully performed by both parties. Here, B fully performed by obtaining the materials and building the fence. When O refused to pay, she was in breach of her obligation to pay. Had the contract been fully performed, B would have expected to be paid the contract price of $7,000. Thus, if there is an enforceable contract, B would be entitled to $7,000.

Quasi-Contract

If there was no enforceable contract, B may still be able to obtain some of the money under the theory of quasi-contract. A quasi-contract is an equitable doctrine used to

prevent the unjust enrichment of one party. A quasi-contract arises where one party confers a benefit upon the other with the reasonable expectation that they will receive payment for the benefit. Unlike contract damages, however, the measure of damages under quasi-contract are restitution, or the prevention of unjust enrichment. In other words, the law will require O to pay B for the reasonable value of the services to prevent her unjust enrichment.

In this case, a quasi-contract likely arose. B certainly conferred a benefit on O. She has a brand new redwood fence. The issue is whether it was reasonable for B to expect that he would be compensated for his services. As discussed above, it is a close call as to whether B was reasonable in interpreting O's silence as consent. While it was probably not sufficient to bind O to the contract terms, it may have been sufficient under the circumstances to create a reasonable expectation in B that he would be compensated for his services.

If B prevails on a quasi-contract theory, he would at a minimum be entitled to recover the value of the materials, or $4,500. If the new fence has increased the value of O's property, he may also be entitled to recover that increased value because to allow O to benefit from the increased value to her property would also unjustly enrich her. If this measure is applied, however, it would be limited to a maximum of $7,000 representing the effective contract price. Furthermore, O may oppose this measure of damages as being too speculative.

Accord and Satisfaction

O will be required to pay B $5,500 on the accord and satisfaction contract. When O returned and discovered the fence, she sent B a letter. In this letter, she agreed that B did a "great job" but asserted that she had never agreed to the contract. O then offered that in order to "avoid a dispute" she would "split the difference" and pay B $5,500. This may be interpreted as an offer of accord. The offer was effective on May 26, when B received it.

There is sufficient consideration to bind the parties to this agreement because O has agreed to pay $5,500 in exchange for B agreeing not to waive any claim to the original contract. As discussed, although her claim that she never agreed is stronger, B still had a viable contract claim against her. B reinforced his reasonable belief that he had a non-frivolous claim when he called her and told her that his first instinct was to get a lawyer and sue her. By forgoing his right to sue her on the contract theory, B has incurred a legal detriment sufficient for consideration.

O became bound to the offer when B called her and accepted it. In general, an offer may be revoked at any time by the offeror, but a revocation is not effective until communicated. Here, B called O and immediately accepted her offer of accord. Although O may have decided to revoke the offer before B called (which she suggests by saying "You're too late. I've changed my mind"), her subjective intent does not legally revoke the offer until she communicates the revocation to B. Here, since B

accepted before she could revoke, and there is sufficient consideration, O will be bound to the accord and satisfaction contract. B may recover $5,500 from her on that theory.

Answer B to Question 3

Builder v. Owner

Builder may wish to proceed on three theories: 1) that Owner is in breach of contract formed on May 2, and thus, he should recover the full contract price; 2) that Owner is in breach of contract formed on May 25; and 3) that Builder should be entitled to restitutionary remedies under an unjust enrichment or quasi-contract theory.

Controlling Law

The first issue is whether the agreement between Builder and Owner is controlled by the UCC or the common law of contracts. The agreement was for the construction of a fence. In general, constructions are contracts for the personal services of the builder, with the cost of materials being incidental to the contract. However, the contract also involves the sale of goods, since the fence was being built out of wood. The UCC controls contracts for the sale of goods, which are defined as movable, tangible personal property. Thus, whether the UCC or the common law controls the contract depends on which part of the contract was the most important part.

If the agreement were for a cedar fence, the labor was valued at $2,500 and material valued at $1,500. Thus, such a contract would be governed by the common law of contracts. If the agreement were for a redwood fence, the labor was again valued at $2,500 but instead the materials were valued at $4,500. This contract could be governed by the UCC, since the primary part of the contract was the sale of the redwood, with the labor constructing the fence being incidental to the sale of the expensive wood.

Here, Builder is asserting a contract for the construction of a redwood fence. This is a close issue, because while there is a disparity between the value of the labor and the goods, the entire purpose of the contract was not to buy and sell wood, but rather to construct a fence. A pile of redwood would not be of use to Owner. Rather, Owner contacted Builder for the purpose of the construction of a fence. Thus, the court could also hold that the contract should be controlled not by the UCC, but rather by the common law.

1. Contract Formation on May 2

K Formation

In order to form a valid contract, there must be 1) offer, 2) acceptance, and 3) consideration.

Offer

An offer is the manifestation of a present intent to contract, definitely communicated to the offeree, inviting acceptance. Whether a statement constitutes an offer will be judged by a reasonable person standard. If a reasonable person in the offeree's shoes would understand the commitment to be a contract, then the statement is an offer.

Builder may argue that he made an offer to build the redwood fence on May 1. However, this argument will likely fail because Builder stated on May 1 that he would have to verify that the redwood was available. Thus, Builder's equivocation regarding the availability of redwood made his statement too indefinite to be considered an offer. Builder may also argue that he made an offer to build a cedar fence, but his argument would also likely [fail] because he was simply responding to an inquiry by Owner for an estimate regarding the cost of completion.

Builder will also argue that his May 2 telephone message constituted an offer. Owner stated in her phone message that she would be checking her messages daily. His message stated a price term, was definitely communicated to Owner, and manifested a present intent to contract. Thus, Builder's May 2 message would very likely be considered an offer because, judged by a reasonable person standard, it was clear that he was inviting acceptance of his promise to build a fence for $7,000, and it was clearly directed at her based on their prior conversation.

Acceptance

Acceptance is words or conduct manifesting an assent to the terms of the offer. At common law, acceptance had to be a "mirror image" of the offer. Any deviation from the terms of the offer constituted a rejection of the offer, and instead formed a counteroffer. Under the UCC, acceptance may be made on different terms, and whether such terms become part of the contract depends on whether the parties are merchants.

Builder may argue that Owner accepted his offer on May 1. This argument will fail because, as noted above, Builder did not make an offer on that date. Thus, there could be no acceptance. Builder's better argument is that Owner accepted his May 2 offer by her silence.

Silence ordinarily does not manifest an assent to the terms of the offer. Silence can only indicate acceptance when the circumstances would clearly indicate to the offeror that his offer had been accepted. In this case, Builder will argue that he knew Owner was checking her phone messages daily. Thus, he would understand that Owner would receive his message if not on May 2, then certainly soon thereafter.

However, this argument should also fail because Builder himself requested that Owner "give him a call" soon, since redwood was in short supply and he wanted to get to work right away. Twelve days elapsed between May 2 and May 14, when Builder – who still had not heard from Owner – commenced building the fence. Based on their past conversations, Builder was aware that Owner wanted to think about building the fence before coming to a decision. Thus, it was unreasonable for Builder to assume that Owner's silence manifested an assent to his offer.

Moreover, Builder may argue that Owner had made time of the essence of the contract, since she stated in their May 1 conversation that she wanted the fence completed by June 1 in any event. Builder was concerned on May 14 that he would not be able to complete the fence by June 1 and therefore he commenced building in order to comply

with this condition set by Owner. This argument would also likely fail, because while a time of the essence clause makes late performance a material breach of contract, no contract had yet been formed between Owner and Builder. Thus, Builder cannot state that Owner's silence was acceptance even if time was of the essence.

Consideration

Consideration is the bargained-for exchange between the parties. Consideration is present any time promises or performances are exchanged. Any legal detriment or forbearance, as well as actual benefits and performance, can constitute consideration.

If there was a valid offer and acceptance on May 2, consideration would be present because Owner would have promised to pay $7,000 in exchange for Builder's promise to construct the fence. This would be a bargained-for exchange of promises, and thus consideration would be satisfied.

However, as noted above, Owner did not accept Builder's offer on May 2 through any action or through silence. Therefore, no valid contract could have been formed on May 2.

Unilateral v. Bilateral

A unilateral contract is one whose acceptance is expressly conditioned on performance. That is to say, the offer can only be accepted by the demanded performance. All other contracts are bilateral. Builder may attempt to argue that, on May 1, Owner made an offer to pay $7,000 if the fence were completed by June 1, and that a unilateral contract was formed by his full performance of building the fence. However, for the same reasons noted above, Owner did not make any offer on that date, and thus a unilateral contract argument will be rejected.

Statute of Frauds

Even assuming a contract was formed between Owner and Builder, Owner may attempt to assert a statute of frauds defense if the contract is governed by the UCC. Under the UCC, contracts for the sale of goods in excess of $500 must be in writing. If the court finds that the UCC governs this contract, it would be in violation of the Statute of Frauds because all communications made between the parties were oral. In order to satisfy the Statute of Frauds, there must be a writing evidencing the contract, signed by the party to be charged (unless the parties are merchants).

Builders may argue that the signed written estimates he sent to Owner should satisfy the statute of frauds. Under the UCC, a Merchant's Firm Offer will take a contract out of the statue of frauds, even if the party to be charged does not sign a writing evidencing the contract. The merchant's firm offer rule will apply if 1) the sender is a merchant, 2) the recipient has reason to know its contents, and 3) does not respond to the writing. Here, Builder is likely a merchant under the UCC's broad definition of a merchant, since he probably frequently deals in construction contracts. Owner received the estimates and knew their contents, since she expressed that she liked the idea of the redwood fence. However, Owner did respond to the estimate, indicating that she wanted time to

think about it. Thus, the merchant's firm offers rule here cannot apply. Any subsequent agreement must still be evidenced by a signed writing, which here is absent under these facts.

It should also be noted that if the contract is governed by the common law, there would be no Statute of Frauds issue because the contract did not fall within the types of contract normally governed by the Statute.

Frustration of Purpose

Additionally, assuming a contract was formed, Owner may attempt to assert a defense based on frustration of purpose since the whole purpose for which she wanted to build the fence – the charity event in her backyard – was cancelled. However, this argument would fail because the purpose of the contract was not to perform a charity event, but rather to build a fence, which was still possible even after the event had been cancelled.

Conclusion

Thus, on May 2, no contract was formed between Owner and Builder. As such, Owner is not in breach of contract for refusing to pay $7,000 and Builder has no contract remedy to recover any part of that money.

2. Formation of Contract on May 25

Builder may alternatively argue that a new contract was formed on May 25, when Owner returned home. Builder will assert that Owner's letter to him was an offer to pay $5,500 in exchange for the fence, which Builder accepted by his phone call on May 26. Again, every contract must contain both offer, acceptance, and consideration. Offer and acceptance are likely satisfied, but Owner will assert that no consideration was present.

Owner will argue that the consideration for her promise to pay $5,500 was Builder's completion of the fence. That would be past consideration, which cannot constitute a bargained-for exchange, since there was no promise to support Builder's performance at the time he rendered it. In other words, Owner will argue that she did not bargain for the fence, and thus there was no return promise or performance in exchange for her offer to pay Builder $5,500. Owner will very likely prevail on this point, and therefore since no consideration was present, a new contract to build the fence could not have been formed on May 25.

Good Faith Settlement of a Dispute

Alternatively, Builder may argue that Owner's promise to pay $5,500 constituted a good faith settlement of a dispute, which Builder then accepted. Here, the exchange was not money for the construction of the fence, but rather money in exchange for Builder's release of any legal claim he might assert against Owner.

In this case, Owner stated that she never agreed to the fence, and that Builder should have waited until she returned – but that to avoid a dispute, she will offer Builder $5,500. Builder stated that he was going to get a lawyer and sue Owner, but agreed to accept the money instead. Thus, there is a good faith dispute between these parties as

to the existence of the debt and as to the amount owed. Owner made an offer via her letter on May 25, and Builder accepted it on May 26. Consideration is present because there was a bargained-for exchange: in this case, Owner promised to pay money in exchange for Builder's legal forbearance (doing something he had a right to do, in this case, sue Owner).

Accord and Satisfaction

An accord is an agreement which rests on top of an underlying contract. An accord occurs when one party agrees to accept a different performance in lieu of the performance promised in the underlying agreement. An accord suspends performance of the underlying agreement. Satisfaction is the performance of the accord agreement. When a satisfaction occurs, the accord merges with the underlying agreement, which is extinguished.

Here, Builder will argue that the settlement of their dispute constituted an accord but not a satisfaction. As analyzed above, the good faith dispute contained an offer, acceptance and consideration. Thus, there is an overlying agreement resting on top of an underlying agreement. However, the accord was never performed. Owner did not pay the $5,500 in lieu of her original performance. Thus, Builder could seek damages for breach of the accord agreement – but not damages for breach of the underlying contract since, as noted above, no actual contract was formed to build the fence. Builder's damages would be measured by the loss he incurred as a result of the breach of the accord agreement, which here would be $5,500.

Revocation of Offer

Owner will argue that she revoked the offer on May 26 when she told Builder that she had changed her mind. In a bilateral contract, an offer may be revoked at any time before acceptance is made. Once acceptance is given, the contract is formed and an offer cannot be revoked. Here, Owner's argument will fail because Builder accepted the offer by calling her immediately. Thus, Owner could not revoke her offer.

Therefore, if Builder proceeds on this theory, he could likely recover the $5,500.

3. Quasi-K Remedies

If Builder decides that he cannot succeed on a contract theory, he may proceed on a quasi-contract theory, which will avoid unjust enrichment on the part of the defendant. In this case, Owner has a new redwood fence in her backyard. Builder will argue that if she were permitted to keep it without paying any sort of damages to Builder, she would be unjustly enriched.

Builder could likely prevail on this argument. Owner would argue that she should not have to pay any amount of damages because she did not actually request that Builder construct the fence. However, Owner heard Builder's message on May 2 and decided not to reply, because the event had been cancelled. Owner knew that she would not be returning until May 25, and that she had told Builder she wanted the fence built by June 1. Additionally, Builder had asked her to call him back as soon as possible, because

the redwood was in short supply. Thus, based on Builder's message on May 2, Owner should have at least communicated to Builder that she was no longer interested in having the fence constructed.

Fairness would therefore require that Owner make restitution for the benefit conferred upon her by Builder. Builder will be able to recover the fair market value of the work he did in order to build the fence. It should be noted that restitutionary remedies can sometimes even exceed the contract price, if that is the fair market value of services rendered. Thus, Owner can recover all, part, or more of the $7,000 depending on the fair market value of the benefit conferred upon Owner.

THURSDAY MORNING
JULY 31, 2008

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.

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ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2009
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 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.

Question 5

Developer had an option to purchase a five-acre parcel named The Highlands in City from Owner, and was planning to build a residential development there. Developer could not proceed with the project until City approved the extension of utilities to The Highlands parcel. In order to encourage development, City had a well-known and long-standing policy of reimbursing developers for the cost of installing utilities in new areas.

Developer signed a contract with Builder for the construction of ten single-family homes on The Highlands parcel. The contract provided in section 14(d), "All obligations under this agreement are conditioned on approval by City of all necessary utility extensions." During precontract negotiations, Developer specifically informed Builder that he could not proceed with the project unless City followed its usual policy of reimbursing the developer for the installation of utilities, and Builder acknowledged that he understood such a condition to be implicit in section 14(d). The contract also provided, "This written contract is a complete and final statement of the agreement between the parties hereto."

In a change of policy, City approved "necessary utility extensions to The Highlands parcel," but only on the condition that Developer bear the entire cost, which was substantial, without reimbursement by City. Because this additional cost made the project unprofitable, Developer abandoned plans for the development and did not exercise his option to purchase The Highlands parcel from Owner.

Builder, claiming breach of contract, sued Developer for the $700,000 profit he would have made on the project. In the meantime, Architect purchased The Highlands parcel from Owner and contracted with Builder to construct a business park there. Builder's expected profit under this new contract with Architect is $500,000.

What arguments can Developer make, and what is the likely outcome, on each of the following points?

1. Developer did not breach the contract with Builder.
2. Developer's performance was excused.
3. In any event, Builder did not suffer $700,000 in damages.

Discuss.

Answer A to Question 5

This contract is for construction services. As a result, it will be governed by the common law.

Valid Contract

In order to proceed, Builder must establish a valid contract, which requires (1) offer, (2) acceptance, and (3) consideration. The facts state that Builder and Developer reached an agreement and signed a contract. Therefore, there is likely the required offer, acceptance and consideration. The contract does not fall under the Statute of Frauds because it is not: in consideration of marriage, suretyship, contract for real property, sale of goods $500 or more, or unable to be performed within one year. In any event, the contract was signed, which indicates that it would satisfy the Statute of Frauds anyway. There is a valid enforceable contract.

1. **Developer did not breach**

A breach of contract occurs when a party to the contract does not perform after performance comes due. Therefore, if performance has not come due, there can not be a breach. Likewise, if the party substantially performs his obligations under the contract, there is no breach. Performance only comes due after the occurrence of all conditions precedent to performance. This contract contained such a condition. The contract contained the condition that obligations were only due once the City approved "necessary utility extensions." Therefore, unless the City approved these extensions, performance is not due.

Builder will argue that the City did approve the extensions, and that performance is due. The fact that the City approved the extensions is true; however, it still may not give rise to performance. Developer will rebut this argument with a claim that Developer and Builder agreed that this condition impliedly included the condition that City reimburse Developer for the cost of the extensions.

Merger and Parol Evidence: A merger clause in a contract indicates that the contract is a final integration of the agreement between the parties. This clause causes the Parol Evidence rule to apply. This rule states that no prior or contemporaneous oral statements are admissible that contradict the final integration between the parties. Builder will argue that the statements by Developer that the condition means that the City must approve and reimburse for the extensions is barred as parol evidence. However, the parol evidence rule does not outlaw all statements. Developer can still admit statements that prove the existence of a condition precedent to the formation of the contract or statements that explain the meaning of a clause in the contract. Both of these rules apply here.

The statements in question represent the agreement by Developer and Builder that the condition in 14(d) means that the agreement is conditioned on reimbursement by the City for the cost of the extensions. This means that there was an additional condition precedent: the contract is conditioned upon reimbursement by the City. This also means that statements that Developer seeks to admit will explain the language of 14(d). Therefore, the statements Developer seeks to admit will [be] admissible by the Parol Evidence Rule.

Because Developer can admit the statement pertaining to reimbursement, he will be able to establish that performance is not due. As a result, his failure to perform is not a breach.

2. **Performance was excused**

Performance can be excused by the occurrence of a number of events. These include frustration of purpose, impracticability, impossibility, and failure of a condition precedent. Failure of a condition precedent is discussed above.

Frustration of Purpose

Frustration of purpose excuses performance under a contract when performance is still technically possible, but the purpose of the contract no longer exists. In order to prevail, the defendant must show (1) the purpose of the contract was known by the plaintiff at the time of contracting, (2) circumstances that are out of the defendant's control changed, and (3) the change of circumstances caused the original purpose to be unavailable.

Here, the purpose of the contract was to make money on the development of a residential community. Builder, who knew that he was expected to build single family homes, was aware of the purpose of the contract. Circumstances did change pertaining to the development. The City had a long-standing policy of reimbursing the cost of extensions to new areas. After this contract was entered into, the City changed this policy. Therefore, the second element is met. Lastly, Developer must show that the change in circumstances made the purpose of the contract unavailable. City's change in policy made Developer bear the cost of the extensions. However, Developer could still build the extensions, and therefore, build the residential development. It would cost Developer more money; however, the purpose of the contract was still available. Therefore, the purpose of the contract was not frustrated. It may have been less appealing to Developer, but it was not frustrated.

Impracticability

Performance of a contractual obligation is impracticable when (1) circumstances affecting the contract have changed, (2) the change is not due to any act by the defendant, and (3) the change of circumstances causes undue hardship on the defendant. Here, as discussed above, circumstances did change: City changed a long-standing policy. This was out of Developer's control. Therefore, Developer need only demonstrate undue hardship to prevail with this claim. The change of the policy meant that Developer would bear the burden of financing the extensions required to build the community. This cost was "substantial," and

made the project unprofitable for Developer. Making a project unprofitable is probably inadequate for a court to find impracticability. Developer would have to establish more than simple unprofitability. If Developer could show that the cost is so burdensome that he would be forced out of business, that would establish impracticability. However, simply unprofitability is probably inadequate. Therefore, this element is not met. The court will probably not find that performance was excused by impracticability.

Impossibility

Impossibility occurs when (1) circumstances affecting the contract have changed, (2) the change is not due to any act by the defendant, and (3) the change of circumstances causes performance to be impossible for the defendant. As discussed above, the change in circumstances makes performance unappealing, but not impossible. Impossibility will not excuse performance.

Developer should be able to successfully argue that performance should be excused by failure of a condition precedent.

3. **Builder did not suffer $700,000 in damages**

A plaintiff in breach of contract claim can pursue damages that put the plaintiff in the position he would have been in had the defendant fully performed. This is generally established by expectation damages, incidental damages, and consequential damages, minus any mitigation available to the plaintiff. These damages are not available to the plaintiff if there is a valid liquidated damages clause. This contract fid not have a liquidated damages clause, so that will not apply. Punitive damages are not available in a contract cause of action.

Expectation Damages

For a seller or provider of services, these damages typically equal the amount of profit the plaintiff expected to make. Here, that is clearly established as $700,000.

Incidental Damages

These damages are the damages that the plaintiff incurred as incidental to the defendant's breach. They typically include the cost of finding a replacement buyer and administrative costs incurred because of the breach. Here, the facts do not indicate any incidental damages. However, if Builder incurred any costs in contracting with Architect to construct a business park, such as lawyer's fees, etc., these would be covered as incidental damages.

Consequential damages

These are the damages that occurred as a foreseeable result of the breach. In order to recover these damages, the plaintiff must establish that the parties contemplated these damages at the time the contract was formed. Builder does not appear to have incurred any consequential damages.

Mitigation

Generally, a plaintiff is required to mitigate damages. He is not allowed to sit by after a breach and allow himself to incur more damage than is necessary. Here, the original contract required Builder to build residences for Developer on The Highlands. After the alleged breach by Developer, Architect hired Builder to build a business park on the Highlands. This contract would not be available to Builder had he performed for Developer. If it would have been possible for Builder to perform both contracts, then this would not be mitigation. However, that would be impossible. Therefore, this is proper mitigation of damages. The other issue involved with mitigation is time. If the work for Developer would have taken 9 months, and the work for Architect takes 12 months, Builder could argue that the entire $500,000 profit should not be considered for mitigation. However, no facts indicate the time required for either job, so the court will assume equal performance for both contracts.

Builder's damages for the alleged breach are $700,000. However, because Builder is required to mitigate his damages, the $500,000 from the contract with

Architect will be applied to the damages. Therefore, Builder's total damages due to the alleged breach are $200,000.

Answer B to Question 5

1. Developer did not breach the contract with Builder.

Parol Evidence Rule

Although Developer will assert that he was not obligated to perform under the contract with Builder unless the City followed its usual policy of reimbursing for installation costs, Builder will argue that this condition precedent is not part of the agreement between the parties and therefore Developer has breached the contract by failing to perform. Builder's argument will rest on the parol evidence rule.

The parol evidence rule provides that the terms of a written agreement cannot be varied by prior or contemporaneous oral terms where the writing represents the party's final agreement. Consistent additional terms may supplement the writing if the contract is not complete, and extrinsic evidence may also be introduced to interpret ambiguous terms as long as the terms are reasonably susceptible to the proffered meaning.

Here, the agreement between Developer and Builder has been reduced to writing. Under the Williston rule, a court will look at the contract and determine whether the parties likely intended it to be the final and/or complete expression of the agreement given the detailed or specific nature of the terms. In this case, the contract provides for the construction of 10 single family homes and has several sections (including section 14(d)) describing aspects of the venture. Importantly, the writing contains a merger clause which states that "This written contract is a complete and final agreement between the parties hereto." Courts typically find that the parol evidence bar to extrinsic evidence presumptively applies where the writing contains a merger clause.

Accordingly, a court will likely find that the parol evidence rule applies. Developer's best arguments, therefore, are exceptions to the parol evidence rule. These exceptions include where extrinsic evidence show (1) fraud, (2) subsequent modification of the contract, (3) absence of consideration and other formation defects, (4) to interpret ambiguities, (5) to show a collateral agreement, (6) to show the existence of a condition precedent.

Exception to Parol Evidence Rule – Conditions Precedent

One exception to the parol evidence rule's bar on extrinsic evidence that may be helpful to Developer is the exception permitting a showing of conditions precedent. A condition precedent modifies a promise to perform; the promise to perform will not mature until the condition is satisfied, and accordingly a party cannot be in breach of said promise unless the condition precedent occurs.

Developer can argue that the City's following of its ordinary policy of reimbursing utility installation was a condition precedent to the obligations under the contract, and therefore the parol evidence rule does not bar him from presenting evidence on the existence of this condition.

However, Builder will have a good argument in response; specifically, Builder will point to section 14(d), which provides "All obligations under this agreement are conditioned on approval by City of all necessary extensions." Section 14(d) clearly is a condition precedent to Developer's performance, but it is expressly provided for in the written contract. Under the Williston Rule of contract interpretation, Builder will argue that since the contract included written terms covering conditions precedent, it is reasonable to presume that the parties would include all such agreed upon conditions precedent in the writing.

Accordingly, in light of these arguments, the "condition precedent" exception to the parol evidence rule is probably not Developer's best argument, although a

court that mechanically applies the exceptions to the parol evidence rule could be sympathetic. Developer should raise it and hope for the best.

Exception to Parol Evidence Rule – Explaining Ambiguity

Another exception to the parol evidence rule is extrinsic evidence admitted to explain an ambiguity in the written contract. Some jurisdictions, such as California, permit a party to also introduce extrinsic evidence to first demonstrate the existence of the ambiguity. This exception will be helpful to Developer in light of the difficulties presented by section 14(d) above.

Under this exception, Developer will argue that the term "conditioned on approval by City of all necessary utility extensions" implicitly included the City's willingness to pay for utility installation. To support his argument, Developer will utilize the general commercial construction customs and understandings in the community, which may likely include the fact that any reasonable builder or developer operating in City would interpret "approval by the city of necessary utility extensions" to include, as a matter of course, funding to install the utility extensions. Developer will particularly be likely to avail this exception to the parol evidence rule in jurisdictions like California, since this ambiguity is not clear from the face of the contract.

Builder, however, will argue that section 14(d) is not reasonably susceptible to the meaning proffered by Developer. Availing the Williston Rule, Builder will likely harp on the fact that the sophisticated, commercial parties would insert such a material condition if it was in fact part of the agreement, especially where the writing contains a merger clause.

Ultimately, Developer's arguments supporting the introduction of the prior negotiations will likely be successful; courts are loath to ignore clear, understood commercial patterns in an industry in contracts between sophisticated parties. Merger clauses are typically inadequate in such circumstances unless they

explicitly except course of dealing, course of performance, usage of trade from being permissible interpretive tools for the contract.

Exception to Parol Evidence Rule – Collateral Agreement

Developer may also argue that he did not breach the contract because it was controlled by a separate, collateral agreement. However, this argument will likely fail. Although collateral agreements are exceptions to the parol evidence rule, a court must conclude that the parties would reasonably have made the proffered collateral agreement separate from the primary contract.

Here, interpreting the condition of receiving installation funding from the City as a collateral agreement would be unreasonable. First, it is intimately related with the primary contract, and it is unlikely that Builder and Developer would fashion it separately from the main agreement. Second, it is unclear whether the proffered "collateral agreement" could even be an enforceable contract, as there would not be any consideration—i.e., bargained-for-legal detriment—flowing to support the agreement.

Accordingly, although the "collateral agreement" arguments is available to Developer to argue that the failure of a condition precedent did not mature his obligation to perform, it is one of his weakest arguments.

Mistake Due to Ambiguity

Mistake due to ambiguity is a contract formation defect. Developer could foreseeably argue that no contract was formed because of his mistake as to the meaning of a material term in the contract. Mistake due to ambiguity usually does not obtain relief for a party (typically the form of rescission or reformation) unless the other party was aware of the ambiguity.

Here, under these facts, Developer might argue that Builder was aware that section 14(d) was ambiguous and would not necessarily be interpreted to have

the meaning that Developer intended. Further, Developer would argue that the term was material to the contract, as the failure of the city to pay for the utility installation would drastically alter the expected benefits he would receive. If Developer can demonstrate these facts persuasively, he may be able to argue that there was either no "meeting of the minds" or that the contract should be reformed to match the "innocent party's" interpretation of the contract. Under either scenario, Developer would not be in breach.

Unconscionability

Unconscionability is another contract formation defect, which is determined at the time of formation. There are two types, procedural and substantive. No facts suggest that the terms of the contract were so prolix as to amount to procedural unconscionability, but Developer may argue that the absence of a condition requiring reimbursement from the City makes the bargain so one-sided as to "shock the conscience" of the court.

Such an argument will likely not succeed in this case; the parties are sophisticated, commercial parties who are able to fend for themselves. Developer's unfortunate circumstances are not of the type that would raise to unconscionability.

2. **Developer's performance was excused.**

Impossibility

Developer may try to argue that his performance under the contract, even if matured because the court does not recognize his proffered condition precedent, was excused under the doctrine of impossibility.

Impossibility excuses performance of the contract where performance would be objectively impossible, i.e., not only can the party asserting the defense not perform, but no one could perform the contract under the unforeseeable circumstances that have arisen.

Here, impossibility will not be a helpful argument because not only could other developers potentially execute the agreement Developer has with Builder, Developer himself could do so, but simply at a large loss because he would have to pay for the utility installations.

According, the Developer's performance is unlikely to be excused by impossibility.

Nonetheless, Developer could successfully argue impossibility in that the subject matter of the contract can no longer be obtained by him because it was sold by Owner to Architect.

Impracticability

Developer may be better suited to prevail under the argument that performance was excused under the doctrine of impracticability. Impracticability is a subjective test that examines whether performance would be commercially unreasonable due to subsequent circumstances unforeseeable at the time of contract formation.

Here, Developer will argue that City's long-standing policy of paying for utility installation was a reasonable assumption by both parties. Further, the policy had been so ingrained in the community and understood by commercial developers and builders that a change in the policy was practically beyond the realm of possibility. Builder will respond that Developer's reliance on the permanence of the policy was misplaced, and he assumed the risk that the City could easily change its discretionary policy if economic requirements warranted. Ultimately, if Developer is able to persuasively argue his position, he may ultimately prevail on his argument of impracticability.

Frustration of Purpose

Developer may try to argue that the failure of the City to reimburse for construction costs constituted frustration of purpose. Frustration of purpose arises where circumstances unforeseeable at the time of contract formation arise that destroy the purpose of the contract, and that this purpose was known by both parties involved.

Here, Developer is unlikely to prevail on his frustration of purpose argument. Although, both Developer and Builder were aware of the purpose of the contract, the purpose of the contract—namely to construct ten single-family homes on the Highlands—was not "destroyed" by the City's decision not to reimburse for utility installation. Accordingly, whether or not the City's decision was foreseeable, it would not constitute frustration of purpose. Accordingly, this argument by Developer would fail.

3. **Builder did not suffer $700,000 in damages.**

The purpose of compensatory damages is to place a non-breaching party in as good a condition as he would have been had the breach not occurred. The requisite showing in order to obtain compensatory damages is (1) breach, (2) causation, (3) foreseeability, (4) certainty, and (5) unavoidability.

Applicability of "Lost Volume Seller" Rule

Builder may try to argue that he is a "lost volume seller," and accordingly the fact that he was hired by Architect should not reduce his damages in the slightest because, had the contract with Developer been performed, he would have made both $700,000 and $500,000 in profits.

Builder's argument is unlikely to succeed. Lost volume sellers must, in effect, have "unlimited supply" of whatever good or service they provide. Builder is not properly viewed as a car or TV salesman; he builds structures, and therefore his

services are in limited supply. Accordingly, a lost-volume seller type argument by Builder will be unavailing.

Certainty Requirement

In order to recover compensatory damages, such damages must be relatively certain. If the contract provided that Builder's payment was in any way contingent on the ultimate sale of the homes, his damage may well be too uncertain to permit recovery.

Unavoidability / Mitigation Requirement

A non-breaching party is required to mitigate his damages. Although failure to mitigate will not eliminate one's damages, it can reduce them to the amount that would have been incurred had proper mitigation been pursued.

Here, Builder did not fail to mitigate his damages; rather, he sought employment by Architect to construct a business park for $500, 000. By mitigating, Builder was only damaged by the alleged breach to the extent of $200,000, because only $200,000 is needed for Builder to obtain the "benefit of his bargain" with Developer.

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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.

Question 1

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

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

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

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

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

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

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

Answer A to Question 1

The issue is whether Pat has a valid contract with Danco and whether Danco has breached such contract, and what damages Pat is entitled to as a result.

Service Contract

Contracts for services are governed by the common law. Although a computer program could be considered a good, the UCC only applies to tangible, movable goods. Therefore, the UCC does not apply and the contract, if any, is governed by the common law.

Elements of a Contract

In order to have a valid contract, there must be mutual consent and consideration. There was mutual consent here, because Pat offered to write four computer programs for use by Danco, and Danco accepted the terms of Pat's offer in a written agreement between the two. The consideration requirement is satisfied because there was a bargained-for exchange: four computer programs in exchange for $25,000. Thus, there was an offer, acceptance and valid consideration; a valid contract exists between Pat and Danco.

Statute of Frauds does not apply

The Statute of Frauds requires that any contract for goods greater than $500, or services which may take longer than one year to be performed, must be in writing, and signed by the party to be charged. Here, the contract is for services, and was to only take one month to perform. Thus, the Statute of Frauds does not apply. Although the agreement is in writing this was not necessary.

Time of the essence

The contract stated that the work was to be completed and delivered to Danco "no later than May 1." Thus, if this is considered to mean that time is of the essence, then performance after such time could be considered a material breach of the contract. However, contracts are generally given a reasonable time for performance under the

common law, and if time was not of the essence then Pat has a reasonable time to finish his work. In any case, this condition was waived as discussed below.

April 15th call form Pat

Danco claims that Pat anticipatorily repudiated the contract when he called on the 15th of April saying, "I won't have it ready to deliver to you until at least May 8th—maybe closer to May 15." A contract is anticipatorily repudiated when a party unequivocally manifests an intention to not perform the agreement by words or conduct. Here, although the contract specified performance by the 1st of May, Pat indicated that he would perform at least half of the services by that time, and indicated he would complete the other two within a couple weeks. Thus, he did not unequivocally manifest an intention to not perform the contract, but merely requested an extension of time, or modification of the contract. Thus, Danco could not treat the contract as breached but could ask for assurances that the contract would be performed.

Attempted Modification of the Contract

Chelsea, who has authority to bind Danco because of her implied apparent authority as President, manifested assent to the modification when she said "I guess I'll have to live with that." A modification under the common law, however, requires additional consideration to be valid. Here, there was no change in the form of consideration, or any additional consideration by Pat to be given extra time; therefore, the modification attempt was invalid. The oral nature of the modification was not a problem, because this is a services contract and the modification did not bring the services to beyond one year, as required for the Statute of Frauds to apply.

Waiver of condition to perform on May 1st

Danco may claim that its duty to pay Pat was expressly conditioned on performance by May 1st; therefore no payment is due. As a condition precedent, no duty to pay would arise until it is met. However, Pat will counter that Chelsea, as President, waived the condition by saying "I guess I'll have to live with that." Even if a condition is not met, it may be waived by the party benefited by the condition. Thus, Danco must pay Pat as promised under the agreement because the condition was orally waived by the

president of the company. Since the Statute of Frauds does not apply, this oral waiver was valid.

April 24th call: Anticipatory Repudiation

On April 24th, when Pat made assurances that the contract would be performed by the 12th of May, Chelsea responded by saying that she was "going to start looking around for another consultant" and that the company did not owe Pat anything. Pat may treat this as an anticipatory repudiation of the contract, because it manifests an unequivocal intention not to perform. He may thus, at this point, stop performance and sue for breach of contract. In the alternative, he may wait to sue for breach of contract on the date when performance is due, or ignore the repudiation and encourage Danco to pay for the programs.

Integration Clause and Parol Evidence Rule

Danco claims that no evidence of oral agreements will be allowed because the writing was intended to be a final expression of the agreement, and therefore fully integrated. The parol evidence rule, however, only bars oral evidence prior to or during negotiations leading to the writing. Any subsequent oral modifications or agreements are admissible; thus, Pat may validly admit evidence of waiver of condition and anticipatory repudiation in the conversations on May 1st and April 24th.

Expectation damages

Because Pat had a valid contract, which Danco breached by anticipatory repudiation, he is entitled to compensatory damages to put him in the position had this wrong and resulting damage not occurred. Such damages must be caused by the breach, [be] foreseeable, and certain. Pat must also have mitigated any unnecessary damages. Here, the damages are certain ($25K) and foreseeable as a result of Danco's breach, because this is what the parties expressly agreed to as payment.

Consequential damages

Pat will also claim right to consequential damages, because he turned away opportunities to take on more lucrative work in anticipation that the job would lead to future work. These damages lack certainty, however, and were not foreseeable at the time of contract formation. Danco was not aware of Pat's other opportunities to take on more lucrative work. Therefore, they will not be awarded.

Restitutionary Damages

In the alternative, Pat may seek return of any unjust enrichment of Danco should the court find fault with the contract, or that Pat breached. He would be entitled to the amount that Danco unfairly benefited: if Danco was given the two programs in the case at hand, Pat may seek recovery for the value of the benefit to Danco.

Answer B to Question 1

Can Pat Prevail Against Danco for Breach of K?

Applicable Law

Pat has entered into a services contract ("K") to perform work for Danco between April 1 and May 1 or, alternatively, May 15. Thus, this K will be governed by common law rules.

Formation

For Pat to win on a breach of K claim, he must first show there was a valid contract. A valid contract requires an offer, acceptance and consideration. In this case, the first line of the facts state that Pat entered into a written services K with Danco, to write software programs in exchange for $25,000. The facts imply a valid offer was made and properly accepted. Both parties have provided consideration, a bargained-for legal detriment, when Pat agreed to perform services he was not legally required to do and Danco agreed to pay Pat without having a legal obligation to do so. Thus, a contract was likely made.

Terms

A contract at common law must also state material terms with definiteness. In an employment services contract, the primary term needed is duration. Here, the K calls for services to be provided for one month and then the K will end. Thus, duration has been provided and the contract will not fail for lack of material terms.

Statute of Frauds

This is a services K which will end, by its terms, [and/or] can be finished within one year of its inception. Thus, the Statute of Frauds will not apply. The Statute of Frauds, if applicable, requires a K to be in writing and its subsequent modifications to be in writing as well, pursuant of the Equal Dignitaries doctrine.

Modification Clause (generally not valid in CL outside SOF)

The facts state that the written K has a clause in it, however, stating that the initial written services contract signed by Pat and executed by Danco's President, Chelsea, "is the complete and entire contract between the parties and no modification of this contract shall be valid unless written and signed by both parties." Generally, at common law, clauses which seek to invalidate modifications that are not in writing are themselves not valid. Thus, though the contract states as much, a court will still allow evidence of oral modifications, particularly in light of the Parol Evidence Rule. This is important because the facts state that the contract was later sought to be modified orally by Pat, which I will discuss two sections below.

Parol Evidence

Parol Evidence Rule ("PER") states that generally, where a written contract is intended to be a complete and final integration of a K, that no evidence may be admitted outside of the four corners of the contract to establish whether a breach has occurred. However, an exception exists for subsequent modifications. In this case, as noted above, the K states that it is intended to be the "complete and entire contract," language sufficiently similar to that required under the PER. However, to the extent that the contract was later modified, the court will allow at common law for evidence, whether oral or written, to be admitted to establish any subsequent modification agreed to by the parties.

Modification without Consideration

Pat, after signing the K, called Danco and told them that he wasn't sure he could complete the K on time and would need 8 to 15 extra days to finish the project, as well has voicing concerns of his ability to finish it at all. Chelsea replied, "if you can't deliver until May 15, I guess I'll have to live with that."

Danco will want to argue that Pat's failure to provide for the four programs he agreed to write by the stated date of May 1 will constitute a material breach, thus entitling them to avoid their obligation to perform on the contract. However, Pat will want to introduce this evidence as showing a modification to the original agreement. While the PER will

not bar this evidence, the modification Pat seeks to establish occurred without any subsequent consideration. Generally, at common law, consideration is required for a subsequent modification to be considered valid. However, courts have generally been willing to find that consideration when both parties limit their right to assert their rights and sue on the original contract. Here, Danco's President, likely authorized to negotiate and make contractual agreements on behalf of Danco, appears to have agreed to the modification by stating, "I guess I'll have to live with that." Thus, Pat will argue Danco agreed to limit its rights to sue based on the original May 1 deadline, constituting consideration. However, Chelsea did not explicitly agree. Danco would likely argue that she was simply stating that, at that time, she could not legally compel Pat to finish and was thus simply stating her acknowledgment that she would have to wait until May 8 or 15 for the programs, but not that she would be willing to ignore Pat's failure to abide by the K. Further, Pat does not appear to have limited his own consideration in this modification. He still appears to have the full right to demand $25,000. Thus, Danco will likely succeed in asserting that this modification, even if admissible, is not valid.

Waiver to Time is of the Essence Clause

Generally, a "time is of the essence" clause is a clause in a K that asserts a necessity for the contract to be finished, or one party to perform fully, by an established date. Here, Pat is faced with a deadline of May 1, though the contract does not explicitly state that time is of the essence, but merely provides for the deadline. If Danco wishes to assert that Pat's failure to finish by May 1 constitutes a material breach pursuant to the terms of the contract, Pat should then argue that Danco waived its right to that deadline and the time is of the essence clause when Chelsea said she would have to live with Pat's tardiness. Again, Danco will argue this does not constitute an explicit waiver. This is a close situation because of the vagueness of the statement, but a court will likely side with Pat that the deadline was waived by Chelsea, who as President of Danco is authorized to alter the K with Pat.

However, waiver usually occurs once a time is of the essence clause has passed. Thus, a court may deem the waiver argument is not as sufficient as an estoppel argument.

Estoppel

Even if Pat cannot assert a waiver claim, which usually occurs after a term has not been agreed to, Pat can assert an estoppel argument. Estoppel occurs when one party makes assurances that the other party can be reasonably, objectively expected to rely on, and the other party does so to their detriment. In this case, Chelsea's claims are vague and imply her acceptance of Pat's tardiness. A reasonable person, when told that the other person expecting earlier delivery, will "live with" later delivery would assume that statement to imply acceptance. Pat indeed relied on that assertion and continued to perform his services, which is to his detriment. If he were in material breach and were told so and that he would be sued in such a manner, he would not be required to continue to perform fully. Pat continued to work for 13 days after his April 15 discussion of his problems with Chelsea and announced he would finish the services he was expected to perform on May 12. Thus, Pat's estoppel claim should succeed, and the modification will thus be included in the K.

Anticipatory Repudiation

Danco will alternatively argue that Pat gave Danco an anticipatory repudiation when he announced he could not perform his services by May 1. When a party asserts it will not perform its contractual obligations prior to deadlines stated in a K, giving the other party his reasonable grounds to believe the K will not be performed, the party notified will have the right to cease its own performance and sue for breach of K unless it has already performed fully. Alternatively, the party has the right to seek assurances from the party concerned about its potential failure to perform before continuing on the contract. In this case, Danco has not yet paid Pat so it has not fully performed. Danco will assert that Pat's statements constitute an anticipatory repudiation because he not only told Danco he was worried about the deadline, but also that their hardware was so obsolete that he may not even be able to finish 50% of the contract at all. Pat will assert that Danco made assertions in response that it would live with Pat's tardiness. However, Danco will argue that it only discussed the tardiness and not the potential failure to provide two of the software programs at all. Danco has a strong argument. However, Pat was told Danco would live with his tardiness and Danco never requested any further assurances of Pat's work. In addition, Danco never discussed concerns

about Pat's inability to finish the 3rd and 4th software programs. Finally, Pat told Danco it would deliver programs 1 and 2 by May 1. Danco told Pat prior to that date, on April 28, that it would not accept his work and was going to look for an alternative software consultant because of Pat's April 15 phone call. Thus, they did not even wait until May 1 to determine if Pat could deliver. While Danco will argue that it was not required to wait because of Pat's anticipatory repudiation, without any discussion to Pat implying that they would not allow him to miss the May 1 deadline, a court will not accept Danco's argument of anticipatory repudiation.

In fact, because Danco announced it would not pay him for his services prior to even the May 1 deadline, Pat himself will use the anticipatory repudiation claim to be able to assert his right to sue on the contract prior to the modified deadline date of May 15 (or May 12, which he claimed would now be his end date). He will be able to sue prior to that date as he has not fully finished performance and they have anticipatorily repudiated.

Thus, Pat's claim of estoppel will hold on the modification during his April 15 phone call. Based on this modification, Pat will have a valid claim for breach of K because he appeared to be able to finish the contract by the modified deadline and, prior to doing so, Danco repudiated its agreement. Thus, Danco breached its K obligations and Pat is entitled to damages.

If so, what are Pat's Remedies?

Pat's likely remedies are legal remedies, or money damages.

Compensatory Damages

Pat should be entitled to compensatory damages, which are designed to place the plaintiff in the position they expected to be in had the contract been properly performed by the defendant. To obtain them, he must show that Danco caused the damages, that they were foreseeable, that the damages are certain and that they were unavoidable. Causation, particularly but-for causation, requires that, but for Danco's actions, Pat would not have been injured. If it is clear Danco breached the K, then but-for causation follows that but for the breach, Pat would not be injured, as he would have been fully

paid. Further, it is foreseeable that Pat would be injured by Danco failing to pay him for his services. Pat will be suing for the contract price of $25,000 likely, and these are certain given the terms of his contract. Finally, Pat must show the damages were unavoidable, meaning he must seek to mitigate these damages if at all possible. Usually, in an employment K case, this requires the employee to seek other employment. However, based on the unique services he provided Danco and the relatively short time left on his contract, he will be able to show his damages were unavoidable. The court may, however wish to determine that Pat did not destroy his work for Danco or stop working prior to Danco's breach. Also, to the extent that Pat's failure to meet his original deadline injured Danco, his damages will be reduced. The facts give no mention of any specific injury caused by Pat's tardiness.

Consequential Damages

In addition to the contract price, Pat may wish to claim additional consequential damages, which are damages that do not arise specifically from the breach but are foreseeable by the defendant at the time the contract was made that the plaintiff would likely suffer if it were to breach. In this case, Pat will argue that he turned down other opportunities to finish this contract in the relatively short amount of time he was given. It would be reasonably foreseeable that, were Pat to not be paid on the contract, Pat will argue, he would not only lose that contract price but also the value of the work he turned down to perform that work. Danco will likely argue that these are merely opportunity costs which Pat gave up and were reflected in the contract price which he accepted. While Pat did likely lose out on additional work, Danco will probably win this argument unless Pat can show with specificity and certainty that he had contracts offered to him in excess of his contract price that were only turned down as a result of his agreement to work for Danco, and that he could not have taken those contracts once his work with Danco was finished.

Punitive Damages

Punitive damages are designed to punish the defendant and are based on the notion that the defendant maliciously violated its agreement. In this case, Chelsea consulted with her attorney, who told her that Danco was not liable to execute the contract. The

facts thus do not imply that Chelsea or Danco acted in any way other than negligently in breaching its contractual duties, and thus punitive will not be available.

Restitutionary Damages

If Pat for some reason could not succeed in his breach of K, he could likely obtain restitutionary damages so long as he delivers his completed software to Danco. Restitution, or "quasi-K," allows for a plaintiff to recover if a K (or modification in this case) is not deemed valid, by showing that he conferred a benefit upon the defendant, that a reasonable person would expect to be paid, and that it would be unjust to allow the defendant to be enriched freely for the plaintiff's efforts. In this case, so long as Pat delivers the software to Danco, he will be able to show he conferred the benefit of the software, and a reasonable person would expect to be paid for writing computer software for a company. It would be unjust to allow a company to obtain these services freely when it told the writer they would be paid, and thus Pat will be able to assert his quasi-K claim if he for some reason could not assert his breach claim. The damages will be the value of the work he provided them, not the contract price.

Specific Performance (not available)

Specific Performance is not applicable here because Pat's claim is primarily for money damages and, even if it were not, there is an adequate legal remedy (money) which will suffice.

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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 if falls under the statute. Although there's an offer in writing, the acceptance of C wan 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, Ca 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 form 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 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.

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2011
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2011 California Bar Examination and two answers to each question that were written by actual applicants who passed the examination after one read.

The selected answers were assigned good grades and were transcribed for publication 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.

Question 3

Betty is a physician. One of her patients was an elderly man named Al. Betty treated Al for Alzheimer's disease, but since she believed he was destitute, she never charged him for her services.
One day Al said to Betty, "I want to pay you back for all you have done over the years. If you will care for me for the rest of my life, I will give you my office building. I'm frightened because I have no heirs and you are the only one who cares for me. I need to know now that I can depend on you." Betty doubted that Al owned any office building, but said nothing in response and just completed her examination of Al and gave him some medication.

Two years passed. Al's health worsened and Betty continued to treat him. Betty forgot about Al's statement regarding the office building.

One day Betty learned that Al was indeed the owner of the office building. Betty immediately wrote a note to Al stating, "I accept your offer and promise to provide you with medical services for the rest of your life." Betty signed the note, put it into a stamped envelope addressed to Al, and placed the envelope outside her front door to be picked up by her mail carrier when he arrived to deliver the next day's mail.

Al died in his sleep that night. The mail carrier picked up Betty's letter the following morning and it was delivered to Al's home a day later. The services rendered by Betty to Al over the last two years were worth several thousand dollars; the office building is worth millions of dollars.

Does Betty have an enforceable contract for the transfer of the office building? Discuss.

Answer A to Question 3

Applicable law

The common law governs all types of contracts except those for the sale of goods. Here, the contract between Al and Betty was for services of medical care in exchange for an office building thus it will be governed by the common law.

Valid contract

A valid contract must have been formed by an offer, acceptance, be supported by consideration and no subject to any defenses. If Betty can show that these all existed she will have an enforceable contract. This is decided by the objective manifestations of the parties, thus Betty's subjective thoughts in believing that Al did not have the office building or in forgetting about the offer do not impact the formation of the contract.

Offer

An offer is a manifestation of intent to enter into a contract that is certain and definite and communicated to the offeree. Here, Al stated that he would give Betty his office building in exchange for her to continue to give him medical care until his death. This shows intent to be bound to the offer on those terms and was stated to Betty. Thus, his statement is an offer. On the other hand, the offeree did not think there was an offer because she did not think he owned a building and his statement was phrased in such a way as to suggest that he was merely expressing gratitude for Betty's work, by saying she was the only one who cared for him and that he did not have any other heirs. Overall, although couched in language that would not be an offer, there is a clear intent to give Betty his building in exchange for her caring for him for the rest of his life.

Bilateral or unilateral contract.

The issue is whether Al's offer was an offer to enter into a unilateral or bilateral contract. A unilateral contract is one that can only be accepted by performance. Here, Al said he would give Betty the office if she cared for him for the rest of his life. He was not seeking her promise to care for him for the rest of her life, but rather that she actually care for him for the rest of his life.

On the other hand, most contracts are construed as bilateral, that is are formed by the promises to perform. And here the offer could be accepted by Betty's promise to provide medical services.

Termination of an offer

An offer may be terminated. Here, there is no indication that Al terminated his offer in the two years after the conversation.

Lapse of time

An offer will terminate if it is not accepted after a reasonable period of time, if none is suggested by the contract. There is usually a reasonable time limit on offers. Here, Betty did not accept the offer until two years later when she learned that Al actually owned the building. It should be argued that the offer has lapsed. However, since it was an offer to care for him for the rest of his life, two years may not be an unreasonable period of time, depending on his age and need for care.

Death

Death of the offeree will terminate the offer. Here, Al died before receiving the acceptance. However, Betty may have accepted the offer before her death, see acceptance, and thus his death would not be an issue, since death only terminates an offer, not necessarily a contract.

Irrevocable offer for unilateral K

Betty will argue that the offer was unrevocable because she had started performance of the unilateral contract by continuing to care for Al through the next two years.

Acceptance

Acceptance is the unequivocal manifestation of assent to the offer by one with power of acceptance. Here, the offer was made to Betty so she had power of acceptance. There are several arguments Betty will make to show acceptance.

Silence

Here, Betty was silent when the offer was first made. Thus she made no manifestation of assent. However, she did continue to treat him for the remainder of his life and thus her silence could be deemed acceptance since she continued to perform the contract by providing medical care.

Mailing Acceptance

Normally an acceptance is effective upon mailing. Here, the effectiveness of Betty's actions depend on whether properly addressing and stamping the envelope and putting it outside is an effective mailing of the acceptance. On one hand, she completed all actions required for mailing and putting it outside her door to be picked up by a mailman is no different than walking to the post office and dropping it in the mailbox. All that remains is the actual mailing of the envelope. On the other hand, when one goes to a post office or hands mail to the mailman one cannot thereafter get that mail back. Betty could easily have gone outside and retrieved the envelope from her own mailbox at any time before the mailman arrived and thus the letter was not posted. Overall, it is likely that this is not proper dispatch of the mail since she could so easily retrieve it. As such it was not an effective acceptance until the mailman picked up the letter the next morning. As discussed above, once Al had died the acceptance could no longer be effective since the offer was terminated. Thus she did not accept the offer by mailing.

Acceptance by Performance of a unilateral Contract

Betty will also argue that she accepted the contract by performing the terms of the unilateral contract. She continued to provide Al with medical care until his death. Thus upon Al's death she had fully performed and had the makings of an enforceable contract.

Consideration

A valid contract must have consideration. Consideration is the bargained for exchange of something of legal value. Here, Al is offering Betty his office building in exchange for

her medical care, these are both of legal value or detriment because they are giving up an office building and Betty is giving up payment for her services.

Bargained for exchange: The promise must induce the detriment and the detriment induce the promise. Here, Al's offer to give the building was to induce Betty to give him medical care. However, Betty did not think he had the building and continued to give him medical care anyhow for two years before "accepting" the offer. This suggests that she was not induced to give medical care for the rest of his life by the promise of the building.

Past Consideration

Al's heirs should also argue that Al's promise was really for past consideration. That is the work Betty had done before. This is evidenced by Al's statement I want to pay you for all the "work you have done over the years." Consideration is not present where the work has already been done. However, this argument will fail because Al not only offers for the previous work done by Betty but also by the remaining work that he will do.

Illusory

The heirs should argue that the promise is illusory because Betty may only have to do work for Al for one day or even one hour. However, this argument will fail because she will be bound to compete the medical work until he dies, which could be in twenty years or in 2 minutes.

Overall, it does not seem like there is consideration since the promise of the building did not induce the medical work.

Promissory Estoppel

Betty will argue that while there is no consideration she should be able to enforce under a promissory estoppel doctrine. There, a person must have relied upon a promise, to their detriment, and done so justifiably. Betty will argue that in providing free medical care to Al for two years she was relying on his promise. However, she had forgotten about the statement regarding the building and thus her actions were not a result of reliance on the promise, but rather her own good work.

Defenses

Assuming there is consideration there are several defenses to contract formation that can be raised and prevent the enforcement of the contract.

Statute of frauds

The statute of frauds requires that certain contracts be in writing in order to be enforceable. The sale of land is one such contract. Here, although Al is not obtaining the typical purchase money in his conveyance he is nonetheless receiving a service of value in exchange for his land. Thus, it could properly be considered a sale of land. Additionally Betty could argue that it is a contract that cannot be performed in under a year, however this will fail since Al could die at any time and the contract would be performed.

Additionally, since this is a contract to give something at death it could be considered an executory contract, but this does not fit either since it is not relating to the executor giving a promise to pay the debts of the estate.

The statute of frauds is satisfied by a writing signed by the party to be charged or by part performance or detrimental reliance. Here, Al orally offered the building to Betty and thus there is no writing that evidences the contract. The letter from Betty to Al will not satisfy the writing requirements because although it contains the material terms (building for medical care) as required to satisfy the statute of frauds it does not contain the signature of the party to be charged, here, Al.

Further, the statute is not satisfied by the performance because in the sale of land this is satisfied by two of three things: possession, improvement or payment. Here, Betty's "payment" of medical services would satisfy one, but she did not take possession and did not make any improvements to the land thus it would not be removed from the statute of frauds.

A contract that cannot be performed in under a year would be satisfied by full performance, as here where Betty provided care until Al's death, but as discussed

above this has no merit since this was not a contract that could not be performed in under a year.

Finally, there is no detrimental reliance on the contract since she forgot about while giving care for the two years until she found out he actually owned the building. She was not relying on the contract. Thus she will not remove the contract from the statute of frauds through detrimental reliance.

Betty could argue that this agreement is not within the statute of frauds since it is not for the conveyance of property for money. She will likely fail as the substance of the agreement is the office building for an amount of service.

Incapacity

A contract is voidable at the option of a person who does not have the capacity to contract. Here, the facts state that Al has Alzheimer's disease. Thus he may not have been able to understand the contract or enter into it. If Al did not understand what he was doing when he offered the building due to his mental disease and could not properly contract a contract will not be enforced. Here, Betty was his doctor and should have known that he was incapable of contracting. She knew he had a mental disease and thus even if he showed no outward signs of incapacity at the time he entered into the contract, she was aware. However, incapacity does not depend on the awareness of the other party. A party that does not have capacity due to mental disease cannot be found to have entered into an enforceable contract regardless of whether the other party knows of this.

Undue influence

A contract will be voidable if it is a result of undue influence. Here, Betty was in a position of power - giving him medical care. Al was clearly frightened by the prospect of not having medical care in the future as evidence by his statements that he needed to be able to depend on her. This suggests that the contract for the building is a result of her power over him as a physician and not freely contracting to give her the building. The fact that she had previously provided medical care buttresses the argument since Al had come to rely on her and she could use her influence to her advantage. However,

this argument is likely to fail since she did not say anything in response to his offer and simply continued her exam and gave him the medication he needed.

Conclusion

Betty probably does not have an enforceable contract for the transfer of the building because it is not supported by consideration or a consideration substitute and it is barred by the statute of frauds.

Answer B to Question 3

Applicable Law

This is a contract for Betty's personal services as a physician. Therefore, the common law applies.

Contract Formation

To form a contract, there must be offer, acceptance, and consideration. Betty will argue a contract exists based on theories that (a) an implied contract was created when Betty accepted the offer as implied by her conduct; (b) an express contract was created when Betty sent the letter; and (c) a contract was formed when Al made the offer in payment for past services. Each theory will be examined below. Also, a number of defenses exist, which are discussed at the end.

Implied Contract

Betty will argue that Al made an offer, and her acceptance can be implied by her conduct.

Offer

An offer is a manifestation of a present intent to enter into a contract. It must be definite and clear, and it must be communicated to the offeree. Here, Al offered to enter into a contract when he offered to give her the office building in exchange for continued care. His statement shows that he intended, at that moment, to enter into this relationship with Betty. His statement was unambiguous and on precise terms, hence it was definite and clear. Al said it to Betty, thus it was communicated to the intended offeree. Therefore, Al's statement is a valid offer.

Acceptance

An acceptance must be an unambiguous communication from the offeree to the offeror showing acceptance of the offer on its terms. The acceptance can be through words or conduct, and is judged by an objective standard. Here, Betty will argue that her conduct should reasonably be understood to show acceptance, because right after Al offered to

give her a building in exchange for treatment, Betty completed her examination and gave him medication. Therefore, Betty will argue that her conduct shows an unambiguous intent to be bound by the offer's terms.

However, in the context of their past dealings, Betty's conduct does not show an intention to accept the offer. Betty had long treated Al without charge. After Al made the offer, Betty said nothing and proceeded with business as usual. If this had been their first meeting, then her subsequent performance (by treating Al) would be indicative of an acceptance of the offer. However, given their past dealings, Betty's subsequent performance was perfectly in line with what would be expected if she rejected the offer. In other words, it could be argued that Betty did not intend to be obligated to Al for the rest of his life, and her conduct was merely consistent with how she had acted in the past.

Therefore, Betty's conduct was ambiguous, in that it is unclear whether she intended to accept the offer, or reject the offer and continue their relationship as it existed before the offer. Thus, Betty most likely did not accept the offer by her conduct.

Acceptance by silence

Courts have sometimes found acceptance by silence, if the parties' past dealings would create a reasonable expectation that silence equals acceptance. However, the rule will not apply here. Betty and Al do not have a history of previous contracts. Betty's treatment of Al has been purely gratuitous, therefore there is no history of prior dealings on which to base an expectation of the form of acceptance. Thus, Betty will not be able to establish silence by acceptance.

Consideration

Consideration is the bargained-for exchange of legal detriments. Each party must suffer a detriment, and the detriments must induce each other. Here, Betty will argue that she suffered a detriment in the obligation to care for Al for the rest of his life, and Al suffered a detriment by giving up his office building.

However, the detriments must induce each other. Here, Al was induced into giving his office to Betty in exchange for medical care. However, Betty was not induced into providing services to Al for his office building. In fact, Betty "doubted" whether Al even owned an office building. She even forgot about Al's statement, which by itself does not have legal significance, but it does serve as evidence that the office was not something Betty considered important. Most people, even rich Doctors, would not forget that they are due an office building, if they really expected to receive one.

Furthermore, once Betty learned about the office building, she responded immediately and enthusiastically with an acceptance letter. This shows that Betty did not provide her earlier services in exchange for Al's promise to give her an office building. It also shows that she did not believe she had accepted the offer with her prior conduct. Therefore, even if a court were to imply that Betty's conduct constituted an acceptance, there arguably would not be mutually-induced consideration.

Express Contract

Betty will argue that Al made an offer that she expressly accepted with her written letter.

Offer

Al's statement is a valid offer. See above.

Acceptance

See rule above. Betty will argue that she expressly accepted the offer with her letter. The letter was unambiguous. It will be a valid acceptance.

Consideration

See rule above. Al suffers a detriment (giving up his office building) in a mutually-induced exchange for Betty's promise to care for him the rest of his life. Even if that life were short, it would still be valid consideration, because courts do not generally question the sufficiency of the amount of consideration. Courts may choose not to enforce some contracts with an imbalance of consideration on duress or unconscionability grounds, discussed below.

Expiration

Unless stated otherwise, an offer stays open for a reasonable amount of time. Here, Betty attempted to accept Al's offer after 2 years. It was so long that she had even forgotten about Al's offer. Two years is most likely longer than a reasonable amount of time. Therefore, the offer expired, and Betty's attempt to accept it will not be valid.

Revocation

Offers are revoked on the death of the offeror, even if the offeree is not aware of that death. Here, Al died at night after Betty placed the letter in her mailbox, but before the mail carrier picked up Betty's letter. Therefore, Betty's letter will only be valid if it fits in the mailbox rule and thus accepted the offer before Al died. Note, even though Al's life was only for a few hours after acceptance, consideration is still valid for the reasons discussed above.

Mailbox Rule

If sent by mail, acceptances are valid when sent. A letter will be sent when it is placed in the mailbox or location where the mail is collected. Here, Betty's mail was usually picked up from a location outside her front door. Therefore, Betty's acceptance was valid once she placed the letter outside her front door, and thus the mailbox rule applies. Betty accepted Al's offer, and a contract was formed.

Contract formed by past services

Betty could argue that Al's statement was an offer to pay for past services rendered. Betty had treated him for years for free. She will argue his statement is an offer to pay the moral debt he owes to her.

Consideration

See rule above. Here, Al is offering to give his office to Betty, but there is no bargained-for exchange. Betty provided her past medical services gratuitously, and she was not induced by to do so by Al's subsequent promise to give her an office building. Therefore, there is no consideration to support this contract.

Past Moral Obligations

Courts will enforce offers to pay for past moral obligations. Typically, this is the situation where a debtor offers to pay his unenforceable debts. Here, Al does not owe Betty any debt. While she offered him free medical care, that did not create a moral obligation to pay. Indeed, many doctors are motivated by a dedication to their patients, as evidenced by their socratic oath. Therefore, Betty's motives were likely altruistic, and thus were gifts. Al's promise to pay her back for all she has done cannot be construed as an offer to pay for past debt.

Defenses

Statutes of Frauds

A contract for the sale or transfer of land cannot be enforced without a writing, signed by the party to be enforced against, evidencing the existence of a contract, i.e. showing the material terms. Here, Al's offer to Betty was an oral attempt to transfer ownership of land. The only signed writing appears to be Betty's letter. While it shows the material terms, and is signed by Betty, it was not signed by Al. Therefore, even if Betty formed a contract with Al, it cannot be enforced against him.

Duress

Al's estate could argue that the contract was formed under duress. Here, they can point to Al's statement that he has no heirs or anyone who cares for him. He needs someone to help him, and he appears to be in a state of loneliness and fear. Therefore, the estate could make an argument that Al was pressured into forming a contract out of duress, and he had no real choice but to form the contract.

However, this argument would most likely be rejected, since Al was the one who made the offer, and Betty gave no sign that she would withhold medical care if Al did not give her an office building.

Unconscionability

Similarly, Al's estate could argue that the deal was unconscionable, in that Betty took advantage of her superior position to extract a payment out of Al. Al's dependence on her created an element of unfair bargaining power, which Betty used to her advantage. It was improper for a doctor to make such a contract with a dying patient.

However, this argument will be rejected. The facts show no evidence that Betty in any way exerted pressure on Al. Indeed, Al's statement appears to be spontaneous.

Capacity

Al's estate can argue that Al lacked the capacity to enter into a contract. Al was an Alzheimer's patient. He most likely did not have the mental faculties necessary to enter into a contract.

Betty will counter that the statement was perfectly clear, and that it was made during one of Al's moments of lucidity. Therefore, at that moment, he did have the capacity to enter into a contract.

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The selected answers were assigned good grades and were transcribed for publication 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.

Question 4

Peter responded to an advertisement placed by Della, a dentist, seeking a dental hygienist. After an interview, Della offered Peter the job and said she would either: (1) pay him $50,000 per year; or (2) pay him $40,000 per year and agree to convey to him a parcel of land, worth about $50,000, if he would agree to work for her for three consecutive years. Peter accepted the offer and said, "I'd like to go with the second option, but I would like a commitment for an additional three years after the first three." Della said, "Good, I'd like you to start next week."

After Peter started work, Della handed him a letter she had signed which stated only that he had agreed to work as a dental hygienist at a salary of $40,000 per year.

After Peter had worked for two years and nine months, Della decided that she would sell the parcel of land and not convey it to him. Even though she had always been satisfied with his work, she fired him.

What rights does Peter have and what remedies might he obtain as to employment and the parcel of land? Discuss.

ANSWER A TO QUESTION 4

What rights does Peter have?

The first issue is what law should apply. The UCC applies if the contract is for sale of goods. The common law applies if in all other circumstances, including a contract for services or land. In this case, there is an employment contract that contemplates the payment of a salary and a land conveyance in exchange for services. Thus, the common law applies to this contract.

The second issue is whether there is a valid contract. A valid contract requires offer, acceptance, and consideration. An offer exists if the offeror offers the offeree a deal and signals that acceptance will conclude the deal. An acceptance occurs if the offeree agrees to the terms of the offeror and gives the offeree notice of his assent. Consideration exists if there is a bargained-for exchange and legal detriment (which involves perform [SIC] in a way that one is not legally required to perform). Acceptance only exists if the offeree consents to the exact terms of the offeror, also known as the mirror image rule. If the offeree attempts to change any terms of the offer, then there is an effective rejection and counteroffer. Della advertised for a dental hygienist. Advertisements are not usually considered offers and Della's advertisement did not indicate that anyone who responded would be hired. The need to conduct an interview suggests that Della's advertisement was an invitation to make an offer, not an actually offer. Della interviewed Peter and offered him a job. She gave him a choice of being paid $50,000 per year, or being paid $40,000 per year and the conveyance of a $50,000 parcel of land at the completion of three years of work. This might have been an offer because it signaled to Peter that the deal would be complete if he chose either option. However, it would more likely be considered preliminary negotiations since Peter could still choose which option he preferred. Peter said, "I'd like to go with the second option..." If there was an offer, and he had left his statement at this, then this would constitute acceptance because it gave Della notice that he was accepting her offer. However, Peter attempted to modify the terms of the deal by adding a commitment for

an additional three years after the first three years. Thus, Peter's attempted acceptance was ineffective because it altered the terms of Della's offer and does not meet the mirror image rule. Rather, Peter effectively made a counteroffer to Della (or an offer if Della's original options were considered preliminary negotiations). Della accepted Peter's counteroffer when she said, "Good, I'd like you to start next week." The exchange of six years of dental hygienist services for a $50,000 parcel of land and a $40,000 per year salary constitutes consideration. Because there was an offer, an acceptance, and consideration, there is a valid contract.

The third issue is whether the statute of frauds makes the service or land contract unenforceable. The statute of frauds requires some contracts to be in a writing signed by the party against whom enforcement is sought. Contracts for land and contracts that cannot be completed within a year are both included within the statute of frauds. Contracts for land must adequately identify the parties and the parcel of land to be conveyed. The contract between Della and Peter was for six years of employment. Peter could not complete his performance of six years of services within one year, thus this contract falls within the statute of frauds. The contract between Della and Peter also contemplated the conveyance of an interest in land. Della did sign a contract with Peter, but the contract only specified that Peter agreed to work as a dental hygienist for a salary of $40,000 per year. The conveyance of land was not considered within the signed contract, nor was the length of the term of employment. Thus, the contract Della signed cannot be used to overcome the statute of frauds. The employment contract for a term of years and the land conveyance are both unenforceable under the statute of frauds.

The fourth issue is whether Peter can overcome the Statute of Frauds defense via the doctrine of part performance or equitable estoppel. Part performance in a land conveyance requires that the party who seeks to enforce the contract must have engaged in partial performance, which is usually evidenced by possession or payment of the purchase price. Equitable estoppel requires that the party who seeks to enforce the contract show that there was a promise and that the party reasonably relied upon

that promise to their detriment. It will probably be difficult for Peter to show partial performance since he has not taken possession of the land or paid the full purchase price. He might be able to argue that he has "paid" a substantial portion of the purchase price since he worked for two years and nine months, which is the equivalent of 75% of the service he was to perform before receiving the land. However, equitable estoppel is probably a better argument for him to make. The fact that Della offered Peter two options suggests that $40,000 was less than the market rate for dental hygienists. Peter chose the option that gave him less yearly salary in reliance on Della's promise that he would be employed for six years and would receive a $50,000 parcel of land. He received less salary than he otherwise would have, so his reliance was detrimental. Peter may be able to overcome Della's Statute of Frauds defense under the doctrine of equitable estoppel.

The fifth issue is whether there was a breach of contract. A breach occurs when one party fails to perform as obligated under the express and implied conditions in the contract. Assuming that the court finds a valid and enforceable contract, then Della committed a breach when she fired Peter before the six years were complete. She also committed an anticipatory repudiation when she decided to sell the land instead of convey the land to him. She also potentially breached her implied duty of good faith by firing Peter when she was satisfied with his work.

What remedies might Peter obtain?

The first issue is whether Peter can receive expectation damages. The general measure of damages in a contracts case attempts to put the plaintiff into the position he would have been in if the contract had been fully performed. A plaintiff does have a duty to mitigate, which requires that he make a reasonable effort to find similar employment. He does not have to settle for lesser employment or move to a distant location to find employment. Assuming that the court finds there was an employment contract for six years, the court would award three years and three months worth of the $40,000 per year salary if Peter cannot find similar employment. If Peter can find similar

employment, the reward will be reduced based on whatever his new salary is. Assuming that the court finds there was a contract to convey land, Peter could sue for the value of the land, which was $50,000. If the court finds that there was an employment contract, but no contract to convey land, then Peter might be able to receive more than the $40,000 per year salary award if he can show that he took a reduced salary in reliance on the promise that he would receive a land conveyance.

The second issue is whether Peter can receive restitutionary damages. Restitutionary damages are only awarded when a benefit has been bestowed and it would unjustly enrich the other party if they are not required to pay for that benefit. A plaintiff cannot receive restitutionary remedies if they receive expectation damages. Restitutionary damages would probably not be Peter's best option. However, Peter might be able to receive the difference between his salary and the market rate salary for a dental hygienist if he can show that he took the lower salary in reliance on the promise to receive land.

The third issue is whether Peter can receive specific performance. Specific performance is awarded when there is a definite and certain contract, an inadequate legal remedy, enforcement of specific performance is feasible for the court, and there is mutuality. The party attempting to avoid specific performance can do so by raising various defenses, such as laches or unclean hands. Assuming Peter overcomes the statute of fraud objections, Peter will not be able to seek specific performance for the employment contract. Attempting to enforce an employment contract, which is a contract for personal services, is not feasible for the court. Personal service and employment contracts require individuals to work together in a cooperative environment; it is not feasible for the court to monitor the relationship between the parties. Peter probably will not be able to seek specific performance for the land contract. There was a definite and certain contract to convey a parcel of land worth $50,000, though there may be some issues with this element if it is not clear which parcel of land Della intended to convey. Land is considered unique, so a legal remedy of $50,000 would be inadequate. It would be feasible for the court to enforce the specific performance. Under the common law

doctrine of mutuality, both parties must have been able to request specific performance. In this case, Della could not have sought specific performance if Peter breached. However, under the modern theory, the requirement for mutuality is met if one party can sufficiently assure performance. The court would have to decide if the two years and nine months was enough to constitute full performance, but this is only 75% of the total performance required. Peter may be willing to work the remaining three months, but the court cannot require him to do it. Thus, there is no mutuality and Peter cannot successfully obtain specific performance.

ANSWER B TO QUESTION 4

What Rights Does Peter Have as to Employment and the Parcel of Land

I. The Contract, if Valid, Is Governed By Common Law

The issue is what law governs the contract, if valid, between Peter (P) and Della (D). The UCC governs contracts involving the sale of goods. Contracts which are for services or are land contracts are governed by the common law. Here, P and D are contracting for employment and possibly land. This is a contract for services and land and therefore the contract is governed by common law principles.

II. There is Likely a Valid Contract Between Peter and Della

The issue is whether Peter and Della actually entered into a valid contract. For a contract to be valid, it must contain offer, acceptance, and consideration. An offer is an outward manifestation by the offeror that creates the power of acceptance in the offeree. An advertisement can be a valid offer is it is made to a particular person, outlines the specific details of the offer, and presents the recipient of the advertisement with instructions as to how acceptance can be made. Acceptance is an outward manifestation by the offeree that he accepts the terms of the offeror. Acceptance must mirror the terms of the offer. If acceptance does not mirror the terms of the offer or, in itself, alters the terms of the offer, it is a counteroffer and effectively rejects the original offer. However, a mere inquiry is not a counteroffer. Consideration is a bargained-for legal detriment. (i.e., A works for B in exchange for a salary).

Here, P responded to an advertisement from D, a dentist, who was seeking a dental hygienist. The advertisement was not a valid offer because there are no facts that it was sent directly to P, there are no facts that it contained the details of any potential employment contract, and there are not facts that it told P how he could accept. However, when D interviewed P, she presented him with a valid offer to be her hygienist for three years in exchange for either (1) working for $50,000 per year; or (2) working for $40,000 per year and she would agree to convey to him a parcel of land,

worth about $50,000. When P accepted, he said "I'd like to go with the second option, but I would like a commitment for an additional three years after the first three." This acceptance by P does not mirror the terms of the offer by D and therefore acts as both a rejection of the offer and a counteroffer. Della said, "Good, I'd like you to start next week."

Peter will argue that Della's comment of "Good, I'd like you to start next week," is her acceptance of his counteroffer. He will argue that the terms of the deal are that he works for Della for 6 years at $40,000 per year and is conveyed the parcel of land after the first three years. When P started to work and D handed him the letter stating only that he had agreed to work as a hygienist for $40,000 per year, P will argue that this letter is merely a documentation of the salary he is to receive and nothing more.

In conclusion, Peter's counteroffer is the controlling offer and D accepted it by saying, "Good, I'd like you to start next week." The consideration is that Peter work for 6 years at $40,000 and will receive the parcel of land at the completion of the first three years. The consideration is valid. There is likely a valid contract between P and D.

III. The Letter D Presented to P Is An Invalid Modification

The issue is whether the letter D presented to P is an invalid modification. Under the Common Law, a modification to a contract must be supported by consideration. The pre-existing duty rule prohibits the modification of any contractual duties which have been agreed to absent consideration because the party is attempting to modify something that he/she is currently obligated to do.

Here, D attempted to modify the existing when she presented P with a letter, which she signed, documenting P would work as a dental hygienist for $40,000 and no other elements of the deal between P and D were documented. There was no consideration paid by D to P to enforce this modification and it is invalid.

In conclusion, the modification is invalid because D is obligated to have P work for 6 years at $40,000 and convey a piece of land to him after 3 years of work. To reduce her obligations to only paying him $40,000 per year without consideration is in violation of the pre-existing duty rule.

IV. Della Can Assert the Defense of Statute of Frauds (SOF)

The issue is whether D can assert a SOF defense. The SOF requires that certain contracts be in writing. The categories are contracts regarding marriage, contracts which cannot be performed within one year, land sale contracts, executor agreements, guarantees or suretyships, and contracts for the sale of goods for over $500. A contract which cannot be performed within one year is determined at the time of the contract execution and is measured by whether there is any possibility performance can be completed within one year. The writing that will satisfy the SOF must contain the essential terms of the contract and be signed by the party to be charged.

Here, P's contract is for 6 years, or, at the least, 3 years, and is clearly not performable within one year. This contract is subject to the statute of frauds. The parties did not sign a written contract for P's services to D. Further, part of the deal is a land conveyance which is also subject to the SOF. Neither of those terms were ever written down and D can assert that the contract fails under the SOF. Peter will argue that the letter D gave to him after he started working is a writing confirming their contract because it says he gets paid $40,000 and it is signed by D. However, this is not the same contract to which they agreed.

In conclusion, it is likely that D can assert a valid SOF defense because the ` contract was not in a writing which comports with the requirements of the SOF.

V. P Can Assert The Defense of Estoppel and Likely Partial Performance to the SOF Requirements.

The issue is whether P can assert the defenses of estoppel or part performance to the SOF requirements. As stated above certain writings are subject to the SOF. There are four defenses to the enforcement of the SOF: (1) Partial or Full Performance, (2) Estoppel, (3) Judicial Acknowledgement of Contract, and (4) Merchant's Confirmation Memo. There has been no acknowledgement in a judicial proceeding and the merchant's confirmatory memo is only for UCC contracts with a merchant, so neither apply. However, Partial or Full Performance and Estoppel may apply.

Partial or Full Performance

A party may not comply with the requirements of the SOF if he partially or fully performs his contract and the other party accepts the benefits of the performance. Here, P worked for D for 2 years and 9 months. At the very least, D was under the impression that P was going to be working for her for 3 years, even though the final accepted offer was likely for 6. There are no facts which say she failed to pay him so she very likely was performing her obligations under the contract. She was accepting his benefit of being a hygienist in exchange for her payment. Therefore, under the doctrine of part performance, P has a meritorious defense to the requirments of the SOF.

Equitable Estoppel

A party may not comply with the requirements of the SOF if he can assert a defense of estoppel. Equitable estoppel occurs when a party says or does something that foreseeably creates action in another person, the other person relies on the party's previous statement or action, and it would be unjustly prejudicial to the relying party. Here, P has fully relied on Ds statement of acceptance to his counteroffer. He began working for her and has been working for her for almost 3 years. D has reason to know that he was working for her based on their discussions of the $40,000 and land conveyance. P may not have started working for D without the provisions agreed to in his counteroffer and therefore it would be unfairly prejudicial not to enforce his contract.

In conclusion, P has a likely defense of partial or full performance ot the SOF and may have a mertitorious defense of Estoppel.

VI. If A Valid Contract Exists, It is A Contract For Term and Not an At-Will Contract

The issue is whether the contract is a contract for term or an at-will contract. In a contract for term, an employee has a property right in the job and may not be terminated without cause. Conversely, an at-will contract allows the employer or employee to terminate employment for good cause, bad cause, or no cause.

Here, P will argue that this is a contract for terms because the terms of his counteroffer were that he worked for D for 6 years. Further, he will argue that even if her original job offer is controlling, that offer was for a 3 year term. Either way, it is not an at-will employment. Since it was not at will, she was not able to fire him because she had always been happy with his work. Della will argue that her letter modifying the contract has no language regarding term and therefore it is an at-will employment and she can fire him for any reason.

In conclusion, this is a contract for term and P may not be fired absent cause.

In conclusion, P and D have a valid contract for 6 years at $40,000 per year. Further, D is obligated by the contract to convey P the parcel of land upon completion of his 3rd year. Peter has a right to seek remedies for breach of contract.

What Remedies Can Peter Seek

VII. Peter May Seek Expectation Damages and Reliance Damages

The issue is whether Peter may seek expectation damages and reliance damages for his contract with Della. Legal remedies are available if the plaintiff can clearly estimate the damages incurred with specificity. Legal damages are in three categories, expectation, reliance, and restitution. Expectation damages place the

plaintiff in the position he would have been in had the breaching party performed the contract in full. Reliance damages place the plaintiff in the place he would have been had the contract not existed. Restitution damages reimburse the plaintiff for any benefit conferred on the defendant. A plaintiff always has the duty to mitigate damages and, in the employment context, the duty to to find other employment. The plaintiff is not required to find any job, but rather a job comparable to the job that has been taken. If a plaintiff cannot find replacement employment, a good faith effort must take place to find employment.

Here, P will argue that he should get his expectation, or benefit of the bargain damages, from the contract including any incidental and consequential damages that are reasonably foreseeable from D's breach.. He can easily estimate them because he was due 3 years and 3 months salary and the parcel of land. He had a right to those damages because he was under a contract for which he was improperly fired. These damages will place him in the position he would have been in had he not been fired and the contract been performed. However, he has a duty to find alternative employment and there are no facts which say he has looked for or obtained any further employment. Also, there are no facts that say he has acted in bad faith which would negate the award of damages. If and when he does, his salary from that employment can be applied against his damages from D. There are no facts indicating any incidental and consequential damages.

Also, if P spent any money in reliance on his contract with D, he may recover those costs that are reasonable and foreseeable. Any money that he spent in reliance on the contract with D is obtainable.

In conclusion, he can obtain expectation and reliance damages from D less his duty to mitigate by finding other, comparable employment.

VIII. <u>Peter May Seek Specific Performance of the Land Contract, But Not the Services Contract</u>

The issue is whether Peter can seek specific performance of the land contract. Specific performance is available when the contract has definite and certain terms, there is an inadequate legal remedy, the court can correctly adjudicate, there is mutuality between the parties and there are no defenses. Inadequate legal remedy applies when you are dealing with land or unique items. Mutuality has been relaxed and no longer requires that the parties must each be able to get specific performance. Just that the party is ready and willing to perform. Specific performance will not be applied to a services contract because it is difficult to enforce and can abridge certain constitutional provisions against servitude.

Here, the land at issue is unique and is a definite term of the contract. Money damages will not suffice. Peter contracted and performed for the piece of land. The judge can properly adjudicate the matter. However, Peter likely may not seek specific performance of the services contract.

In conclusion, P may seek specific performance of the land contract but not the services contract.

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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.

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

Question 4

On March 1, Ben, a property owner, and Carl, a licensed contractor, executed a written agreement containing the following provisions:

1. Carl agrees to construct a residence using solar panels and related electrical equipment manufactured by Sun Company ("Sun") and to complete construction before Thanksgiving.

2. Ben agrees to pay Carl $200,000 upon completion of construction.

3. Ben and Carl agree that this written agreement contains the full statement of their agreement.

4. Ben and Carl agree that this written agreement may not be modified except upon written consent of both of them.

Prior to execution of the written agreement, Ben told Carl that Carl had to use Sun solar panels and related electrical equipment because Sun was owned by Ben's brother, and that Carl had to complete construction prior to Thanksgiving. Carl assured Ben that he would comply.

In August, Ben began to doubt whether Carl would complete construction prior to Thanksgiving; Ben offered Carl a $25,000 bonus if Carl would assure completion, and Carl accepted and gave his assurance.

To complete construction prior to Thanksgiving, Carl had to use solar panels and related electrical equipment of equal grade manufactured by one of Sun's competitors because Sun was temporarily out of stock.

Carl completed construction prior to Thanksgiving. Ben, however, has refused to pay Carl anything.

What are Carl's rights and remedies against Ben? Discuss.

SELECTED ANSWER A

Governing Law

Contracts are governed by either the UCC or Common Law. The UCC relates only to contracts for the sale of goods. Here, the contract is for the construction of a residence, using certain products manufactured by Sun. Although this involves the goods manufactured by Sun, it is primarily for the purpose of having Carl build a residence for Ben. Therefore, common law controls.

Valid Contract

To have a valid and enforceable contract there needs to be (1) an offer, (2) acceptance, and (3) consideration. Here, the facts indicate that Ben and Carl reached an agreement related to the terms. Thus, the first two elements are present. Additionally, the contract calls for Carl to construct a residence to Ben's specifications and for Ben to pay Carl $200,000 in return. Thus, there is a bargained-for exchange of legal detriment by the parties because they are both doing something that they have no legal obligation to do, in exchange for a benefit.

Therefore, there is a valid contract formed between Ben and Carl.

Terms of the Contract

Generally, the terms of the contract are determined by the written agreement itself. Here, the written agreement indicates certain terms, including that Carl will construct a residence using solar panels and related electrical equipment manufactured by Sun and that Ben will pay Carl the $200,000 upon completion.

However, these promises contained in the agreement are not the only terms that the parties may claim exist.

Parol Evidence Rule

The parol evidence rule bars the introduction of an oral or written agreement which was made prior or contemporaneous to the execution of the contract and which contradicts or varies the terms of the integrated contract.

Here, Ben may argue that prior to the execution, Ben and Carl agreed that the use of Sun products and completion prior to Thanksgiving were conditions, not promises. A condition precedent to performance is a term in the agreement that must be satisfied strictly in order for the party's performance to be due. If the condition never occurs, the party never has a duty to perform. A promise, on the other hand, only needs to be substantially performed under the common law in order for the other party's performance to become due. In the contract, the use of Sun products and completion by Thanksgiving are merely promises because they do not indicate any mandatory language or language to show that Ben's performance is not due unless they are strictly followed.

Carl will argue that introducing the evidence of Ben and Carl's oral agreement prior to the execution of the contract regarding the mandatory nature of the Sun product and completion terms is barred by the parol evidence rule.

Although this does constitute a prior oral agreement, the parol evidence rule does not bar the introduction of evidence to show that there was a condition precedent to performance. This is one of the rule's exceptions. Therefore, if this agreement did make those terms conditions, rather than promises, then the argument can be used to show that.

Here, the agreement between Carl and Ben does show that Ben told Carl that he "had to use Sun" products and that he "had to complete construction prior to Thanksgiving." Although these do indicate more definiteness, there is no express language stating that unless Carl does so, Ben will not have to perform. Thus, Carl will argue that this agreement only enforced the terms of the written agreement, not changed them into conditions.

Ultimately, because there is no express language and because the courts do favor promises over conditions because of the strict compliance requirement of conditions, this will likely be found to be an enforcement of the promise in the agreement and therefore not parol evidence to contradict the terms.

Bonus Agreement

Ben began to doubt whether Carl would complete construction prior to Thanksgiving, so he offered Carl a $25,000 bonus if Carl would assure completion. Carl accepted and gave such assurances. Carl will argue that this was a new contract or a modification to their existing contract.

Modification in Writing

If Carl argues that this agreement modified the written agreement that Carl and Ben had, Ben will point to the term in the agreement which states that "this written agreement may not be modified except upon written consent of both of them." These modifications in writing terms are generally not enforced under common law.

Statute of Frauds

A writing is only required to modify an existing agreement under common law if the modification places the contract within the statute of frauds. The statute of frauds generally does not apply to services contracts unless they are not capable of being performed within one year. Here, the agreement that attempts to modify the existing agreement states that performance must be completed by Thanksgiving (late November). The original contract was made on March 1, and the modification in August. Therefore, this is requiring that performance be completed under a year from the time of the contract or the modification. Therefore, the statute of frauds does not require a writing.

Therefore, Ben cannot challenge this modification on the basis of a lack of a writing.

Enforceable Agreement

Although it is permissible for the parties to orally modify their agreement, a modification or subsequent contract requires the three elements required in every contract: (1) offer, (2) acceptance, (3) consideration. Here, there was an offer from Ben to Carl for $25,000 extra if Carl finished construction prior to Thanksgiving. There was an acceptance because Carl accepted these terms as they were, without condition. There also must be, however, consideration.

Pre-Existing Duty Rule

The pre-existing duty rule holds that a promise to do what a party is already contractually or otherwise obligated to do is not consideration for a new agreement. The exceptions to this agreement are for (1) if a third party will perform the obligation, (2) if unforeseen circumstances have made it such that the performance would otherwise be excused, or (3) there is a change in the amount or type of performance.

Here, the performance between Ben and Carl was set in the agreement to be completed before Thanksgiving. Thus, Carl was under a pre-existing contractual duty to perform by Thanksgiving. As such, there is no consideration given by Carl in the agreement, only by Ben in offering to pay more money.

Carl might argue that because Ben began to doubt Carl's ability to perform, this rule is excused. However, that is not the law. Common law, unlike the UCC, strictly requires adequate consideration for a modification or a creation of a new agreement. Here, there was not an excuse of Carl's performance under the circumstances, nor did he promise to do more than he was already obligated to do under the agreement, and he did not assign his duties to a third party.

Therefore, there is no consideration to support the agreement between Ben and Carl made in August. Thus, Ben has no obligation to pay Carl $25,000.

Thus, the terms of the agreement are unmodified and remain just as they were in the original written integration.

Performance of the Contract Terms

Carl's Performance

Under common law, a breach of contract occurs if a party fails to fully perform its obligations under an existing contract. However, in order to discharge the other party's obligation to perform its obligations, there must be a material breach. Therefore, in order for Carl to have sufficiently performed to give Ben an obligation to perform, Carl must have substantially performed his obligations under the contract.

Under this contract, Carl constructed a house for Ben. That was his primary obligation and he completed it. Additionally, he completed it on time: by Thanksgiving. Therefore, Carl fully and completely performed two of his three obligations under the contract.

Carl did not, however, perform his obligation to use Sun manufactured solar panels and related electrical equipment in constructing the house. Carl knew he was supposed to do this, but he failed in this because in order to get it done on time, he had to use solar panels manufactured by one of Sun's competitors. Therefore, by not complying with the contract terms as to this requirement, Carl did commit a breach of contract.

This breach, however, is minor. Carl substantially performed his obligation under the contract because he built an entire house for Ben and got done on time. Therefore, the failure to use Sun products was a minor breach for which Carl is liable, but it does not discharge Ben's obligation to perform.

Ben's Performance

Ben flatly refused to perform at the time that his performance was due: upon completion of the construction. Therefore, because his performance was due, he is in material breach of the contract.

Excuses for Non-Performance

Carl's Non-Performance

Waiver of Promise

Carl will argue that his performance was discharged by Ben's waiver of the promise to use material made by Sun when he mandated and offered more money for Carl to complete performance by Thanksgiving.

Generally, a party may waive a condition precedent to performance if the condition is in the contract to protect them, but it is not permissible to waive performance of a promise under a contract unless there has been a modification of the agreement.

Here, as shown above, the offer to give Carl an extra $25,000 was not supported by consideration. Therefore, it is not enforceable as a modification. Further, even if it was enforceable as a modification, it does not indicate that Ben "waived" the right to have Sun products used in his home. Carl never informed him that it would not be possible to use those products and perform on time.

Therefore, the promise is not waived.

Impossibility/Impracticability

Carl will also argue that impossibility or impracticability discharged him of the obligation to use Sun products. Impossibility discharges performance if it would be objectively impossible to perform due to unforeseen circumstances. Impracticability discharges a party's performance if the performance has become extremely and unreasonably difficult and expensive as a result of unforeseen circumstances.

Here, although Carl may claim that it was objectively impossible to get Sun products in time to construct the house before Thanksgiving, Ben will counter that difficulty in obtaining Sun products was not an "unforeseen circumstance."
To be unforeseen, the circumstance must be one that the parties did not, or could not, contemplate at the time of the agreement. Here, the possibility that it would be

challenging to get Sun products specifically, is a condition that the parties, particularly Carl, should have contemplated at the time of the agreement since the agreement was specific as to their use. Further, it is unknown exactly what the hardship or difficulty was in obtaining those products on time. If it was a totally unforeseen circumstance which led to the hardship, then Carl would have a stronger argument.

However, in the absence of information showing that an unforeseen event caused the inability to obtain these products on time, Carl's performance on that term will not be excused.

Ben's Non-Performance

Non-Occurrence of a Condition Precedent

Ben will argue that the condition precedent that the house be built using Sun products discharges him of any liability for payment. However, as discussed above, it is most likely that the court will construe the written term and the oral agreement as creating a promise, not a condition.

Therefore, his obligation is not discharged since Carl substantially performed his obligation under the contract (see above).

Conclusion

Therefore, Ben is liable to Carl for a material breach of the agreement. Ben is not responsible to pay the extra $25,000. But Carl is responsible for the damages caused by his minor breach of the agreement.

Carl's Remedies

Compensatory Damages

Compensatory damages in contract are aimed to place the plaintiff in the position that he expected to be in but for the breach. This is the general measure of contract compensatory damages.

In order to recover compensatory damages, the damages must be shown to be (1) caused by the defendant, (2) foreseeable, (3) unavoidable, and (4) certain.

Here, the damages were caused by Ben's refusal to pay. They were foreseeable because it was foreseeable that Ben would simply refuse to pay; this is not an attenuated or unexpected event. The damages were unavoidable to the extent that Carl could not have done anything else to mitigate his loss. He built the house and has not received payment; he is not in the type of contract where he can seek cover or performance from another.

Finally, the damages must be certain. In a construction contract, the damages for a party who completes a performance but is not paid is the contract price. Here, the contract price is $200,000. Therefore, Carl's damages are certain in sum based on the contract.

Therefore, he can recover $200,000 in compensatory damages from Ben.

Offsetting Damages

Carl's compensatory damages award will be offset by the damages that he caused Ben as a result of his failure to use Sun products. Since the products used by Carl were of equal grade to those used by Sun, the damages will be fairly nominal.

Ben will try to retrieve consequential damages arising from his brother's lost profits. However, although Ben's brother owns Sun and would have benefitted from the contract, it was only incidentally. Thus, Ben's brother is not entitled to anything on a third party beneficiary theory since only intended beneficiaries have such rights.

Consequential damages here would not be available for loss to the brother's business unless Ben can show that those are his own personal damages. However, if he can show a personal loss stemming from this failure, he can recover consequential damages since the ownership of Sun was known to Carl at the time of making the contract.

Therefore, Ben's $200,000 will be offset by Ben's damages.

Specific Performance

Specific performance is an equitable remedy which requires the contract to be performed. To be granted, it must be shown that (1) there is a valid, certain, and definite contract, (2) the plaintiff's conditions for performance were met, (3) there is not an adequate remedy at law, (4) enforcement is feasible, and (5) there are no defenses.

Here, the contract is valid, and definite in the terms of the integrated writing (see above). Carl (the plaintiff's) conditions for performance were met. But there is an adequate remedy at law. Since the payment of money is not unique, unless there is an indication that Ben is insolvent, there is a perfectly adequate legal remedy in compensatory damages. Finally, feasibility would be enforceable.

Unclean Hands

Further, even if there was not an adequate remedy at law, Ben might raise the defense of unclean hands. Unclean hands is an equitable defense which says that the contract should not be enforced in equity if the plaintiff committed wrongdoing in the transaction. Here, Ben will argue that Carl breached the agreement by not using Sun products and therefore comes to the court with unclean hands. This will likely not prevail since Carl's breach was minor.

Regardless, Carl's best remedy is legal. Specific performance will not be granted.

SELECTED ANSWER B

Carl's rights and remedies against Ben will be determined by principles of contract law.

Applicable Law

The common law of contracts will govern the contract that Carl and Ben made. The common law governs all contracts except for contracts regarding the sale of goods, which are governed by the UCC. The common law governs services contracts, and therefore covers construction contracts. Here, Carl is a licensed contractor, and he has agreed to construct a residence for Ben. Therefore, Carl has entered into a services contract, which will be governed by the common law. One may argue that Carl has agreed to provide a house, which is a good, but this argument will fail. Carl was hired for his services in constructing a house.

Formation

The facts show that a validly executed contract was formed. A contract requires mutual assent and consideration. Here, Ben and Carl entered into a written agreement, whereby both manifested consent to be bound by the terms of the contract.

Moreover, there is adequate consideration. Consideration is a bargained-for legal detriment. Here, Carl agreed to build a house and Ben agreed to pay $200,000 in consideration.

Terms of the Contract and Ben's Alleged Breach

The written contract states that Carl agreed to construct a residence using solar panels and related electrical equipment manufactured by Sun Company. In addition, Carl agreed to complete construction before Thanksgiving. Ben agreed to pay Carl $200,000 upon completion of the contract.

Carl constructed the home before Thanksgiving. Now, Ben refuses to pay Carl anything. Carl's rights and remedies under the contract will be determined by the court's interpretation of the contractual terms and whether the parties modified the terms of the contract.

Promise or Condition to Use Panels from Sun Company

A condition precedent is a condition that must be fulfilled in order to require the party with the benefit of the condition to render full performance under the contract. If a condition precedent is not fulfilled, the party with the benefit of the condition is not required to perform. Here, Ben will argue that the contract includes a condition precedent that Carl had to use Sun Company solar panels in construction of the house. Ben will argue that Carl did not use Sun Company solar panels and related electrical equipment, and that Carl therefore did not satisfy the condition. Therefore, Ben will argue that he was not required to render performance under the contract and pay Carl the $200,000 for the house.

In contrast, the non-occurrence of a promise or the failure to fully satisfy a promise contained in a contract does not relieve the other party of liability. If a party promises to render performance of a contract, the other party will not be relieved of performance unless the party who made the promise materially breached the contract. A material breach occurs when the party does not render substantial performance. A minor breach does not relieve the non-breaching party of their duty to perform, although they can sue for damages. In order to determine whether a breach is minor or material, a court will consider the extent of performance, the hardship to the breaching party, the adequacy of compensation, and the additional work needed to fulfill the promise.

A court will consider the intent of the parties in order to determine whether a clause at issue is a condition or a promise. As explained above, Ben will argue that the use of Sun Company products in construction of the house was a condition while Carl will argue that he merely promised to use the products. Here, the court will likely hold that, under the terms of the written contract, the agreement to use Sun Company products was a promise. The language of the contract does not expressly condition Ben's

performance on the use of Sun Company products. In a large construction project like this, a court will likely require unambiguous language that the parties intended to create a condition and not a promise. Solar panels and electrical equipment are relatively minor elements of an overall house. Therefore, based on the terms of the contract, the court likely will not find that the clause requiring Sun Company products was so important that the parties intended for it to be a condition. Here, Carl used solar panels of equal grade and otherwise constructed the house per the terms of the contract.

Parol Evidence

However, Ben will argue that the court should consider the parties' discussions prior to entering into the contract when interpreting the terms of the contract. Ben will argue that he explicitly told Carl that he had to use Sun Solar panels and related electrical equipment, because Sun was owned by Ben's brother. Therefore, Ben will argue that the use of the Sun Company products was a very important part of the contract. Ben will argue that he would not have made the contract with Carl unless Carl agreed to use Ben's brother's products.

Carl will argue that the Parol Evidence rule bars the court from considering evidence of these discussions. The parol evidence rule applies when a contract has been fully integrated. Integration occurs when the parties intend the contract to integrate all prior discussions and that all terms be included in the final written agreement. A merger clause in a contract is probative of the parties' intent to integrate but it is not conclusive.

If a contract is integrated, prior communications between the parties cannot be used to contradict the terms of the contract. However, the parol evidence rule does not bar the use of prior communications to show the non-occurrence of a condition, to challenge the validity of the contract, or to construe ambiguous terms.

Here, the court will likely find that the contract was integrated. The contract contains a merger clause, which shows that it is likely that the parties intended to reduce their agreement to a final written agreement. Moreover, the written contract is complete and includes all material terms.

Therefore, the use of parol evidence to contradict the terms of the contract will be prohibited. Carl will argue that Ben's statement that Carl "had to use Sun Solar Panels . . . because Sun was owned by Ben's brother" cannot be considered by the court, because it contradicts the terms of the written contract. Carl will argue that the contract language is clear, and it does not state that the use of Sun Company products was a condition. Carl will argue that such an important provision of the contract would have been included in the final written agreement. However, Ben will likely prevail in arguing that this statement can be used by the court to consider whether clause 1 of the contract is condition. As explained above, prior communications can be used to show the non-occurrence of a condition. Moreover, the parol evidence does not directly contradict clause 1 of the contract. Instead, whether clause 1 is a condition or promise is unambiguous and will need to be determined by the court. Therefore, the court will likely consider this evidence in order to determine the parties' intent. Here, the oral communication shows that Ben told Carl that he "had to use" Sun Company products and Carl assured him that he would comply. However, even if the court does use the parol evidence, it still may not conclude that the parties intended the use of Sun Company products to be a condition. As explained above, a court usually will presume that a clause is a promise and not a condition.

Material v. Minor Breach

If the court determines that the clause was a promise and not a condition, then Carl will argue that Ben must pay him for constructing the house. However, Ben will argue that Carl still breached the promise by not using Sun Company products. Therefore, Carl will be liable for some damages. Whether Ben will be required to pay Carl for the house will be determined by whether Carl committed a material or minor breach.

As explained above, the court will consider several factors in determining whether a breach is minor or material. Here, the court will likely conclude that the breach was minor. Carl substantially performed under the contract. He built a house for Ben and he did so within the time limit that Ben wanted. Moreover, solar panels are a minor component of the house, and not a very important part of the overall construction. Finally, the solar panels and products used were similar in quality and design to the Sun

Company products. Therefore, the hardship to Ben here is minimal. Carl has provided Ben with a sufficient home, and Ben should not be allowed to escape payment by arguing that Carl materially breached for the mere failure to use Sun Company products.

Impossibility

Even if Ben is successful in arguing that Carl materially breached, Carl will argue that his breach is excused by impossibility. Impossibility occurs where the nonoccurrence of an event was a basic assumption of the parties, and neither party assumed the risk of the occurrence of the event. Impossibility must be objective. Here, Carl will argue that Sun was temporarily out of stock of solar panels and products. Therefore, it was impossible for him to use Sun Company products in the home.

Carl will likely succeed in this argument. Ben will argue that the impossibility was not objective, because Sun Company was only out of stock temporarily.

However, Carl was limited by the term in the contract requiring construction to be finished by Thanksgiving. Therefore, under the terms of the contract it was impossible for him to use both Sun Company products and complete the construction prior to Thanksgiving.

Frustration of Purpose

Carl may also argue that the purpose of the contract was frustrated. This occurs when an event occurs that was not foreseeable, the non-occurrence of which was a basic assumption of the contract, and the occurrence of which frustrates a purpose of the contract that both parties intended. Carl will argue that Sun Company's inability to provide product was a supervening event which frustrated the purpose of his contract with Ben. Therefore, he will argue that his performance of his promise to use Sun Company products was excused.

Carl's Liability and Damages

Therefore, Carl likely committed a minor breach of the contract. Ben can sue Carl for damages caused by the breach. But, Ben must perform under the contract and pay Carl for his work. Therefore, Ben will be required to pay the $200,000 less any damages caused by Carl's breach. Here, the damages are likely minimal. The purpose of damages is to compensate the damaged party. Carl may ask for expectation damages, which is measured by the damaged party's expectations. The purpose is to put the party in a position they would have been in but for the breach. Here, Ben expected a home constructed with Sun Company products. However, he received a home constructed with products of equal grade. Therefore, he has not suffered any economic damages, for which he can be compensated. He may argue that he is personally dissatisfied with the home, but the court will be unlikely to recognize these damages as legitimate or be able to quantify these damages.

Ben may also argue for specific performance. Here, the court will be unwilling to grant specific performance. Requiring Carl to deconstruct and then reconstruct the home using Sun Company products would place an extreme hardship on him and be difficult to supervise by the court.

Even if Carl is found to have materially breached the contract or failed to perform a condition under the contract, he will likely be compensated under a quasi-contract restitution theory. Ben will not be allowed to be unjustly enriched by Carl's work. Under this theory, Ben will have to pay Carl for the value of the benefit that Ben received less any damages that Ben suffered.

Modification

Carl will argue that he is also owed the $25,000 bonus that Ben offered him in order to complete the home by Thanksgiving. A modification to a contract under the common law must be supported by consideration. Under the UCC, modifications in good faith without consideration are permitted. Here, Ben will argue that the modification is not valid or binding, because it was not supported by any consideration. Consideration is a bargained-for legal detriment. Ben offered to pay $25,000; however, Carl merely

agreed to assure completion by Thanksgiving. Ben will argue that under the terms of the contract, Carl was already required to complete the construction by Thanksgiving. Therefore, consideration does not exist.

Carl may argue that the contract pre-modification was not a “time is of the essence” contract. Therefore, pre-modification Carl did not agree to forfeit his pay if the contract was not fully performed by the specific date (Thanksgiving). He may argue that the modification made performance by Thanksgiving mandatory, because time is of the essence. Therefore, Carl will argue that there was consideration. This argument will likely fail. Regardless, under the terms of the contract Carl agreed to perform by Thanksgiving. Even though he might not have committed a material breach by performing later, his agreement to perform an obligation he already has is not consideration.

Second, Ben will argue that the modification was invalid, because it was not made in writing. The parties’ contract in clause 4 states that the agreement may not be modified except upon written consent of the parties. This argument will fail. Under the common law, a clause requiring modifications to be in writing is not enforceable, although such a clause is enforceable under the UCC.

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2014

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 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.

Question Number	Subject
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.

<u>Incidental Damages</u>

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 award 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 hours 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.

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

QUESTION 1

Marta operated a successful fishing shop. She needed a new bait cooler, which had to be in place by May 1 for the first day of fishing season.

On February 1, Marta entered into a valid written contract with Don to purchase a Bait Mate cooler for $5,500 to be delivered no later than April 15.

On February 15, Don called Marta and told her that he was having trouble procuring a Bait Mate cooler. Marta reminded Don that meeting the April 15 deadline was imperative. "I'll see what's possible," Don responded in a somewhat doubtful tone. Concerned that Don might be unable to perform under the contract, Marta immediately sent him the following fax: "I am worried that you will not deliver a Bait Mate cooler by April 15. Please provide your supplier's guarantee that the unit will be available by our contract deadline. I want to have plenty of time to set it up." Believing that Marta's worries were overblown and not wanting to reveal his supplier's identity, Don did not respond to her fax.

When Don attempted to deliver a Bait Mate cooler on April 16, Marta refused delivery. Marta had purchased a Bait Mate cooler from another seller on April 14, paying $7,500, which included a $2,000 premium for one-day delivery by April 15.

Have Marta and/or Don breached the contract? If so, what damages might be recovered, if any, by each of them? Discuss.

QUESTION 1: SELECTED ANSWER A

I. Governing Law

The UCC governs contracts for goods. The common law governs all other contracts, including contracts for services and real estate. The UCC has additional rules that apply when both parties are merchants.

Marta and Don entered into a contract to purchase a bait cooler. Because the bait cooler is a good, the UCC rules will govern this contract. Further, Marta is the owner of a successful fishing shop, and Don sells bait coolers. They can both be considered merchants and the UCC's merchant rules should also apply.

II. Contract Formation

A valid contract requires an offer, acceptance, and bargained for consideration. Under the UCC, goods that cost over $500 require that the contract be in writing to satisfy the Statute of Frauds.

The facts state that Marta and Don entered into a “valid written contract" to purchase the Bait Mate cooler. Marta and Don mutually assented for Marta to purchase a Bait Mate cooler for $5,500 to be delivered no later than April 15. Because the contract was for over $500 for a purchase of a good, the contract needed to be in writing to satisfy the Statute of Frauds, which Marta and Don satisfied.

III. Breach of Contract

A. Anticipatory Repudiation

A person who unequivocally states that they will not perform the contract before the time performance is required will have been considered to anticipatorily repudiate the

contract. The other party who has not repudiated can treat this as a total breach and sue on the contract prior to the time of performance.

Two weeks after Marta and Don entered into their contract, Don called Marta and expressed his concerns in procuring a Bait Mate cooler. Marta told Don that meeting the April 15 deadline "was imperative" and Don merely responded that he would "see what's possible."

Marta may argue that Don anticipatorily repudiated the contract by telling Marta that he may not be able to perform on the contract before the contract was due. However, his statements were not unequivocal as to his inability to perform. Rather, Don only expressed doubt as to his ability to procure and deliver.

Because Don did not unequivocally state that he would not be able to deliver the Bait Mate cooler, he will not have been considered to have anticipatorily repudiated the contract.

B. Reasonable Assurances for Insecurity

Under the UCC, a buyer who has reasonable concerns or insecurity about the seller's ability to tender a good can request assurances that the seller will tender a good. The seller must offer the assurances within a reasonable period of time (generally no more than 30 days) or else the buyer who requested the assurances can treat the lack of assurances as a contract breach. The buyer has no duty to inform the seller that she is seeking to cover through the breach.

Here, Marta had reasonable concerns that Don would not be able to tender the Bait Mate cooler. Don himself raised his concerns about his possible inability to procure and deliver the good, and when Marta reminded him that she needed the cooler by April 15, Don did not assuage her concerns by stating that he would absolutely perform. Instead,

he merely responded that he would see what was possible. Thus, Marta had reasonable concerns and was within her right to ask Don for further assurances.
Don, however, might point out that Marta demanded that he provide the supplier's guarantee that the unit would be made available by the delivery deadline. He did not want to reveal the identity of his cooler supplier and he believed that Marta's demand was unjustified. However, as discussed above, it was reasonable for Marta to have the concerns about Don's inability to deliver the contracted good. Accordingly, Don should have provided assurances and communicated his ability to tender the goods as contracted within a reasonable period of time. Don not only failed to respond to Marta in a reasonable time, he wholly failed to respond to her.

Don may counter that Marta should have informed him that she was treating his failure to respond as a breach of contract. However, Marta is not under any obligation to do so after not receiving assurances for her reasonable insecurity.

Because Marta had reasonable grounds to be insecure about Don's delivery of the bait cooler, Don should have replied to Marta within a reasonable period of time. Don failed to provide Marta any sort of assurance. Accordingly, Marta was justified in treating Don's lack of assurances as a breach.

However, if Marta did not have reasonable grounds to be insecure, and should not have treated the lack of assurances as a breach, then she can point out that Don breached the contract when he failed to deliver on April 15 (discussed below).

C. Failure to Tender the Good on the Contracted Date

The UCC requires that goods be perfectly tendered. This requires that the products have no defects and that they are delivered by the date required.

Marta can argue that even if she couldn't treat Don's failure to provide assurances as a breach, that Don breached the contract because he failed to deliver the cooler on the

contracted date. Marta and Don's contract stated that Don would deliver *no later than April 15*. However, Don delivered on the 16th. By failing to tender delivery of the good by the contracted date, Marta can argue that Don breached and she isn't required to accept the good.

Don may argue that he substantially performed by delivering the day after, and in any case, the contract did not specify that time was of the essence. Further, he might argue that Marta was not harmed by the delay, because he still delivered the cooler before the first day of fishing season on May 1. However, Marta can correctly point out that those defenses such as substantial performance and delivery within a reasonable time frame after the contracted date where time is not of the essence is not applicable to UCC contracts. Perfect tender requires delivery on the contracted date. In any case, Marta may further counter that the contract was specific about the date the cooler needed to have been delivered. Additionally, she had made known through her fax communication in February that she needed the cooler on April 15 because she needed sufficient time to set up the cooler.

Because Don failed to perfectly tender the good, by not delivering the good on the contracted date, Don breached the contract.

D. Purchase of the Replacement Good Prior to Date of Delivery

Don might argue that it was Marta who breached the contract by purchasing a replacement cooler before the affected delivery date. However, as discussed above, if he failed to provide assurances for her reasonable insecurity, then Don was in breach and Marta was entitled to cover. If Don breached on April 15, Marta's cover purchase on the 14th should not be considered a breach of contract because Marta may still have been able to perform had Don delivered on April 15. However, Don did not deliver nor was Don aware of Marta's cover purchase.

IV. Damages for Contract Breach

A. Expectation

Where a contract has been breached, and the buyer is without the good and the seller has the good, the UCC provides that the buyer can receive expectation damages for the breach. This would place the non-breaching party in the position it would have been in had the contract been fulfilled. This can include the cost to cover and purchase the replacement good.

Here, Marta expended $7,500 to purchase a replacement Bait Mate cooler on April 14th. This included a $2,000 premium for the one-day delivery of the cooler by April 15. Marta paid $5,500 for the cooler itself, which is the same price she would have paid to Don for the same cooler. Marta then paid an additional $2,000 to have this cooler delivered within one day.

As to the cooler itself, Marta did not pay additional costs to actually cover for the replacement Bait Mate cooler. Thus, as to the cost of covering for the replacement cooler, Don would not be liable for any additional costs to cover the purchase of the replacement cooler.

Marta might argue that Don should be liable for the additional $2,000 it cost to deliver the Bait Mate cooler because this is the additional cost it required to have the cooler delivered by April 15, and place her in the position she would have been in had Don performed on the contract. Don will counter (as discussed below) that Marta did not mitigate her damages.

Consequential damages

A breaching party can also liable for the foreseeable indirect harm that results from the breach of contract. This might include, for example, economic harm that Marta's shop faced when she didn't have the Bait Mate cooler on the date contracted.

Here, it does not appear that Marta is alleging such losses that relate to Don's breach.

Incidental damages

A breaching party can also be liable for incidental damages, which cover the ordinary expenses the non-breaching party may have incurred in responding to the breach of contract. This includes the costs of inspection, the costs to return the non-conforming good, or the costs of negotiating with a new vendor to cover a good.

Marta does not appear to have additional incidental costs related to negotiating with the new supplier for the replacement cooler.

B. Duty to Mitigate Damages

The non-breaching party still has a duty to mitigate damages and minimize the costs that the breaching party will be liable for.

Here, Don might point out Marta breached her duty to mitigate the damages.

If Marta is correct in arguing that Don breached the contract by failing to provide assurances for her insecurity, Don will point out that the breach would have occurred when he failed to provide the assurances in a reasonable period of time. Marta demanded assurances in mid-February and Don never responded. Don will point out that if Marta is correct that he failed to provide necessary assurances, then he would have breached after that reasonable time period expired. We can assume that 30 days would be a reasonable response period. Accordingly, Don would have breached the

contract in mid-March. However, Don can point out that Marta did not seek to replace the Bait Mate cooler until April 14.

Marta may argue that she had been looking for a replacement cooler and it wasn't until April 14 that she was able to enter into the contract. However, the facts do not indicate that Marta took those steps to replace the cooler. If Marta breached her duty to mitigate because she failed to try and cover earlier, then Don has a strong argument as to why he should not be liable for the $2000 premium Marta paid.

Further, Don might argue that if it wasn't reasonable that Marta demanded assurances, then his breach of contract did not occur until April 15, but Marta purchased the cooler on April 14. He might argue that he shouldn't be liable for Marta's premium purchase prior to the breaching date, but he could be liable had she purchased after the breach and paid a premium for the speedy delivery.

Don has a strong argument that Marta breached her duty to mitigate. Accordingly, Don may not be liable for the $2,000 premium Marta paid on her replacement cooler.

QUESTION 1: SELECTED ANSWER B

Governing Law

The UCC governs contracts for the sale of goods. Goods are tangible and moveable items. The common law governs all other contracts. If the UCC governs, certain rules will apply if the parties are merchants. Merchants are those who deal in the type of goods or have specialized knowledge or skill regarding the goods. Implied in every UCC contract is a covenant of good faith and fair dealing.

Here, there is a contract for a bait cooler. A bait cooler is a tangible good, and therefore, the UCC will govern this contract. Marta owns a fishing shop, which means she has specialized knowledge and skill and deals in the type of goods here (fish and fishing supplies), so she is a merchant. It is unclear is Don is a merchant. Marta has contracted with Don to purchase a bait cooler, but nothing in the facts indicate if Don is a commercial seller of bait coolers, or anything else to indicate his status as a merchant. However, because this is a very expensive cooler ($5,500), it is very likely that Don is a merchant seller of bait coolers. Also, because Don is procuring it for Marta, as opposed to having one personally and selling it online or by advertisement, that tends to show he is a merchant seller. Certain rules may apply relating to the parties as merchants. Also, because this is a UCC contract, there is an implied covenant of good faith and fair dealing.

Contract Formation

To have a valid contract, there must be mutual assent and consideration. Mutual assent is an offer and acceptance. An offer is a manifestation to presently have the intent to contract, with the terms clearly specified, communicated to the offeree. An acceptance is a manifestation to assent to the terms of the offer. Consideration is a bargained-for exchange, consisting of a legal value to one party and a legal detriment to the other. Consideration usually comes in the form of performance, forbearance, or a promise to perform or forbear.

Here, the facts indicate that a valid written contract was formed on February 1st; therefore, it can be inferred that there was a valid offer and acceptance. The consideration for the contract was the promise by Marta to pay the $5,500, and for Don to procure and sell to Marta a bait cooler.

Statute Of Frauds

Certain contracts must be in writing to be enforceable, signed by the party against who enforcement is sought. One such type of contract is a contract for the sale of goods over $500.

Here, the contract is for a good (cooler) for $5,500, which is over $500. The facts indicate that a valid written contract was entered into. Therefore, it is assumed that the statute of frauds is satisfied.

Anticipatory Repudiation

When one party gives a clear and unequivocal indication that he will not perform his end of the contract, the other party can treat that as an anticipatory repudiation, which is an instant breach of the contract. When this occurs, the non-breaching party may elect to not perform and immediately sue for damages, or to wait until performance is due and then sue for damages.

Here, On Feb 15, Don called Marta and told her that he was having trouble procuring the cooler. Marta reminded Don that there was a strict deadline of April 15, and Tom told her he would "see what is possible", using a doubtful tone. Because these words are not a clear and unequivocal indication that Don would not perform, there is not an anticipatory repudiation. To have an anticipatory repudiation, Don would have had to say something more along the lines of "I will not be able to procure the cooler by April 15". Because Don's words did not amount to an anticipatory repudiation, Marta cannot treat the contract as breached as of Feb 15. However, she can demand assurances.

Reasonable Grounds For Insecurity and Demand for Assurances

When a party has reason to believe the other party may not be able to perform, typically actions by the other party that fall short of an anticipatory repudiation, the party may, in writing, demand assurances of performance by the other party. If commercially reasonable, the demanding party may suspend performance. Additionally, if the party who has given reasonable grounds for insecurity does not provide assurances within 30 days, the other party may treat that as an anticipatory repudiation and immediately treat the contract as breached, even if the time for performance has not come.

Here, Don's words to Marta on the phone did not amount to an anticipatory repudiation (above), but, they certainly gave Marta reasonable grounds for insecurity. At the time the contract was formed, Marta and Don agreed that the cooler would be delivered no later than April 15. On the Feb 15 phone call, Marta again reminded Tom of the strict deadline. When Tom, using a doubtful tone, said he will see what is possible, this gave Marta reasonable grounds for insecurity. Marta was worried that he would miss the deadline and she would not have time to set the cooler up and ready for the first day of the fishing season. Marta faxed Don, which meets the writing requirement, asking him to provide assurances of performance by providing his supplier's guarantee that the unit will be available. Don believed that this was overblown and did not respond. Marta will argue that Don needed to provide assurances within 30 days. Because Don did not respond, Marta can treat the contract as repudiated as of 30 days after the fax, which would be March 15. Don did not want to give up his supplier's identity, and may argue that although Marta's grounds for insecurity are reasonable, that her demanding his suppliers guarantee was unreasonable. Don is assumingly in the business of procuring items for fishing shops, and he will argue that if he gave up his suppliers identity, Martha may go straight to the supplier in the future for her needs and circumvent Don. A court could go either way on deciding this issue. A court will surely find that Marta had reasonable grounds for insecurity, but may find that her demand for assurances (providing the supplier) was not reasonable. However, the court would likely find that Don doing nothing, and not responding at all, was also reasonable and not in good faith.

If Don did not want to give up his supplier, he still could have replied and given Marta assurance that he would perform by the deadline.
It is most likely that a court would find that Don failing to respond to Marta's insecurity within 30 days amounted to an anticipatory repudiation. In that case, Marta could treat the contract as breached immediately and find other options for her cooler, and sue Don for damages. However, even if the court finds that it did not amount to a repudiation, Don will still be in breach of the contract for delivering late.

UCC Perfect Tender

In UCC contracts, there must be a perfect tender of goods; otherwise there is a breach. A perfect tender means every item is delivered as promised, and at the correct time. When there is not a perfect tender, the non-breaching party may take the non-conforming goods and sue for damages, reject some goods and keep some, or reject all the goods and sue for damages. The non-breaching party must notify the seller of the breach and if they are going to accept or reject the goods, and if they reject, must timely return the goods, arrange for the goods to be shipped back, hold the goods for pickup, or re-sell on the breaching party's account.

Here, Don attempted to deliver the cooler on April 16th, one day late of the strict deadline. Because Don did not deliver on the agreed deadline (April 15), he did not make a perfect tender. Therefore, Don has breached, and Marta is under no obligation to accept the cooler. The facts indicate that Marta promptly notified Don that she was refusing delivery, as required by the rules.

Damages

Marta's Damages Claims

When a UCC contract has been breached, the non-breaching party may sue for and receive compensatory damages. The most common compensatory damages are expectation damages, incidental damages, and consequential damages.

Expectation Damages

Expectation Damages put the non-breaching party in the position they would be had the contract not been breached. Expectation damages must be foreseeable, certain, and mitigated. When the seller has breached, the expectation damages would normally be the fair market value of the good minus the contract price, or the cost to cover minus the contract price.

Here, Don and Marta contracted for the sale of the cooler for $5,500. Because Don did not perform by the deadline of April 15, and because he likely repudiated when he did not respond to Marta's request for assurances, Marta was entitled to either sue for the difference in the fair market value of the cooler and the contract price, or to cover and sue for the difference between the cost of cover and the contract price. Here, Marta covered and purchased a different cooler for $7,500. Marta will argue that Don is liable to her for the difference of $2,000. Don may argue that he should not be liable for this difference, because the fair market value (and the price it appears Marta paid) of the cooler was actually only $5,500; the $2000 extra was a one day rush delivery fee. Marta will argue, however, that she had no choice but to pay the $2,000 delivery fee, since she needed it by April 15th. Don may also argue that if the court does find he repudiated as of March 15th, that Marta did not mitigate, because she could have found another cooler between March 15 and April 15th, but instead, she waited until April 14th to purchase the cooler with 1 day rush. Marta may respond that when there is a repudiation, she has the option to wait until performance is due to treat the contract as breached. However, Don will then argue that because she bought the new cooler on April 14, not April 15th, that she was not waiting for performance. Also, Don will likely successfully argue that Marta MUST have been relying on the anticipatory repudiation, and not on the perfect tender breach, since she did not wait until his performance was due on the 15th to purchase the new cooler.

A court could go either way. Don may have to pay Marta the $2000 difference for what she paid and the contract price, but, the court also might find that Marta did not mitigate, and therefore the $2000 rush fee was avoidable. However, if Marta did in fact look

around for coolers between March 15 and April 15 and just could not find one until April 14, then she will have met her duty to mitigate and could recover the $2,000.

Incidental Damages

Incidental damages are those damages that are incidental to the breach, and are always expected, such as costs to return or store the goods.

If Marta incurred any incidental costs, such as advertising that she was looking for a cooler, or long distance calls to other suppliers, etc., then she will be able to recover these costs also.

Consequential Damages

Consequential damages are special damages that are unique to the non-breaching party, such as lost profits, and they must be foreseeable at the time of contracting to the breaching party to be recoverable.

It does not appear that Marta suffered any consequential damages as a result of the breach, but if she did, and they were foreseeable, then she could recover these too.

Punitive Damages

Punitive damages in contract cases are not recoverable. Marta will not be able to recover any punitive damages, because they are not available in breach of contract actions.

Don's Damages Claims - Restitution

Restitution is an equitable remedy meant to prevent unjust enrichment. Typically, this type of remedy is used when a contract is unenforceable, and one party received a benefit but did not have to pay for it. In such a circumstance, the other party can usually receive the reasonable value of their services. At common law, the breaching party could not receive restitution. But, modernly, many courts will provide reasonable value of services even to the breaching party to prevent unjust enrichment by the non-breaching party.

Here, Don may argue that he is entitled to something from Marta, since he procured the cooler, and likely had to pay for the cooler from his supplier to get it for Marta. However, Marta will successfully argue that she was not unjustly enriched in any way, because she did not get anything from Don. She did not keep the cooler. Don may then try to argue that the services he provided in spending the last few months procuring the cooler were valuable services, and that he should be compensated for the procurement services. However, a court will likely find this a very weak argument, as Don breached the contract, and Marta received absolutely no benefit from Don.

Torts

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2001 CALIFORNIA BAR EXAMINATION

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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.

QUESTION 5

Ann, an attorney, represented Harry in his dissolution of marriage proceedings, which involved an acrimonious dispute over custody of Harry and Wilma's minor children.

Ann advised Harry that a favorable custody ruling would be more likely if he could show that Wilma had engaged in improper behavior. Two days after receiving this advice Harry came to Ann's office with his wrist heavily bandaged. Harry told Ann that, when he went by the family home the prior evening to get some of his things, Wilma had tried to run over him with her car, actually hitting him. This was the first suggestion of any violence between Harry and Wilma. After listening to Harry's story, Ann urged Harry to sue Wilma for assault and battery. Ann said: "Filing this suit will improve our bargaining position on custody." Ann did nothing to investigate the truth of Harry's story.

Just before the hearing on custody, Ann filed a tort action on Harry's behalf alleging Wilma had committed an assault and battery on Harry. Ann referred to the tort action at the custody hearing, and Wilma denied that the incident ever occurred. The judge, however, believed Harry's version and awarded sole custody to Harry.

Three months later, Ann learned that Harry had fabricated the story about how he injured his wrist. Ann did not report Harry's lie to anyone and merely failed to prosecute the tort action, which, as a result, was dismissed with prejudice. Wilma then sued Ann for malicious prosecution, abuse of process, and defamation. Wilma also filed a complaint against Ann with the State's office of lawyer discipline.

A: What is the likelihood that Wilma can succeed on each of the claims she has asserted in her civil suit against Ann? Discuss.

B: Did Ann's conduct violate any rules of professional ethics? Discuss.

ANSWER A TO QUESTION 5

I. **What is the likelihood that Wilma (W) can succeed on the following claims against Ann (A)?**-

A. **Malicious Prosecution-**

Malicious prosecution requires (1) filing of a claim against a party for a purpose other than seeking justice, (2) the claim being dismissed in the defendant's favor (3) that there was a not sufficient probable cause to bring the claim, and (4) damages.

On the first element, W will likely argue that A should have known that the claim was frivolous, or at least suspected that the claim might not be valid because H was suddenly injured two days after A advised H that he needed to obtain evidence of improper behavior by W. Further, W may assert that the fact A filed the claim right before the custody hearing suggests that A's intent was to use the claim against W in the custody hearing. Because A did use the information of the claim in the custody hearing, W will likely meet the requirements of this element (additionally, that A stated to H her intent to file to improve the likelihood of success is evidence of filing for an improper purpose. However, this is confidential communication and W would likely not ever be aware of it).

On the Second Element, the claim was dismissed with prejudice in favor of W because A failed to prosecute the claim prior to filing. Therefore, this element is satisfied.

On the Third Element, W will argue that because the event did not occur, that it was impossible for A to have sufficient probable cause that the event occurred. W will further argue that A failed to make a reasonable investigation to determine whether there was any substance to H's claims (such as inspecting the car, arranging to depose W to determine if W was the driver . . . etc . . . . .). While A may assert that she had probable cause due to H's injuries, such a line of argument may be undermined by A's failure to investigate the extent of H's injuries by requesting H to seek a doctor. Because there was insufficient probable cause to bring the claim for either battery or assault, W will win on this element.

On the Fourth Element, W must establish some form of pecuniary loss. Because W was required to undergo the expense of preparing to defend the claim against her, W has suffered loss.

Because W has met her burden on all of the elements, she will likely win here.

B. Intentional Infliction of Emotional Distress-

Further, W may seek damages for emotional distress under IIED. Because A's conduct was beyond the scope of social tolerance, and A had demonstrated recklessness by not pursuing an investigation, if W has suffered severe emotional distress, W may recover here.

C. Abuse of Process-

To establish abuse of process, a party must show (1) that a claim was brought to further an improper purpose, (2) that there was a sufficient act or threat used to accomplish that purpose, and (3) damages.

With regard to the first element, W may argue that the claim was not brought to adjudicate H's injuries, but rather to create false evidence to use against W in the child custody hearing. W may demonstrate that there was no proper purpose by showing that the claim was brought immediately before the child custody hearing even though the claim was not ready to file due to an insufficient investigation. Further, W may assert that the claim was raised as evidence in the hearing, and that after its usefulness had been served, A left the claim to wither by failing to even try and prosecute it. (Additionally, A stated to H her intent to file to improve the likelihood of success is evidence of filing for an improper purpose. However, this is confidential communication and W would likely not ever be aware of it.) While A may assert that she had a justification to file the claim due to H's injuries, such an argument may be undermined by A's failure to investigate the extent of H's injuries by requesting H to seek a doctor. Because there is sufficient evidence that the claim was brought to further H's interests in the custody hearing and not to adjudicate the alleged battery or assault, W will win on this element.

On the second element, W may assert that the act of filing the claim was intended to place pressure on the judge to award H custody by discrediting W's character. Because A filed a frivolous tort claim against W to achieve those purposes, A has engaged in a sufficient act under this element.

Because W has undergone damages, both emotionally (from the claim itself, and its effect in causing W to lose custody of her children) and economically (expenses in fighting the claim), there is sufficient damage here. Therefore, because W has satisfied all of the elements of the claim, she will likely win here.

D. Defamation- To establish a claim for defamation, the plaintiff must prove the following elements:

1. Defamatory Statement-

A statement satisfies the defamatory element if the statement causes harm to a person's reputation. W will argue that a charge of assault and battery ruined her reputation (as evidenced by the judge's decision not to grant W custody of the children). Unless A can show evidence that W had a reputation for being violent, W will win this element.

2. Of or Concerning the Plaintiff-

A statement can be said to be "of or concerning the plaintiff" if a reasonable person would know that the statement was about the plaintiff. Here, the claim was filed in W's name. Therefore, a reasonable person would be able to determine that the statement was concerning W.

3. Publication-

The publication element requires that the statement be memorialized in some medium, or communicated to a 3rd party. Here, the statement that W had assaulted H was not only written in a claim that is public record, the claim was raised in the presence of several persons in the courtroom. Therefore, this element is satisfied.

4. Damages-

As a general rule, a plaintiff does not need to establish damages if the statement was either libel or slander per se. Because the statement was recorded in writing and became public information, the statement is libel. However, W may assert that the statement was slander per se as well. A statement that reflects a crime of moral turpitude will fall under slander per se. W may argue that the battery against a spouse carries a high stigma in our society (and may use the judge's reaction as evidence). Because there is libel and slander per se, W will win on this element.

5. Are there any defenses?-

a **Absolute Privilege**-

A may assert that absolute privilege applies here. Although A is not a state actor, she is an officer of the court and the statements made against W were in furtherance of her duty to her client as an officer of the court. However, A may assert that A's intention in bringing the claim was not to further H's interests with regard to the assault and battery and that A failed her duty to the court by bringing frivolous claim and should not be entitled to immunity. Because A did not know that H was fabricating his story at the time A filed the claim (even if filed for improper purposes), A should be entitled to privilege here and should not be held liable for defamation.

b. **Qualified Privilege**-

Does not apply.

II. **Did Ann's conduct violate any rules of professional ethics?**-

A. **Duties to the Court-**

1. Filing Frivolous Claims (Rule 11 FRCP)-

Under Rule 11, an attorney, by signing the pleading, agrees that: (1) attorney has brought an action for a proper purpose, (2) the attorney has not brought a frivolous claim, (3) the claim is supported by admissible evidence, and (4) a reasonable investigation have [sic] been conducted to ensure the above.

Here, A should have known that the claim was frivolous, or at least suspected that the claim might not be valid because H was suddenly injured two days after A advised H that he needed to obtain evidence of improper behavior by W. Further, prior to filing the claim A was required to ensure that the claim was supported by admissible evidence. Because A failed to conduct a reasonable investigation to determine whether the evidence was valid, and the claim was meritorious prior to filing the claim, A has violated the rules of ethics.

2. Duty to not allow client to commit perjury-

Under the model rules, if a client admits that he/she has committed perjury, the attorney must advise the client to inform the court. If the client refuses, the attorney must attempt to withdraw from representation, and if withdrawal is not possible, the attorney must disclose the perjury to the court. However, under the CA rules, once an attorney has advised the client to disclose the perjury to the court, and the client refuses, the attorney cannot disclose the perjury.

Here, A discovered that H had lied about W trying to hit H with the car, and that H had feigned his injury. Under either of the above stated rules, A had a duty to advise her client to disclose the perjury to the court. However, A did not advise H to disclose the fabrication, but instead chose to allow the case to die without prosecution. Because A failed to take the critical step of advising H to disclose the lie, A has violated the rules of ethics under both the model rules and the CA rules.

3. Duty to Withdraw-

Under the model rules, an attorney cannot assist her client to commit fraud or a crime and must withdraw if the client insists that the attorney pursue these ends. In CA, an attorney's duty to withdraw is permissive, but not required. Here, although H did not ask A to commit fraud, A's failure to withdraw from representing H after learning that H had created his claim against W is questionable. That A failed to at least request H to drop the claim she knew was frivolous may rise to the level of participating in H's fraud.

B. **Duties to Client-**

1. Breach of Client's Authority-

While an attorney has the right to control the arguments and claims put forth, the client (in civil cases) has the right to determine the objectives of the case. Here, A has asked Harry (H) to file a claim against W for assault and battery. However, H did not consent to filing the claim prior to A's filing. However, because H did not challenge A's filing, H will likely be held to have implicitly ratified A's filing of the claim.

ANSWER B TO QUESTION 5

1. Wilma v. Ann

a. Malicious Prosecution

Malicious prosecution in a civil setting is usually referred to as malicious institution of civil proceedings. It occurs when: 1) a plaintiff institutes civil proceedings against a defendant; 2) the proceedings are instituted for an improper purpose; 3) the proceedings are resolved in favor of the defendant; 4) the proceedings were instituted without probable cause or a reasonable basis for believing their merit; 5) harm.

First, Ann instituted the tort action against Wilma for assault and battery of Harry.

Second, the facts suggest that the sole reason for instituting the proceedings was to gain an advantage in the acrimonious custody battle of the children of Wilma and Harry. The most damaging fact is that Ann "urged" Harry to sue Wilma and said: "Filing this suit will improve our bargaining position on custody." The fact that Ann mentioned the tort action in the custody hearings suggests that her purpose in bringing the action was for the advantage in the custody battle. Additionally, Ann failed to investigate the facts involved in this situation before bringing the case. When a lawyer brings an action for any reason other than to vindicate the rights of the plaintiff, the purpose is improper. Therefore, Ann acted improperly when she instituted the proceedings against Wilma.

Third, the tort action was dismissed with prejudice when Ann failed to litigate it. Dismissal with prejudice means that Harry is precluded from bringing the action in the future. Therefore, this designation suggests that Wilma is "off the hook" for this tort action and the proceedings were, in fact, resolved in her favor.

Fourth, the facts suggest that Ann brought the action without a reasonable factual basis for believing in its merit. Ann suggested that Harry would have an advantage if he could show that Wilma had engaged in improper behavior. The fact that Harry came into Ann's office just 2 days after hearing this, claiming that Wilma had attempted to run him over with the car, creates a suspicious causal connection between the advice and the claim. Additionally, the facts indicate that this was "the first suggestion of any violence between Harry and Wilma" and should have put Ann on notice that the claim needed more investigation before bringing suit.

Ann will argue that she is entitled to believe in Harry's account, and the fact that he had a noticeably bandaged hand gave her a reasonable basis for bringing the suit. Since the judge in the custody hearing believed Harry, he must have been quite convincing. However, as discussed above, this probably is not enough basis to bring the suit, given the circumstances between Harry and Wilma's acrimonious custody battle.

Fifth, Wilma will certainly be able to show harm because the judge awarded full custody to Harry and she has no custody of her children.

Therefore, because all of these requirements indicate that Ann acted improperly, Wilma will likely be successful on her claim of malicious institution of civil proceedings.

b. Abuse of Process

Abuse of process occurs when a legal process or proceeding is used to gain an improper advantage and such advantage results in harm to the plaintiff. Here, Ann used the legal process of a civil claim in tort against Wilma for allegedly assaulting and battering Ann's client, Harry.

As discussed above, Ann used this process to gain an improper advantage in the custody hearing between Harry and Wilma. Her advantage was improper because the facts suggest that the sole reason for instituting the proceedings was to gain an advantage in the acrimonious custody battle of the children of Wilma and Harry. The most damaging fact is that Ann "urged" Harry to sue Wilma and said: "Filing this suit will improve our bargaining position on custody." The fact that Ann mentioned the tort action in the custody hearings suggests that her purpose in bringing the action was for the advantage in the custody battle.

Wilma was also likely disadvantaged by Ann's use of the tort action against her. The facts indicate that the judge believed Harry's version of the story over Wilma's and awarded him sole custody of their children. Therefore, Wilma suffered harm and will be successful in showing that Ann abused process by bringing the tort action against her.

c. Defamation

Defamation is the: 1) publication 2) to a third party 3) of a statement about the plaintiff 4) that tends to adversely affect the reputation of the plaintiff. Here, Ann instituted a tort action for assault and battery against Wilma. By filing this complaint, she published in writing the accusations that Wilma acted violently with her husband. This publication is a form of libel. The publication was to a third party because it was filed with the court. Ann published the statements a second time by arguing about them before the judge in the custody hearing. This oral publication is a form of slander.

Because Wilma is not a public figure and the matter is not one of public concern, Wilma does not need to prove that the statement was false.

The statements were clearly about Wilma as the complaint had to name her as defendant and the statements in court must have expressly indicated Wilma as the tortious batterer. These accusations probably tend to adversely affect Wilma's reputation. The accusations suggest that Wilma has violent tendencies against her ex-husband. While some listeners might readily forgive such tendencies, a judge considering whether Wilma is a proper parent certainly would not. Therefore, the accusations not only tend to adversely affect Wilma's reputation but, in fact, hurt her reputation with the judge presiding over the custody hearing.

Defenses

No adequate defenses exist for the malicious prosecution or abuse of process actions.

Common Interest

Ann will try to argue that she had a defense to the defamation action because she made the statements to parties with a common interest. However, this privilege is only a qualified privilege that can be extinguished with abuse. Even though Ann's publication to the judge and the court were to interested parties, Ann did not make any efforts to investigate the truth of the accusation and therefore she abused her privilege of spreading the accusations about Wilma.

Absolute Litigation Privilege

Ann will argue that her comments to the court were privileged because comments in a courtroom have an absolute privilege. Because Ann's publications were to a judge and were in a tort complaint, they do qualify as protected under the absolute privilege for statements made in a courtroom. Therefore, Wilma's defamation action against Ann will fail.

2. Professional Conduct

Duty of Candor to the Court

As an officer of the court, lawyers owe the court a duty of candor. This requires that lawyers do nothing to promote fraud on the court. Ann may have violated this duty by instituting a tort action against Ann without fully investigating the facts first and for the improper purpose of gaining an advantage in the custody battle. Furthermore, she planted the idea in Harry's mind to fabricate conduct about Wilma, thus aiding a client to defraud the court.

When a client seeks representation that would require the attorney to engage in conduct that violates a law or ethical standard, the attorney must withdraw from the representation. Ann should not have represented Harry in this action and should not have counseled her client to improperly gain an advantage by claiming a tort injury. Therefore, Ann will be subject to discipline for this conduct.

Additionally, Ann may have violated her duty of candor to the court when she learned that Harry's story about Wilma was fabricated and merely failed to prosecute the tort action against Wilma.

The ABA Model Rules require that lawyers may not assist their clients in lying to the court. The ABA and California rules say that lawyers may withdraw if they learn that a client has used the lawyer to assist them in a past crime or fraud. California rules of conduct say that lawyers must do nothing to further the deception.

Here, when Ann found out about Harry's lies, she merely failed to prosecute the action against Wilma rather than withdrawing the action. This may have violated her duty of candor to the court because she allowed the case to remain on the docket even after finding out about the lie. Therefore, Ann may be subject to discipline for this action.

Duty Not to Suborn Perjury

Lawyers must not aid clients in suborning perjury. Here, Harry lied to the judge during the custody hearing by claiming that Wilma had engaged in tortious conduct. The ABA would allow Ann to withdraw. California does not allow Ann to do so but she must do nothing to further the deception. In either case, Ann should have counseled Harry to retract his lies to the judge so that the judge would be able to properly rule on the custody matter with truthful facts.

Duty of Fairness to the Adversary

Lawyers owe a duty of fairness to their adversaries. This duty precludes lawyers from engaging in conduct that obstructs the truth-seeking process. By filing a suit to gain an advantage in the custody battle, Ann violated her duty of fairness to Wilma as the adversary. Therefore, Ann is subject to discipline for this violation as well.

Duty of Competence

The rules of professional conduct require that lawyers competently serve their clients. The duty of competence requires lawyers to possess all of the knowledge, skill, thoroughness and preparation necessary for the representation.

Here, Ann may have violated her duty of competence by suggesting that Harry find some improper behavior in Wilma and by urging Harry to file a tort claim for assault and battery without first investigating all of the facts. When Harry came to Ann just two days after Ann's suggesting that Wilma's improper behavior would advantage [sic] Harry in the custody battle, Ann failed to prepare for tort litigation by investigating the facts of the incident. She merely accepted Harry's word.

Additionally, because this was the first suggestion of violence between Harry and Wilma, Ann should have been on notice that investigation was necessary. Therefore, Ann is also probably subject to discipline for violating her duty of competence in failing to adequately prepare for the tort claim against Wilma.

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2002 CALIFORNIA BAR EXAMINATION

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QUESTION 5

Manufacturer (Mfr.) advertised prescription allergy pills produced by it as "the modern, safe means of controlling allergy symptoms." Although Mfr. knew there was a remote risk of permanent loss of eyesight associated with use of the pills, Mfr. did not issue any warnings. Sally saw the advertisement and asked her Doc (Doc) to prescribe the pills for her, which he did.

As a result of taking the pills, Sally suffered a substantial loss of eyesight, and a potential for a complete loss of eyesight. Sally had not been warned of these risks, and would not have taken the pills if she had been so warned. Doc says he knew of the risk of eyesight loss from taking the pills but prescribed them anyway because "this pill is the best-known method of controlling allergy symptoms."

Bud, Sally's brother, informed Sally that he would donate the cornea of one of his eyes to her. Bud had excellent eyesight and was a compatible donor for Sally. This donation probably would have restored excellent eyesight to one of Sally's eyes with minimal risk to her. The expenses associated with the donation and transplantation would have been paid by Sally's medical insurance company. Sally, however, was fearful of undergoing surgery and refused to have it done. Thereafter, Sally completely lost eyesight in both of her eyes.

Sally filed a products liability suit against Mfr. seeking to recover damages for loss of her eyesight. She also filed a suit for damages against Doc for negligence in prescribing the pills.

What must Sally prove to make a prima facie case in each suit, what defenses might Mfr. and Doc each raise, and what is the likely outcome of each suit? Discuss.

ANSWER A TO ESSAY QUESTION 5

Sally will bring products liability actions against Mfr. based on strict liability, negligence, intentional torts and warranty theories.

Strict Products Liability

A strict products liability prima facie case requires a manufacturer or (dealer) of the goods, an unreasonably dangerous product that could have been made safer with adequate warning, a foreseeable user of the product and a foreseeable use of the product that results in injury.

Mfr. is the manufacturer of the prescription allergy pills. The pills were rendered unreasonably dangerous by Mfr's failure to include a warranty that there was a remote risk of permanent loss of eyesight associated with the use. Sally was a foreseeable user because she was an allergy sufferer who read the Mfr's advertisement. Sally was injured because she suffered a substantial loss of eyesight as a result of using the pills, with eventual, total loss of eyesight.

Mfr's Defenses

Mfr. will first assert that the allergy pills are available by prescription only and they had informed doctors of the remote risk (Doc here was aware of the risk), and they were entitled to rely on Doc as a learned intermediary that would adequately warn patients as part of his prescription analysis and treatment.

This will not succeed as Mfr. directly advertised the availability of the allergy pills as "the modern, safe means of controlling allergy symptoms" directly to Sally. Sally relied on the advertisement in requesting Doc to prescribe the pills.

Next Mfr. will assert Sally assumed the risk by taking the prescription pills. This will surely fail. Sally was not aware of the risk, much less willing to take it.

Finally, Mfr. will assert Sally had a duty to mitigate her damages. If a person unreasonably fails to seek medical care that could prevent or lessen damages, the defendant will not be liable for that preventable danger.

Here Sally had the opportunity to undergo surgery to replace a cornea. Her brother Bud was a willing and compatible donor and the surgery would likely

have been a complete success. Additionally, Sally's insurance would have paid all expenses.

Because Sally was fearful she was unwilling to undergo the surgery. The issue is whether Sally was reasonable in that fear and whether Mfr. should be liable for her resulting complete loss of eyesight.

Normally a defendant is liable for all a plaintiff's injuries caused by the defendant even if the extent is more serious than expected. It is likely though that a jury would find Sally unreasonable under the circumstances here because of the low risk, the likelihood of success and the full coverage by insurance. Mfr. will be liable for some damages for Sally's loss of eyesight but not for permanent and total loss.

Mfr. Negligence Products Liability

Sally must establish Mfr. owed her a duty of care, that they breached that duty and the breach is the actual and legal cause of her damages.

Duty

Mfr. owes a duty of care to all foreseeable users of its product. All allergy sufferers are foreseeable users; Sally is owed a duty.

Standard of Care

Mfr. owes Sally a standard of care of the reasonably prudent manufacturer of prescription drugs.

Breach

Mfr. breached its duty to Sally by failing to provide a warning with the allergy pills Mfr. was aware of a remote possibility of risk of permanent loss. The burden of providing a warning is minor compared with the magnitude of potential harm. Mfr.'s failure to provide this warning was a duty breach and resulted in Sally's injury.

Actual Cause

The facts state that the allergy pills were a direct cause of Sally's loss of eyesight.

Legal/Prox Cause

It is foreseeable that a failure to include a warning could result in injury. Sally is entitled to rely on the presumption that she would have heeded the warning had she been informed.

Damages

Sally suffered permanent total loss of eyesight in both eyes.

Defenses

In addition to those described above under strict liability, Mfr. will assert contributory negligence. They will assert that Sally failed to use a reasonable standard of care to prevent injury to herself. This defense will not succeed. Sally was not aware of the risk of danger and this defense is not successful if her only negligence is in failing to discover the defect, here the lack of warning.

Intentional Tort Battery

Sally will assert that Mfr. acted to cause a harmful or offensive contact.

Mfr.'s act was intentional in that they knew with substantial certainty that there was a remote risk of eye damage. They intentionally did not include a warning. The harmful or offensive contact was Sally's loss of eyesight.

Damages as discussed above.

Mfr. will assert the defense of consent. Sally will argue Mfr. exceeded the scope of her consent by failing to include the warning that eye damage could result.

Because Mfr. knew of the risk and intentionally failed to warn Sally may prevail here as well.

Additionally Sally will assert warranty theories.

Express Warranty

Mfr. advertised "modern safe means of controlling allergy symptoms." No disclaimers are given in the facts, but disclaimers not valid as to express warranties anyway.

Sally will be entitled to recover here as well.

Implied Warranty of Merchantability

Implied in all sales of goods is the warranty by a merchant seller – here Mfr. – that the goods conform to reasonable standards of the use for which they are designed. While remedies could be limited here, they couldn't be eliminated and disclaimers are deemed unconscionable when personal injury results.

Implied Warranty of Fitness for Particular Purpose

Sally may bring this action against Mfr. or Doc or both. Sally was seeking relief from allergy symptoms. While there is no evidence she did get relief for allergy, it isn't reasonable that the loss of eyesight accompanies such relief. Sally will seek damages from Doc for negligence in prescribing the pills. Sally must show duty, breach, causation and damages.

Doc's Duty to Care and Standard of Care

Doc owes Sally the duty of a member of good standing practicing medicine in a similar area. It is minimally the duty of a reasonably prudent professional. If Doc is an allergy specialist he will be held to a higher standard.

Sally is owed a duty as a reasonably foreseeable plaintiff. As Doc's patient, Sally is clearly owed a duty.

Breach

Doc breached his duty to Sally by failing to give her informed consent about the allergy pills he was prescribing.

The standard of breach here is judged two ways:

1) What a reasonable person would have wanted to know about the risk;

2) What Sally would have wanted to know.

Causation

If a reasonable person wouldn't have consented or Sally wouldn't have consented if the risks were known and if the risks did in fact occur, Doc's breach was the actual and prox cause of injury.

Sally said she had not been warned and would not have consented to take the pills if she had known of the risk. Perhaps Sally had a[n] unusually high sensitivity to concern over eyesight. It doesn't really matter why she wouldn't have consented.

The lack of warning was the actual cause and prox cause of breach.

Damages are discussed above.

Doc will raise same defenses as above.

Doc and Mfr. will each seek contribution on the negligence claims.

ANSWER B TO ESSAY QUESTION 5

Sally v. MFR – Strict Products Liability

Sally may assert a claim of strict products liability against manufacturer. Manufacturers are held strictly liable for products they put into the market in a defective condition creating an unreasonable risk of injury or danger to the consumer. In this case, Sally has the burden of showing that the allergy medication produced by Manufacturer (Mfr) were [sic] defective when it left Mfr's control and the defect created an unreasonable risk of danger or injury to the consumer.

Failure to Warn

A product may be properly deemed "defective" for the purpose of strict liability if the manufacturer fails to place proper warnings on the product. If consumer warnings may be affixed to the product at relatively low cost to the manufacturer, it may be held liable on a products liability for failure to do so.

Here, Mfr will assert that its medication presented a remote risk of permanent eyesight. Inherent in almost all medication is the risk of some sort of unwanted side effect. Mfr will claim that the "remote" nature of the risk means that the product did not pose an unreasonable risk of danger or injury. However, the degree of harm that may be incurred by takers of Mfr's allergy medication is significant. Permanent blindness is a serious debilitating condition. As such even a remote risk may be something a reasonable person may not be willing to assume. As such, it is likely the court will find that the allergy medication produced by Mfr posed an unreasonable risk of danger or injury due to the fact that Mfr failed to place in warnings in its advertisements or on its packaging. Although the facts do not indicate the cost involved in making such warnings, it is unlikely that a label on a package or a statement in advertising is so cost prohibitive to warrant excuse from its duty to warn. As such, Sally will be able to prove that the allergy medication produced by Mfr is defective for failure to make adequate warnings.

Duty

As mentioned above, Mfr had a duty to warn of the damages inherent in its product.

It breached that duty when it failed to make such warnings. In order to recover, Sally must show that she is a foreseeable plaintiff to whom that duty was owed.

Under the majority test, a plaintiff is foreseeable if she is in the "zone of danger" created by defendant's conduct. Here, any person who received a prescription for the allergy medication produced by Mfr was within the zone of danger created by the risk involved in taking the pills. As such, Sally is a foreseeable plaintiff within the zone of danger under the majority approach.

A minority of jurisdictions follow the Andrews approach which holds that all plaintiffs are "foreseeable." As such, Sally would be a foreseeable plaintiff under this approach as well.

Causation

Once Sally has shown that the allergy medication was defective when it left the control of Mfr and Mfr breached a duty owed to her, she must then establish that the defect was the actual and proximate cause of her injuries.

Actual Cause – But for Test

Sally should have no problem proving the defect caused by failing to adequately warn caused her injury. The facts state that Sally would never have taken the pills if she had been warned of the possible side effect of blindness. Therefore, but for Mfr's failure to warn, Sally would not have ingested the pills and subsequently lost her eyesight.

Proximate Cause – Foreseeability Test

Even though Mfr is the "but for" cause of Sally's injury, Sally must also prove that her injury was foreseeable. Here, Mfr was well aware of the risk presented by its allergy medication. Mfr should have been aware of the fact that its failure to warn would cause users of the medication to unwittingly subject themselves to the risk and some of them would in turn suffer blindness. Here, Sally actively sought a prescription for the pills. There was no warning in the advertisements nor on the package and therefore Sally took the medication unaware of its incumbent risks. As a result, Sally lost her sight. Her injuries were foreseeable and therefore proximately caused by Mfr's breach of duty in failing to warn.

Mfr may assert that Doc's failure to inform Sally of the risks involved in the use of the medication was a supervening factor operating to relieve it of liability. A supervening factor is one that is unforeseeable and extraordinary. It is well established that ordinary negligence in the world is foreseeable and not extraordinary. Consequently, Doc's failure to warn is not a supervening factor because his conduct amounts to negligence and is not so extraordinary or unforeseeable as to amount to a supervening factor. As such, Mfr's conduct survives proximate cause analysis.

Damages

Lastly, Sally must prove that Mfr's failure to warn resulted in damages to her. As mentioned, Sally went blind and so damages are easily established.

Sally v. Mfr – Products Liability – Negligence

In the alternative to strict products liability, Sally may also pursue under a negligence theory. The analysis would be the same as for products liability; however, Sally's burden with respect to breach of duty would be different. In pursuing a negligence claim, Sally must show that Mfr was negligent in its production of the allergy medication or failure to include a warning. In other words, Sally must show that Mfr could have taken reasonable steps to prevent the harm caused. Once shown, the analysis would proceed for causation and damages as stated above. Here the facts support equally a theory of negligence and strict liability. Because strict liability is an easier approach to pursue, Sally will likely proceed under this theory.

Breach of Warranty

Express Warranty

Sally may also assert that Mfr breached an express warranty made in its advertisement claims that the allergy medication was the "modern, safe means of controlling allergy symptoms." Sally may assert that the risk imposed means that the medication is not in fact "safe," and therefore Mfr's representations otherwise are unfounded.

Misrepresentation

In addition, Sally may assert that Mfr engaged in intentional misrepresentation. Sally will claim that Mfr's omission with regarding to the risks amounts to a misrepresentation of safety with knowledge of the falsity of the communication. In addition, Sally will claim such communication was made with the intent that consumers rely. Sally, as a consumer, relied on the representation of product safety and was injured. As such, she can proceed under this claim as well.

Defenses

Contributory Negligence and Comparative Fault are NO DEFENSE to Strict Liability and Intentional Misrepresentation

Mfr cannot assert any contributory negligence or comparative fault of Sally as a defense to her strict liability and intentional misrepresentation claims.

Contributory Negligence and Comparative Fault Available for Negligence

Although contributory negligence and comparative fault are available defenses under negligence, the facts do not indicate that Sally was negligent in taking the medication and so Mfr will not be able to assert these claims.

Assumption of Risk

Assumption of risk is a defense to strict liability if defendant can show that plaintiff went forward in face of a known risk. Mfr may try to assert assumption of risk in that Sally actively sought and procured a prescription for the allergy medication and thereby assumed the risk involved in taking the new medication. However, Sally's conduct was in response to Mfr's advertisements and as mentioned above, such advertisements did not contain any warnings of the risks. In addition, the packaging did not contain any warnings. Crucial to the defense of assumption of risk is the element of "knowledge" on the part of the plaintiff. Here, Sally clearly did not have knowledge of the risk of blindness and therefore cannot be said to have assumed the risk.

Duty to Mitigate

A plaintiff has a duty to mitigate her damages. In other words, plaintiff must act to minimize her loss. Failure to do [so] limits the liability of a defendant for any

aggravation of injury caused by the failure to mitigate. Here, Mfr may attempt to limit its liability for Sally's blindness by pointing to her refusal to engage in the cornea transplant operation that could have been accomplished with minimal risk and no cost to her. Sally opted not to go through with the surgery out of her fear of the operation. Plaintiff's duty to mitigate is judged by the reasonable person standard. If the court determines that Sally's decision not to undergo the surgery was not reasonable, Mfr's liability for damages will be seriously curtailed. However, because the mitigation at bar involves major surgery, it may will be likely that a reasonable person would not choose to undergo the risk involved. Even though the risk is stated to be minimal, this is not the same as involving not the same as involving no risk at all. In fact, Sally may well point to the "remote" risk realized by taking Mfr's medication as grounds for her decision not to undertake any further risks with her health and well-being. Depending on the court's determination of the reasonableness of Sally's decision, Mfr's responsibility for damages may or may not be reduced.

Sally v. Doc – Negligence

Sally may assert a claim against Doc in negligence for his failure to warn Sally of the risks involved in taking the allergy medication.

Duty

Here, Doc had a duty to conform his conduct to the reasonable doctor in good standing in the professional community in which he is situated. This means that if Doc fails to act as a reasonable doctor in good standing in his community, he will be held to have breached his duty of care.

Breach of Duty – Failure to Inform

Doctors have a duty to obtain informed consent of their patients with respect to medical treatment. The duty to "inform" is judged by what a reasonable patient would want to know in making health care decisions. This standard is judged from the patient's perspective, not the doctor's. It is irrelevant that the average doctor would not make a disclosure if the court finds that a reasonable patient would want to know the relevant information at bar.

Here, the risk of blindness is information that a reasonable patient would want to know in deciding whether or not to take medication. This is supported by the fact

that Sally states that she would never have taken the medication had she known of the risks. Therefore, Doc's failure to advise is a breach of duty.

Causation

Here, the facts indicate that Doc's failure to warn was both the actual and proximate cause of Sally's injury. Similar to Mfr, Doc cannot point to Mfr's failure to provide a warning as a supervening cause that relieves him of proximate liability. Doc was aware of the risk and therefore had a duty in his own righ[t] to warn Sally. His failure to do so caused Sally to take the medication uninformed and she suffered injury because of it.

Damages

As mentioned above, Sally's blindness amounts to sufficient damages for recovery.

Defenses

Contributory Negligence & Comparative Fault

As mentioned above, the facts do not support a defense on grounds of contributory negligence or comparative fault as Sally manifested no signs of her own negligence in taking the medication.

Assumption of Risk

Doc's claim of Sally's assumption of risk will fail for the same reasons stated above with respect to Mfr.

Duty to Mitigate

The analysis with respect to Doc's liability for damages and any claim based upon Sally's failure to mitigate will proceed in the same manner as discussed above with respect to Mfr.

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.

Question 4

Paula is the president and Stan is the secretary of a labor union that was involved in a bitter and highly-publicized labor dispute with City and Mayor. An unknown person surreptitiously recorded a conversation between Paula and Stan, which took place in the corner booth of a coffee shop during a break in the contract negotiations with City. During the conversation, Paula whispered to Stan, "Mayor is a crook who voted against allowing us to build our new union headquarters because we wouldn't pay him off."

The unknown person anonymously sent the recorded conversation to KXYZ radio station in City. Knowing that the conversation had been surreptitiously recorded, KXYZ broadcast the conversation immediately after it received the tape.

After the broadcast, Paula sued KXYZ for invasion of privacy in publishing her conversation with Stan. Mayor sued Paula and KXYZ for defamation.

1. Is Paula likely to succeed in her suit against KXYZ? Discuss.

2. Is Mayor likely to succeed in his suit against Paula and KXYZ? Discuss.

Answer A to Question 4

1. Paula v. KXYZ

Paula can attempt to bring a suit against KXYZ for invasion of her privacy on several theories including false light publication, intrus[t]ion upon seclusion, and public disclosure of private facts. The question asks how likely she is to succeed in these suits and each is treated separately below.

A preliminary first amendment concern is appropriate. The Supreme Court has recently held that a broadcaster cannot be held liable for the broadcast of illegally obtained information even if it is aware of the illegality of the recording so long as the broadcaster was not a party to the illegality and the information involves a matter of public concern. Here, the facts suggest that KXYZ was not a party to the illegality which was the surreptitious recorder's acts, and even though it could be aware that the information was not legally obtained, because the subject matter of the statement involves the Mayor as well as the highly publicized labor disputes that Paula was involved in, KXYZ will argue that this is a matter of a public concern and they are protected by the First Amendment in making their broadcasts. Now, special attention will be paid to each of the causes of action.

FALSE LIGHT

An action for false light publication can be brought where the plaintiff shows that there has been widespread dissemination of information that places plaintiff's beliefs, thoughts, actions in false light that would be objectionable to a reasonable person. Here, Paula would claim that KXYZ's actions in immediately playing the recording of her private conversation with Stan placed her in false light because it imputed to her the belief that Mayor was a crook.

The widespread dissemination element is met in this case because KXYZ broadcast the information over the airwaves.

There is an issue as to whether the dissemination of the information placed Paula's beliefs, thoughts, or actions in a false light in such a way that would be objectionable to a reasonable person. KXYZ would argue that a reasonable person would not object to having their claim that the mayor is a crook be publicized because the corruption of the mayor is something that Paula herself wanted to correct. Paula will argue that taking the statement out of context and publishing it makes it seem like she is making a very broad accusation of the mayor. Moreover, Paula would argue that publishing such a statement puts her in jeopardy of potential tort liability, which is the case here, as Mayor has sued her. Upon hearing the arguments of both sides, a court would probably consider the statements disseminated by KXYZ as not being objectionable to a reasonable person because they do not distort Paula's opinion of the mayor but rather accurately represent them because they played the taping of her speaking.

As a defense, KXYZ would argue that the publication of this information is protected by the First Amendment to the Constitution. The First Amendment is incorporated through the due process clause of the Fourteenth Amendment and binds the states as well. Therefore, a state - - as a state actor - - cannot enforce a cause of action where the underlying conduct being adjudicated is protected by the First Amendment unless certain standards are satisfied. In a false light case, KXYZ would argue that because the corruption of the mayor is a matter of public concern and also because the labor dispute between the labor union and the city has been highly publicized, the public has a right to be informed about both the mayor and the labor union's interactions. If the court finds that the subject matter of the broadcast implicating the mayor in corruption and involving negotiations between the Labor Union and Mayor indeed involves a matter of public concern, the court will require Paula to show actual malice on the part of KXYZ to recover. Here, Paula would emphasize their immediate broadcast of the information and claim that such highly reckless broadcast without checking the accuracy of the recording or ensuring that there might be some basis to it constitutes reckless disregard for the consequences of their broadcast. This is a close question, but a court would probably ultimately decide that the broadcasting of the information was short of reckless for false light purposes.

In conclusion, because there was not a material misrepresentation of Paula's views in the broadcast, a court will probably find that the broadcast did not place her views in a false light and Paula will not recover on this theory.

INTRUSION UPON SECLUSION

An action for intrusion can be brought where a plaintiff can show that a defendant intruded, by an act of prying or intrusion objectionable to a reasonable person, into a space where the plaintiff had a reasonable expectation of privacy. The tort provides a remedy for the privacy of the plaintiff, so therefore the truthfulness of any information gained as a result of the intrusion does not exonerate the defendant. Here, Paula will have to show that KXYZ intruded upon her by taking a private conversation she had with Stan and that the information that KXYZ broadcast was taken from a place where Paula had a reasonable expectation of privacy. Because KXYZ did not itself intrude upon Paula, Paula will have to pursue KXYZ on an agency theory. If Paul is not successful in linking KXYZ to the intrusion, then she cannot hold them liable for this tort.

The primary obstacle for Paula is in asserting that KXYZ is the party responsible for intrusion in this case. The tort does not protect the plaintiff's privacy interest as a result of the broadcast of the information, which KXYZ clearly did; rather, the tort provides relief for intrusion upon the privacy interest of the plaintiff. Paula will argue that KXYZ is vicariously liable for the surreptitious recording made by the unknown recorder of the information, the party most appropriately liable for intrusion. Here, Paula would have to draw a connection between KXYZ and the recorded [sic], perhaps by showing evidence that the recorded [sic] was an employee of KXYZ. If, for example, KXYZ by prearranged agreement paid the person to stakeout and follow Paula and record her conversation, Paula might be able to claim that there was an employer-employee relationship upon which vicarious liability could

be grounded. However, the facts suggest that the recorder acted on his own and sent the conversation anonymously to KXYZ. If the court believes that there is no relationship between KXYZ and the recorder, then KXYZ cannot be found liable for intrusion because it was not the party responsible for the intrusion.

Whether or not KXYZ is found to be vicariously liable, it is helpful to discuss the remaining elements of the tort. The first element of intrusion will be difficult to satisfy for Paula. Under the law of intrusion, an intrusion occurs by some act of prying or meddling that is objectionable to a reasonable person. For example, someone using binoculars or high powered camera lens from across the street to spy on or take photographs of someone in a private place is a sufficient act of intrusion. Here, Paula will claim that the "surreptitious" recording of her conversation constitutes an act of intrusion. Paula will argue that a reasonable person would object to other people prying into their conversations. On the question of intrusion, KXYZ will emphasize that there is no intrusion where someone speaks in public. KXYZ will claim that it is not reasonable for a person to object that someone is listening to them when they speak in public, rather, KXYZ will argue, the speaker assumes the risk of an "uninvited ear" whenever they speak in public. This is a close question on intrusion, but because the facts suggest that the recording is surreptitious, a court will probably find that such secretive and intrusive recording of a conversation is sufficient to satisfy the first element of the tort.

On the question of whether Paula had a reasonable expectation of privacy in her place of seclusion, there will be difficulty. The tort of intrusion only protects the privacy interest of the plaintiff where they have a legitimate expectation of privacy in the place upon which their privacy was intruded. Here, Paula was in a coffee shop directly across the street from where contract negotiations were taking place. Paula will emphasize that she was in "the corner booth" of the coffee shop and that she was "whispering" to Stan when she made the statement, all suggesting that she subjectively intended, and that a reasonable person would objectively act that way, to keep the subject matter of her conversation private. KXYZ would argue, like on the intrusion element, that statements made in public, even if the speaker subjectively intends to keep them relatively secret, are not objectively reasonably private. KXYZ will emphasize that a speaker assumes the risk of "an unreliable ear" when they make statements in public. Paula will counter that she took reasonable precautions to keep her statement private despite being in public by being in a corner booth and by whispering. Again, this is a close question, but because the facts suggest that Paula made an effort to keep her statement quiet and between her and Stan, a court could find that she had a reasonable expectation of privacy in the corner booth and in her statement.

PUBLIC DISCLOSURE OF PRIVATE FACTS

An action for disclosure can be brought where a plaintiff can show that a defendant caused widespread dissemination of information in which plaintiff had a reasonable expectation of privacy and which a reasonable person would object to. Because the interest protected by this tort is the privacy of the plaintiff and not the subject matter of the information

disseminated, truth is not a defense to the tort because even if the information is truthful, the injury to the plaintiff's privacy is still unremedied. Here, as discussed above, the primary obstacle for Paula is showing that she had a reasonable expectation of privacy in the contents of her statement.

Here, KXYZ clearly caused widespread public dissemination of the statements Paula made about the mayor. By broadcasting it over the airwaves, this element is met if the dissemination would be objectionable to a reasonable person. Here, KXYZ would argue that Paula was a public figure trying to settle the labor dispute with the city in the favor of her union. KXYZ would emphasize that the labor dispute has been highly publicized already and that it is a matter of public concern. These arguments, however, emphasize the subjective feelings of Paula regarding the information rather than what would be objectionable to a reasonable person. Nevertheless, a reasonable person attempting to put forward a cause, KXYZ would argue, would not object to the disclosure of information pushing for that cause. Paula will counter that the information disclosed would certainly be objectionable to a reasonable person because of the potential tort liability that could arise to the speaker if such information were widely disseminated. Here, in particular, Paula can show that she is being sued by Mayor for defamation and without KXYZ's disclosure of the statement, she would probably not be sued. This, again, is a close question but a court could reasonably find that the disclosure of the information here would be objectionable to a reasonable person because of the potential tort liability the speaker assumes and thus Paula will have satisfied the first element.

The second element is more problematic for Paula because she must show that the facts were private to her and that a reasonable person would consider them private. Here, Paula is a labor union leader and she ardently pushes for the positions of her union through publicity and in her negotiations with the City. The alleged disclosure even concerns a contract to build the new union headquarters, something directly related to the public nature of Paula's position. KXYZ would emphasize this and say that the content of the statement is not private because it has to do with Paula's public actions, negotiating with the city and acting as president of the labor union. A court could find that, despite the private nature of the conversation in the coffee booth corner, the subject matter of the statement here is not private but rather a public matter because it involves the City and the labor union which is currently publicized a great deal. Only if the court finds that the statements contained private information to Paula, would an action for disclosure lie.

2. Mayor v. Paula & KXYZ

As a public figure, the mayor must prove additional elements in his case in order to recover for the tort of defamation. As the actions between the Mayor and Paula and the Mayor and KXYZ are of a different nature and have different defenses, they will be treated separately.

The common law elements for defamation include: (1) a defamatory statement, meaning a statement which a reasonable person would take as being harmful to a person's reputation, (2) that the statement be "of or concerning" the plaintiff, meaning a reasonable

person would understand it to refer to the plaintiff, (3) that the statement be "published," which requires only communication to a third person but may also include more widespread dissemination, and (4) damages, which may be presumed under certain circumstances.

When the plaintiff is a public figure, he must allow show [sic] (1) falsity of the statement as well as (2) some degree of fault on the part of the alleged defamer.

Mayor v. Paula

In Mayor's case v. Paula, he would focus on the actual conversation she had with Stan in the coffee shop. The allegation that Mayor is a "crook" is clearly defamatory particularly in the context of alleging that the Mayor required a payoff as a condition for allowing the union to build a new headquarters. A reasonable person would surely find that such a statement of alleged fact would be considered harmful to the reputation of the target of the speech. Moreover, it is clear from the content of the statement that it concerns the Mayor, a reasonable person hearing the statement would know that it refers to Mayor because it specifically calls him a "crook." Third, the statement was published because Paula made the statement to Stan. Regardless of the subsequent broadcast of the information by KXYZ, Paula's making the statement to Stan is sufficient publication for a tort to lie as between Mayor and Paul. There might be an issue as to whether Paula can be held liable for subsequent damage which occurs to Mayor as a result of the broadcast because Paula is not responsible for that part of the injury to Mayor's reputation.

Because this is spoken defamation, it is considered slander. In particular, Paula's statement would be considered slander per se because it was a statement relating to the Mayor's profession and it was also a statement involving the moral turpitude of the Mayor. Slander per se exists where the alleged defamatory statement concerns a loathsome disease, the unchastity of a woman, the moral turpitude of the defamed person, or the defamed person's business or professional capacity. The effect of slander per se is that damages are presumed and need not be pled, although plaintiffs often will anyway. Here, Mayor need not prove special economic damages from the tort although he almost certainly will want to, particularly to avoid damages being called too speculative because of the problem of KXYZ's broadcast which enlarged the damage to Mayor. This would not be a problem if Paula and KXYZ were found jointly & severally liable for the entire undivided injury to Mayor, although it is not clear that they would be jointly & severally liable because two distinct acts of defamation could be argued to have occurred, one in the coffee shop and then the second on the airwaves. Only if it can be shown that Paula created a foreseeable risk that the information would be let out and that the broadcast was within that scope of risk created by Paula's statement, then the limiting principle of proximate cause would not cut short Paula's liability and allow her to be held responsible for the entire injury.

Having established the basic elements of the tort, Mayor will still have to argue falsity and, because he is a public figure, actual malice on the part of Paula. He will almost certainly not be able to do so, although more facts are necessary to reach a determination. Under New York Times v. Sullivan, a public figure tying to collect damages for defamation must

prove the falsity of the information claimed to be defamatory. It is unclear whether the mayor is in fact a crook, but if he did require a payoff for the permission to build new labor headquarters, then he could not collect damages in this case. Moreover, Mayor will have to show that Paula acted with malice in making the statement, either reckless disregard for the truthfulness of the information itself or reckless disregard as to the consequences of making the statement. Here, because Paula can show that she was taking pains to keep the information between her and Stan private, a court will probably not find her statement to be malicious. If she had used a bullhorn, for example, and made the statements in front of City Hall, then malice might be more appropriately found, but liability would still only lie if the statements were false because Mayor is a public figure. The idea behind the heightened requirements is that the First Amendment protects rigorous debate and exchange of ideas over public issues.

Mayor v. KXYZ

As discussed above, Mayor would have to make the same showing as to KXYZ to recover. Because the broadcast involved the Mayor and defamed him, he has satisfied the basic requirements for defamation. However, special First Amendment concerns arise that further protect KXYZ.

First, KXYZ under the Constitution may broadcast even illegally obtained information if it is truthful so long as KXYZ was not a party to the illegality and the information conveyed was a matter of public concern. Here, the facts take special pains to say the recorder, although surreptitious, was not related to KXYZ. Unless Mayor could connect KXYZ to the taping, they cannot be held liable for the publication of the information.

Second, the falsity of the information might not be able to [be] proven by the Mayor, which alone would relieve KXYZ of liability.

Third, the Mayor may be able to show malice on the part of KXYZ because they broadcast the information so quickly upon receiving the recording. This might be interpreted as reckless disregard for the consequences of broadcasting the defamatory material and if Mayor can show the other [e]lements as well as the falsity of the statement, he might be able to recover by showing this level of actual malice. KXYZ would of course counter that at worst such behavior was merely negligent and should not expose them to liability given the First Amendment protections.

Answer B to Question 4

1. Paula v. KXYZ

Invasion of Privacy – Generally

Paula is suing KXYZ for invasion of privacy for publishing her conversation with Stan. This tort consists of four branches of causes of action. They include: (1) misappropriation, (2) intrusion, (3) false light, and (4) disclosure of private facts. These four causes of action are discussed next.

Misappropriation

To prove a prima facie case of misappropriation, plaintiff must show that the defendant used plaintiff's name or likeness for plaintiff's commercial advantage. Misappropriation is considered an invasion of privacy tort because a person's name or likeness is a matter within plaintiff's control. When another person takes that name or likeness and uses it for their own gain, an invasion into plaintiff's private affairs occurs.

Here, Paula could claim that KXYZ's publishing of the tape misappropriated her name or likeness. Paula is the president of a labor union. Stan is the secretary of the same union. These are–or potentially are–high profile positions in any community. Thus, KXYZ could use a salacious scandal involving these two figures to help boost its ratings. In this case, Paula would argue that KXYZ replayed the tape for precisely that reason. The fact that the conversation had been surreptitiously recorded made the dialogue even more intriguing, which would also help KXYZ's attempts to publicize itself and draw attention to its station. For this reason, Paula would argue that the station used her name and reputation (and even Stan's, if he pled this cause of action) for its own commercial advantage.

Thus, Paula's misappropriation claim has some merit because KXYZ's likely intent was to use this conversation–and its participants – to boost its audience.

Defense to Misappropriation – Newsworthiness

Newsworthiness is a defense to misappropriation. The newsworthiness doctrine states that a person's name or likeness can be appropriated for public consumption if it involves a matter of public concern.

Here, because the union was involved with a bitter and highly-publicized labor dispute with the Mayor and because the conversation involved a discussion about the Mayor, KXYZ would likely claim that it was privileged to replay the tape for those reasons.

Thus, because the tape did involve a matter of public interest, KXYZ's defense in this situation is likely valid.

Defense to Misappropriation – Freedom of Speech

A radio station also possesses a First Amendment right to broadcast issues involving a public matter. The courts have ruled that a radio station may replay a tape that was surreptitiously recorded and not violate a person's rights to privacy. This defense is related–and often intimately commingled with–the newsworthiness defense, but it should be noted here for the sake of thoroughness because of the importance of the First Amendment in American constitutional jurisprudence. This defense also arises in the defamation context, but it might be applied here as well.

Here, KXYZ will argue that beyond mere "newsworthiness," the courts have previously ruled that a radio station may replay surreptiously recorded conversations and not be liable for the airing. While this has been handed down in a defamation context, KXYZ might argue that it should apply here as well.

Thus, KXYZ might have a pure freedom of speech defense based on court precedent in a related area.

Intrusion

To prove a prima facie case of intrusion, plaintiff must show that the defendant invaded a space within which plaintiff had a reasonable expectation of privacy. This tort typically involves cameramen taking pictures of persons in their private homes or even Peeping Toms. However, it can be applied to surreptitiously recorded conversations as well. But the issue is whether KXYZ did the intrusion, or whether the anonymous person was the tortfeasor.

Here, KXYZ did not actually physically intrude on an area where Paula had a reasonable expectation of privacy. KXYZ is not the entity or person that recorded the tape. KXYZ mere[ly] replayed the tape, which was recorded by an anonymous individual. Certainly, the anonymous person may be liable. However, even the anonymous person would argue that because the conversation took place in a corner booth of a coffee shop, it was in a public place where neither Paula nor Stan had a reasonable expectation of privacy. Paula would respond that she "whispered" her comments. However, courts have held that whispered comments in a public area are not afforded a reasonable expectation of privacy (though they have done this in a Fourth Amendment search and seizure context). Even if KXYZ could be held liable under an "agency" theory for the intrusion of the anonymous individual, this argument concerning the public place would prevail in KXYZ's favor.

Thus, KXYZ would prevail on Paula's intrusion claim.

Defense to Intrusion – Public Place with No Reasonable Expectation of Privacy

As discussed immediately above, KXYZ would defend that even if it could be held liable under an "agency" theory for the anonymous person's actions (which may not be possible

under these facts), that Paula's comments in a public restaurant, even if whispered, were not private. The Court had held that "whispered" comments in a public area are not afforded a reasonable expectation of privacy, though it has done this in a Fourth Amendment context.

False Light

To prove a case of false light, plaintiff must show that defendant attributed to plaintiff actions she didn't take, views she doesn't hold, or even comments she didn't make. False light is a watered down version of defamation because it includes material that doesn't necessarily harm plaintiff's reputation, but it merely misportrays her beliefs or actions.

Here, Paula was not portrayed in a false light. Her conversation with Stan was accurately recorded. Her view[s] regarding the Mayor are her views and were not portrayed falsely.

Thus, Paula's false light cause of action is lacking.

False Light – Constitutional Considerations

It should also be noted that false light is likely subject to the same constitutional considerations as defamation. Meaning that plaintiff, if she were a public official or figure and the issue involved a matter of public concern, would have to demonstrate falsity (a prerequisite for false light in the first place) and fault, which would include actual malice if plaintiff were a public figure.

Here, Paula is most certainly a public figure. She is the president of the labor union and is involved in a highly publicized dispute with the Mayor. Paula may very well be an all-purpose public figure because of her position as president of the union, but at the very least, she is a limited-purpose public figure because of the controversy between the union and the Mayor. Thus, Paula might likely need to prove actual malice, which is clear and convincing evidence that KXYZ knew or had a reckless disregard for the falsity of the information. However, here, the conversation recorded truthful information.

Thus, Paula would likely not be able to prove falsity, as discussed, or fault.

Defense to False Light – Truth

As discussed above, Paula's views regarding the Mayor were accurately recorded. There is no false light here.

Private Fact

To prove revelation of private fact, plaintiff must demonstrate that defendant revealed private facts about plaintiff that were facts that a reasonable person would object to being revealed in a public fashion.

Here, Paula would argue that her views regarding the major [sic] were private views that she did not want exposed to the rest of the world. This argument is somewhat diminished by the fact that Paula and Stan (and the union) were in a bitter and highly-publicized dispute with the Mayor. However, Paula would respond that even in bitter disputes a reasonable person would not want their private views toward the other person revealed to the world-at-large. Paula has a good argument in this regard. However, KXYZ might contend this was a newsworthy event and, additionally, that Paula's dislike for the Mayor is likely well-known. This would be a reasonable argument, if KXYZ could prove it.

Thus, Paula may have a cause of action under the private fact doctrine.

Private Fact – Constitutional Considerations

Again, it should be noted, as per the discussion above, that constitutional considerations are likely applied to the private fact cause of action (or at least some commentators and courts have so held). However, where – as here – there is not fault on KXYZ's behalf involving actual malice and because the material recorded was ostensibly truthful, Paula's cause of action suffers in this regard.

Defense – Truth

It should be noted that truth is no defense to private fact causes of action. In fact, what makes the private fact cause of action so unique is that the private facts may very well be truthful (in fact, they almost always are, which separates private fact from false light).

2. Mayor v. Paula

Defamation – Generally

To prove a prima facie case of defamation, plaintiff must demonstrate that defendant (1) made defamatory comments, (2) of or concerning the plaintiff, (3) published, (4) to third persons, and (5) that plaintiff suffered damage to her reputation. These issues are discussed next. Also, when the issue involves a public official, then the official must prove (6) falsity and (7) fault under a constitutional standard.

Defamatory Material

Defamatory material is material that harms plaintiff's reputation when it is published to the outside world.

Here, Paula was quoted as saying that the "[M]ayor is a crook who voted against us allowing us to build our new union headquarters because we wouldn't pay him off." Certainly, such comments are harmful to the Mayor's reputation, especially when they are released over a radio station.

Thus, in and of itself, the material here is certainly "defamatory" in the limited sense of how this term is defined.

Of or Concerning Plaintiff

The defamatory material must be of or concerning the plaintiff, or be reasonably construed to be of or concerning the plaintiff if the plaintiff's name is not explicitly mentioned.

Here, Paula refers directly to the "mayor." However, there may be other communities in the area with mayors. However, Mayor will likely be able to show that because of the controversy between the union and himself, that a reasonable person would construe the comments as being about him.

Thus, this element is satisfied.

Published

The defamatory material must be published to a third person.

Here, Paula "published" her comments to Stan, the secretary of her labor union. Paula might claim that this conversation was privileged between two officers of a union and that, thus, it was not "published" in the normal sense of the term. However, this is likely not an adequate defense. Since Paul revealed her comments to a third person capable of understanding those comments, she "published" the material. Also, it should be noted that Paula ran the risk of others hearing her comments in a public restaurant as well.

Thus, Paula published her comments.

To Third Persons

The comments must be published to a third person, not just to herself.

Here, as discussed, Paula published to Stan (and ran the risk of publishing to others in a public restaurant).

Thus, this element is satisfied.

Damage to Reputation

General damages are presumed when the comments involve libel, which are written statements. However, they are not presumed when it involves slander, which are oral comments. However, damages for slander per se are presumed when the comments involving [sic] the plaintiff's professional reputation.

Here, Paula's comments to Stan were oral. However, they also involved the Mayor's

professional competence and integrity, which would likely fall under a slander per se exception, which would then make damages presumed.

Thus, damages based on slander per se would likely be shown here.

Falsity

The Mayor would need to prove falsity as part of his prima facie case against Paula.

Here, the Mayor may have a problem showing falsity if in fact the comments are true (of course, this goes without saying). But, if the facts later demonstrate that this was a false accusation and that Paul was saying this to spite the Mayor, he can win this element.

Thus, we would need more facts here to satisfy the Mayor's burden on this element.

Fault

Because the Mayor is a public official (the mayor of a city), he would need to show actual malice because this matter involves a matter in the public concern (a highly publicized labor dispute). Actual malice is defendant's knowledge of the falsity or a reckless disregard for the falsity of the statements. Actual malice must be shown by clear and convincing evidence.

Here, again, the issue depends on whether Mayor can show that Paula's statements were false and, if so, whether she acted in knowledge of that fact or in reckless disregard of the fact when conveying her comments to Stan.

Thus, again, more facts are needed here.

Conclusion

The Mayor may not have a problem showing the traditional common law elements of defamation, but more information is needed to determine whether he satisfies the constitutional elements. If he can show falsity (perhaps not!) and fault on Paula's behalf (again, perhaps not, but more facts are needed), then he has a cause of action. Otherwise, his case may be weak.

Mayor v. KXYZ

Defamatory Material

As per above, the material here is defamatory insofar as it hurts the Mayor's reputation when it was revealed. A similar analysis as applied to Paul applies here.

Of or Concerning Plaintiff

Again, as per above, the material here likely concerns the Mayor. Although he is not mentioned by name, because of his dispute with the union, Paula's comments could reasonably be attributed as being about him.

Published

Here, most certainly, the comments were published by KXYZ over its airwaves.

To Third Persons

Again, here, using the same rule discussed above with regards to Paula, the tape was replayed over the airwaves and played to KXYZ's listening audience. This most certainly qualifies.

Damage to Reputation

Unlike the situation with Paula, the issue here is whether the tape, when replayed over the air, is slander or libel. The courts have held that such tapes replayed over the air (along with other planned comments over the radio or comments over television) are generally libel. Thus, here, damages would be presumed, assuming the other elements are true. However, because this is also slander per se, proving that this qualifies as libel is not essential. General damages would likely be presumed either way.

Falsity

Again, Mayor would have to prove falsity as part of his prima facie case. The same problems arise here as arise above in the discussion regarding Paula.

Fault

Again, because the Mayor is a public official (the mayor of a city), he would need to show actual malice because this matter involves a matter in the public concern (a highly publicized labor dispute). Actual malice is defendant's knowledge of the falsity or a reckless disregard for the falsity of the statements. Actual malice must be shown by clear and convincing evidence.

Here, the same problems arise with respect to the radio station as applied to Paula. The Mayor must show that KXYZ knew or had a reckless disregard for the truth regarding the tape-recorded comments.

Thus, more facts are needed for Mayor to prove his case.

Defense – Privilege and Newsworthiness

The courts have held that a radio station is privileged to replay tapes secretly recorded over its airwaves involving matters of public concern. These holdings are most likely premised on the fact that some comments are generally newsworthy and of public importance. Thus, KXYZ can claim this privilege in its defense.

Defense – Truth

It should be noted that because Mayor is a public figure, as discussed, he must prove falsity. This burden [sic] removes the burden of KXYZ proving truth as a defense.

Conclusion

Due to the absence of some critical facts that would help Mayor's case, along with the privilege and newsworthiness defense discussed above, KXYZ may likely win this suit, if for no other reason than Mayor may not meet his prima facie case.

ESSAY QUESTION AND SELECTED ANSWERS

JULY 2004 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from July 2004 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.

Question 6

Jack owned the world's largest uncut diamond, the "Star," worth $1 million uncut, but $3 million if cut into finished gems. Of the 20 master diamond cutters in the world, 19 declined to undertake the task because of the degree of difficulty. One mistake would shatter the Star into worthless fragments.

One master diamond cutter, Chip, studied the Star and agreed with Jack in writing to cut the Star for $100,000, payable upon successful completion. As Chip was crossing the street to enter Jack's premises to cut the Star, Chip was knocked down by a slow moving car driven by Wilbur. Wilbur had driven through a red light and did not see Chip, who was crossing with the light. Chip suffered a gash on his leg, which bled profusely. Though an ordinary person would have recovered easily, Chip was a hemophiliac (uncontrollable bleeder) and died as a result of the injury. Chip left a widow, Melinda.

Jack, who still has the uncut Star, engaged Lawyer to sue Wilbur in negligence for the $2 million difference between the value of the diamond as cut and as uncut. Lawyer allowed the applicable statute of limitations to expire without filing suit.

1. What claims, if any, may Melinda assert against Wilbur, and what damages, if any, may she recover? Discuss.

2. What claims, if any, may Jack assert against Lawyer, and what damages, if any, may he recover? Discuss.

Answer A to Question 6

6)

WHAT CLAIMS, IF ANY, MAY MELINDA ASSERT AGAINST WILBUR, AND WHAT DAMAGES, IF ANY, MAY SHE RECOVER?

Standing - Melinda, the widow of Chip, will sue Wilbur either as his representative under a survival action or for wrongful death as his widow.

Melinda v. Wilbur

Negligence - a breach of duty which is the actual and proximate cause of damage to the plaintiff.

Duty - as the driver of a car, Wilbur owed a duty of reasonable care to the people who were within the zone of danger (Cardozo) or the entire world (Andrews view). Chip, as a person crossing the street in front of Wilbur, was within the zone of danger and therefore owed a duty by Wilbur.

Breach - Wilbur drove through a red light and hit Chip because he did not see him. In driving through the red light, Wilbur was probably negligent. Negligence per se may be implied if driving through a red light is a violation of an applicable law, since Chip would be the kind of person that such a law would be designed to protect.

Causation - actual - but for Wilbur driving through the light and striking Chip, Chip would not have died.

Causation - proximate - it was foreseeable on Wilbur's part that driving through a red light would injure someone. The fact that Wilbur did not see Chip would not relieve him of liability. Wilbur may argue that the fact that Chip actually died was the result of his hemophilia, which caused him to bleed to death when another person would have easily recovered from the gash in his leg. Wilbur may argue that it was not foreseeable that Chip had this condition and that therefore the cause of Chip's death was not caused by Wilbur.

However, hemophilia is a pre-existing condition, and the rule in negligence cases is that the defendant takes his victim as he finds him. This is analogous to the "soft skull" cases where a particular plaintiff was particularly susceptible to injury. Therefore, the hemophilia defense will not work.

Damages:

. **Lost earnings** - future earnings are allowed in negligence actions. The court would compute the amount of time that Chip probably would have lived, using some form of

actuary table. The fact that Chip was a hemophiliac would be relevant to possibly reducing the amount of future earnings allowed by discovering what the expected lifespan of a hemophiliac of Chip's age and general heath is. The amount of future ear[n]ings would be reduced to present-day value, because only one recovery is allowed. However, no reduction would be allowed for the fact that Chip is engaged in an especially lucrative profession; again, Wilbur has to take his victim as he finds him.

. .

. **Particular earnings** - the $100,000 under the contract is not going to be earned at this point, because the contract between Jack and Chip said that the $100,000 would only be paid upon successful completion. Completion will never take place, because Chip is now dead, and Chip's performance was a condition precedent to Jack's obligation to pay. This money would have gone to Chip, but Melinda can bring the suit as the representative of his estate. She does not need to show that she is a third party beneficiary because she is not attempting to enforce the contract itself, but to show that Chip would have recovered under the contract if he had not been injured. However, if forced to rely on a third-party beneficiary claim she would probably fail because she was not an intended beneficiary of the contract between Chip and Jack, but merely an incidental beneficiary.

. .

The question will be whether or not Chip would have successfully completed cutting the Star had he not been struck by Wilbur's car. If it appears that he would have completed, then it is possible that this $100,000 could be recovered. However, there is a very strong argument that Chip would not have completed the task. 19 of 20 master diamond cutters in the world declined the job because they thought that they could never do it without shattering the Star. This means that in the professional judgment of men and women who are masters in their field, 95% of them (19/20) turned the job down as impossible. Since the burden of proof in a civil action is a preponderance of the evidence (51%), it is almost certain that the burden of proof cannot be met here to show that the $100,000 would have been recovered had Wilbur not knocked down Chip.

Melinda will probably not recover the $100,000.

. **Loss of consortium** - as Chip's wife, Melinda can get damages for loss of companionship.

. .

. **Punitive damages** - not usually available in negligence cases unless the action of Wilbur in driving through the red light was gross negligence. We have no evidence of gross negligence here, however, since Wilbur was moving slowly at the time he struck Chip.

. .

WHAT CLAIMS, IF ANY, MAY JACK ASSERT AGAINST LAWYER, AND WHAT DAMAGES, IF ANY, MAY HE RECOVER?

Jack v. Lawyer

Jack will sue Lawyer for malpractice.

Duty - Lawyer had a duty to act in a competent manner and as a reasonable attorney under the circumstances. There was a client-lawyer relationship between Jack and Lawyer, and so the duty was owed to Jack.

Breach - Lawyer breached this duty by not filing the lawsuit until the statute had run. This was something that a competent attorney would not have done.

Causation - actual - but for Lawyer failing to file the suit, the statute would not have run and Jack would still have a cause of action against Chip.

Causation - proximate - it was foreseeable that failing to file the suit would result in the suit being barred by the statute.

Damages - Jack will claim that he should recover from Lawyer the same thing he would have recovered had Lawyer not been incompetent and failed to file the suit. This means we must look to Wilbur's liability to Jack, because the mere fact that Lawyer was incompetent does not mean that Jack is immediately entitled to a recovery; the lawyer is not the insurer of the validity of the client's claim such that a client can get an automatic recovery from the lawyer if the lawyer breaches some duty of care in regards to the client where the claim was one which had a low chance of success.

Hypothetical lawsuit - Jack v. Wilbur
Negligence - supra.

Duty - Jack will have a very difficult time proving that Wilbur owed him a duty. Wilbur was driving down the street and ran a red light. It is difficult to argue that Wilbur owes a duty to Jack, who was probably in his house across the street and was not physically harmed by Wilbur's actions. Jack was probably well outside the zone of danger which resulted from driving a car down the street.

Jack can probably not show that he was owed a duty by Wilbur. If he can, then he will attempt to show breach, causation, and damages.

Breach - If Jack can show a duty owed by Wilbur, then driving through the light probably breached this duty.

Causation - but for Wilbur driving through the light, Chip would not have been injured.

Causation - proximate - it was probably not foreseeable that driving through the light and hitting someone would cause damages to Jack, who was not at the scene; furthermore, these are only economic damages without physical damages[,] which are not the kind of harm anticipated by the breach of duty.

Damages - Jack would have had the same problem showing that the job would have been completed as Melinda: the chance of the job actually being finished is so low and difficult to prove that a court would almost certainly not allow a recovery in this case.

The question will be whether or not Chip would have successfully completed cutting the Star had he not been struck by Wilbur's car. If it appears that he would have completed, then it is possible that this $100,000 could be recovered. However, there is a very strong argument that Chip would not have completed the task. 19 of 20 master diamond cutters in the world declined the job because they thought that they could never do it without shattering the Star. This means that in the professional judgment of men and women who are masters in their field, 95% of them (19/20) turned the job down as impossible. Since the burden of proof in a civil action is a preponderance of the evidence (51%), it is almost certain that the burden of proof cannot be met here to show that the $100,000 would have been recovered had Wilbur not knocked down Chip.

Furthermore, Jack only has economic damages under a contract to which Wilbur was not a party.

Contract - because Wilbur was not a party to the contract and did not intentionally interfere with the contractual relations of Wilbur and Jack, it is unlikely that Wilbur can be sued for interference with this contract.

Jack will probably not recover from Lawyer, due to the fact that Chip actually cutting the Star properly was extremely unlikely to occur.

Answer B to Question 6

6)

1. Melinda v. Wilbur

The issue is what claims if any may Melinda, Chip's widow, assert against Wilbur, and what damages, if any, may she recover?

Survival/Wrongful Death

The executor of a decedent's estate or certain other individuals (spouses, children) enumerated by the state's wrongful death statute may assert a claim against a tortfeasor for damages caused by the tortfeasor's negligence through a wrongful death claim. In a wrongful death action, the executor or other specifically enumerated individual steps into the shoes of the decedent for purposes of asserting the claim on the decedent's estate's behalf. If the decedent survived for even a brief period of time, a claim for survival is also permissible. In both actions, the party asserting the claim is required to prove the underlying tort she alleges lead [sic] to the decedent's death. Thus, Melinda may assert a wrongful death and survivorship claim against Wilbur because Chip survived long enough to bleed to death after the accident before dying.

Negligence

Melinda should claim that Wilbur's negligence in running through a red light caused Chip's death. To assert a successful negligence claim, the plaintiff must demonstrate: (1) a duty owed to her by the defendant; (2) a breach of that duty by the defendant; (3) causation; and (4) damages. As explained below, she can establish each element.

An individual owes a duty to others to act as a reasonably prudent person would in similar circumstances. A reasonably prudent person does not drive through red lights. Thus, Wilbur owed a duty to Chip to not drive through a red light.

A breach is demonstrated by showing that the defendant failed to act as a reasonably prudent person would've acted in similar circumstances. Here, Wilbur breached that duty by driving through a red light. This action also likely constitutes negligence per se. Negligence per se arises when a statute prohibits behavior engaged in by the defendant (here, running through a red light) to protect individuals (like Chip) from harm (injury by failure to stop at a red light). In the presence of such facts, a duty and breach is presumed.

Causation is divided into two parts: (1) factual causation and (2) proximate causation. Factual causation is typically referred to as the "but-for-test," i.e., but for the defendant's negligent conduct the plaintiff would not have been harmed. Here, but for Wilbur's failure to stop at the red light, Chip[,] who was crossing with the light[,] would not

have been injured and then died.

Proximate causation relates to issues of foreseeability. The question is whether the harmed [sic] suffered by plaintiff is foreseeable or rather if some intervening act cuts off the defendant's liability. Wilbur will likely claim that Chip's injuries were not foreseeable because an ordinary person would not have died from a gash on his leg. Here, Chip was a hemophiliac and died as a result of this condition[,] not because of a gash. Running a red light, however, may result in injury to another which could include death, thus proximate causation is clearly present.

Wilbur may also attempt to argue that a defense exists because Chip was comparatively negligent and had the last clear chance to avoid the accident. Defenses to negligence include contributory negligence, which cuts off a plaintiff's right to damages if he shares in the negligence in any way, comparative fault[,] which apportions damages based upon the plaintiff's negligent acts (and in some states limits recovery all together if the plaintiff is more negligent than the defendant), and the last clear chance doctrine, which denies a plaintiff recovery if he had the last opportunity to avoid the accident.

Contributory negligence has been abolished in almost all states and should not come into play here. But what about comparative fault? Wilbur was in a slow moving car so that Chip might have avoided the accident by merely stepping out of the way. This defense seems likely to fail since the facts indicate Chip was crossing with the light. Even if Chip is somewhat negligent for failing to avoid the accident, it is doubtful that his negligence is enough to deny him recovery.

Negligence Damages

A successful negligence plaintiff may recover compensatory damages. Compensatory damages must be certain, foreseeable, and unavoidable. These damages can be divided into economic and non-economic damages which include medical bills, lost wages, and pain and suffering. Chip's estate is entitled to medical bills, funeral expenses, lost wages, and pain and suffering damages. These damages must be reduced to present value after inflation is taken into account.

Here, Wilbur will attempt to argue that some if not all of the damages were not foreseeable. Specifically, he will claim that Chip's death was unforeseeable because an ordinary person would not have bleed [sic] to death after suffering a minor gash to the leg. This claim will fail because of the eggshell-skull doctrine which requires the defendant to take the plaintiff as he finds him. This plaintiff, unfortunately for Wilbur, was a hemophiliac and dies. It sucks to be Wilbur.

Wilbur may also attempt to argue that some if not all of the damages were unavoidable because his car was moving slow and Chip could've avoided the accident. As explained above, this factor may limit damages but not preclude them completely.

Finally, Wilbur may argue that some damages like lost wages (for instance the $100,000 Chip would've made to cut the Star) are not certain. This may work as to this claim since 19 expert diamond cutters refused to take the job. But again it will simply limit recovery, not result in a denial altogether.

Loss of Consortium

A spouse may also assert a claim for loss of consortium if her spouse is injured by a tortfeasor. Here, Melinda may assert her own claim based on the fact that the she lost certain benefits because of Chip's death. She will lose companionship; she will lose his assistance around the house and may have to hire someone to come in and take care of the chores he performed; and she may lose sex.

Since Wilbur caused Chip's death because of his negligence, Melinda should prevail on this claim. She can recover damages based on the amounts if any she paid for substitute services as well as for any other damages she can demonstrate based on the foregoing test.

Negligent Infliction of Emotional Distress

A family member may assert a claim for negligent infliction of emotion[al] distress by demonstrating that she was within the zone of danger when the defendant's extreme and outrageous actions resulted in harm to a fellow family member. Although Melinda may assert the claim, Wilbur's actions do not appear to be extreme and outrageous and it is unlikely that she will recover on this claim.

Jack v. Lawyer

The next issue is what claims if any may Jack assert against Lawyer for failing to file his negligence claim against Wilbur within the applicable statute of limitations, and what damages may he recover if any.

Malpractice

A lawyer may be sued for malpractice if she breach[e]s a duty to her client and this breach results in a harm to the client. To assert a successful claim against Lawyer, Jack must show the Lawyer's conduct fell below that of any other attorney practicing in the locale and that but for this breach of duty he would have not been harmed. Specifically, Jack must show the Lawyer (1) breached a duty to him; (2) causing damages.

A lawyer owes her client a duty to act as a reasonably prudent lawyer would while representing a client under similar circumstances. Here, a reasonable lawyer does not blow a statute of limitations. Lawyer's failure to file a negligence claim against Wilbur on Jack's behalf within the applicable statute of limitations is a breach of that duty. To demonstrate causation, Jack must show that but for the plaintiff's failure he would've

succeeded on his claim against Wilbur.

This requires a brief analysis of Jack's potential negligence claim against Wilbur. The elements of a successful negligence claim have been stated above. First, Jack must show that Wilbur owed him a duty. A person owes a duty to act as reasonable person would [sic] in similar circumstances. But the duty extends only to all foreseeable plaintiffs per Pfalsgraf. Here, Wilbur didn't owe a duty to Jack because Jack was not a foreseeable victim to Wilbur's failure to stop at a red light. Accordingly, Jack cannot show that but for the Lawyer's failure to file a claim within the applicable statute of limitations his claim would've succeeded. Even if the Lawyer had filed the claim, which seems a bit frivolous, Jack still loses.

Accordingly, Jack cannot succeed on his claim against the Lawyer for failing to file that claim. Since his claim will not be meritorious, he cannot recover the damages ordinarily available to a successful claimant in a malpractice action, which include compensatory damages and might well have included damages resulting from his failure to be able to have the "Star" cut since no other master diamond cutter is willing to do it.

Breach of Contract

A contract is a legally enforceable agreement between two people. The facts only indicate that Jack hired Lawyer to file this lawsuit. In California, however, a Lawyer is generally required to enter into a written agreement with a client relating to her representation of him. Assuming the presence of such an agreement, it was likely valid as a bilateral contract (mutual assent plus consideration based on the promises between both parties).

A breach occurs where no conditions exist to performance and the party required to perform fails to do so. Here, the Lawyer failed to file a claim even though she was required to do so. Accordingly, a breach occurred.

When a breach of contract occurs, several remedies are available to a successful party including compensatory damages (those necessary to place the non-breaching party in the same position he would've been in but for the breach), consequential damages (all damages foreseeable as a result [o]f the breach), perhaps liquidated damages. Restitutionary damages are permitted when the defendant confers a benefit on the plaintiff and it would be unjust for her to retain it. In the appropriate situation, injunctive relief, specific performance, recission or reformation might also be appropriate.

Here, if the Lawyer breached a contract, then she owes Jack compensatory damages - - those necessary to place him in the same position he would've been in but for the breach. As explained above, he would still have lost so this is probably nothing. He is also not likely to recover consequential damages for the same reason. However, if he paid the Lawyer any money for her services she may be requi[r]ed to return any amounts that were not used to institute this action

Jack might also consider contacting the local bar association to report Lawyer's actions.

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.

Question 1

Autos, Inc. manufactures a two-seater convertible, the Roadster. The Roadster has an airbag for each seat. Autos, Inc. was aware that airbags can be dangerous to children, so it considered installing either of two existing technologies: (1) a safety switch operated by a key that would allow the passenger airbag to be turned off manually, or (2) a sensor under the passenger seat that would turn off the airbag upon detection of a child's presence. Both technologies had drawbacks. The sensor technology was relatively new and untested, and the safety switch technology had the risk that people might forget to turn the airbag back on when an adult was in the seat. The safety switch would have increased the price per car by $5, and the sensor would have increased the price per car by $900. Research showed that most riders were adults and that the airbags rarely hurt children who were properly belted into the seat. No federal or state regulation required either a safety switch or a sensor. Autos, Inc. chose to install neither.

Oscar bought a Roadster. On his first day of ownership, he decided to take his 10-year-old daughter, Chloe, to a local ice cream shop. On the way home, Oscar accidentally ran the Roadster into a bridge abutment. The airbags inflated as designed and struck Chloe in the head, causing serious injury. Chloe was properly belted into the seat. She would not have been hurt if the airbag had not struck her.

What tort theories can reasonably be asserted on Chloe's behalf against Autos, Inc., what defenses can Autos, Inc. reasonably raise, and what is the likely outcome? Discuss.

Answer A to Question 1

4)

1)

Chloe v. Autos, Inc[.]

Products Liability

When a consumer is injured by a product, there are 5 theories the consumer can sue under in the area of products liability: battery; strict products liability; negligence; breach of warranties; and misrepresen[t]ation. The facts in the present case would give rise to three of the causes of action: strict products liability; negligence; and breach of warranties.

Strict Products Liability

A manufacturer or distributor of a product placing a product into the stream of commerce in a defective manner will be strictly liable for harm caused by the product. In order to recover under this theory, the following elements must be met: a proper defendant, i.e., a manufacturer or distributor of the product that left the plant in a defective condition; a proper plaintiff; a defective product; causation; damages; absent defenses.

Proper Defendant - Manufacturer or Distributor

To recover under strict products liability, the defendant must be a manufacturer or distributor of the product that left the plant in a defective condition. Here, the defendant is Auto[s], Inc[.], the manufacturer of the vehicle. This is a proper defendant for recover[y] under the theory. Additionally, the product must have left the manufacturer's plaint in a defective condition, which will be established under defective condition (see infra). The product here, the car, left the defendant's plant in the condition that was not subsequently changed and if found to be defective, was in that condition at the time it left the plant. This element is therefore met.

Proper Plaintiff - User or Consumer

Traditionally, the person injured was required to be the purchaser of the product, or at least a person in privity with the purchaser. Modernly, a proper plaintiff is any user, consumer, or foreseeable bystander who could be injured by the product. Here, the person injured was a passenger in the car, and the daughter of the purchaser. As a family member and rider in the vehicle, she is a proper plaintiff for recovery under this theory.

Defective Condition

A product can be defective by: manufacturing defect; design defect; or failure to adequately warn.

Manufacturing Defect

A manufacturing defect is present when a few of the products leave the plant in a condition different than the rest. The facts in the present case suggest that all the cars left the plant in the same condition. There was therefore no manufacturing defect.

Design Defect

A design defect can occur when all the products leave the plant in the same condition and there is a defect in the design of the product. There are two tests for design defects: the consumer expectation test and the reasonable alternative test.

Consumer Expectation Test

This test is met if the product leaves the plant in a condition more dangerous than the average consumer would reasonably expect. Here, a consumer might reasonably expect that a safety feature in a vehicle, such as an airbag, would make the car more safe, not less safe. Facts in the present case indicate that but for the airbag, Chloe would not have been injured. This product is therefore defective under this test.

Feasible Alternative Test

This test compares the design of the product with other reasonable alternatives available in the market. The test balances the availability of alternatives and their cost against the risk to users and the value of lives saved. Although there are no facts to indicate what other car producers did, it is evident that there were alternatives that were available. Even though there were no statutes to mandate their usage, this fact is not determinative in alternatives. Facts indicate that the company had considered implementing two separate safety measures. The fact that both the safety measures themselves had risks and drawbacks is also relevant. Chloe will first ague that the first alternative the defendant should have employed was the switch to manually disable the airbag. The cost of this product is very minimal at $5. However, the defendant will claim that there was a risk that people would fail to turn it back on, making the car more dangerous to the majority of passengers, according to research. The reason the airbag was designed in the first place is [sic] to make the car more safe for the majority of riders, which this device would prevent. In weighing these two arguments, the court would probably find that even though the cost of this is minimal, its risk might have outweighed its utility, making the car even more dangerous.

The plaintiff will next argue that the second device should have been employed, the sensor switch, as it would not be at risk to user misuse. However, defendant will assert

that this device, because it is new and untested, would malfunction, making the product more dangerous. They will argue that the cost of this device, at $900, is far too costly to be reasonable. In weighing utility, costs and risks, the outcome of this argument is highly depen[den]t upon the reliability of this device. If it is truly new and unreliable, the defendant will no doubt be successful in its argument. If, however, it is show[n] to be reliable, the defendant's argument will be weakened. The court will have to decide whether, if useful and reliable, $900 is reason[a]ble for this device, in light of its reliability and lives saved.

Failure to Warn

A product is defective if the defendant, knowing of a defect, fails to adequately warn the consumer. An adequate warning is one that tells the consumer of the risk, how it occurs, how to prevent such risk, and any mitigating factors to avoid further injury. Here, facts indicate that the D was aware of the danger of the airbags to children. There is no information on whether there was a warning as to this fact. If there was no warning about the risk of airbags to children, as it appears from the available facts, this product is defective.

Causation

Actual Causation

For strict liability, the injury to the P must have been actually caused by the defendant's product. The test is "but for" for the D's condu[c]t, the P would not have been injured. Here, the facts indicate that but for the airbags, the P would not have been injured.

Proximate Causation

Additionally, the P's injury must have been caused by the D's product. Here, P will argue that the injury was caused by the airbag and the D should be held strictly liable for all injury. The D will argue that Oscar crashing the car is a superceding intervening cause that should sever liability. Since airbags are installed to protect passengers in car accidents, this case is not superceding and the court will agree with the P here.

Damages

For strict liability, the P must have suffered physical injury. Here, the P was struck in the head, causing serous injury. This is a sufficient damage here.

Defenses

Contributory/Comparative Negligence

A P's recovery may be reduced or barred if found to be contributorily negligent. Although comparative neglig[e]nce is the majority view, under either comparative or contributory negligence, the P must be contributorily negligent. It is true here that Oscar ran the car into the bridge, but he is not the P. Even though Oscar may have been negligent, his conduct was not the conduct of the P, in order to trigger this defense. There are no facts present to indicate that P was at all negligent, since she had her seatbelt fastened.

Assumption of Risk

Assumption of risk is a defense when P proceeds in spite of a known risk. However, since D failed to warn of the risk, P could not have knowingly assumed it.

Since all elements have been met, P can recover under strict liability.

Negligence

Negligence cause of action is available when the D owed a duty of care to the P, which he breaches, causing damage to the P. A P can recover for injury caused by a manufacturer's negligence if P can establish: duty; breach; actual causation; proximate causation; damages; absent defenses.

Duty

A duty is owed by all persons to act in a way as to avoid harm to other[s]. The standard owed here is the duty to act as a reasonable prudent person to avoid harm to all for[e]seeable persons. Here, the D, as a car manufacturer (see supra), owed a duty to its consumers to produce a car in a safe way and to avoid all injury to purchasers and passengers. The amount of care owed is that of another reason[a]ble prudent car manufacturer.

Breach

The duty owed is breached when the D fails to act as another reasonable prudent person under the circumstances. Here, the P will argue that a reason[a]ble car producer would employ safety devices to protect riders and passengers, as were available. The D will argue that it acted reason[a]bly, since there were no statutes mandating conduct. Although presence of a statute may mandate conduct, absence of a statute is not a defense. The D still must act as a reasonable prudent car producer. Here, there is no indication of what other vehicle manufacturers do, but there are facts of other safety precautions. Since a reasonable car manufacturer would have at least warned of the danger, and facts indicate that the D did not, it appears as though D breached the duty owed when it failed to at least warn of the dangers.

Causation - Actual & Proximate

Actual Causation

See supra for actual cause. As discussed supra, the D was the actual cause of the D's [sic] injury.

Proximate Cause

See supra for proximate cause. As discussed supra, the D was the proximate cause of the D's [sic] injury.

Damages

The cause of action allows recovery for personal injury, which was incurred here (see supra).

Defenses

The same defenses are available here as under strict liability, and are not met (see supra). Therefore, P will be able to recover.

Warranties

Implied in every product are 2 implied warranties: Implied warranty of merchantability and implied warranty of fitness.

Implied Warranty of Merchantability

A product must be merchantable, meaning generally safe and fit for ordinary purposes. Here, the car was generally safe for general purposes. Although children could be injured by the car, this is a failure to warn not generally de[a]lt with by the warranty.

Answer B to Question 1

1)

CHLOE V. AUTOS, INC[.] ("AUTOS")

Chloe was injured while traveling as a passenger in her father, Oscar's, Roadster, which was manufactured by Autos. Oscar will bring a cause of action against Autos on Chloe's behalf ad litum because she is under eighteen years old. The following will examine and analyze the possible causes of action, the defenses Autos may raise, and the likely outcome.

1. CAUSE OF ACTION UNDER A STRICT PRODUCTS LIABILITY THEORY AGAINST AUTOS

STRICT PRODUCTS LIABILITY

A commercial seller who sells a defective, unreasonably dangerous product to an intended consumer or user will be held strictly liable for any harm caused as a result of the defective product.

Commercial Seller

In order to be held strictly liable, the defendant must be a commercial seller who purposefully injected the product into the stream of commerce.

Autos manufacturers the Roadster and is a corporation. Because Autos manufactures the Roadster and places it into the stream of commerce, Autos is a commercial seller.

Defective Product

A defect may be shown by plaintiff the following ways: 1) Defective Design, 2) Manufacturing Defect of that Particular Product Only, 3) Failure to Warn or Inadequate Warning.

1) Design Defect

Plaintiff may show that defendant's product had a design defect if there was a feasible alternative available at the time it was manufactured and if so, that the alternative would make the product safer and was economically reasonable.

Alternative Design Available

The facts state that at the time the Roadster was manufactured Autos itself was aware of two possible alternative designs to the Roadster that would possibly make the car's airbags safer for childre[n]. This included: (1) A safety switch operated by a key, or (2) A sensor under the seat that would detect the child's presence. The facts do not indicate that either product guaranteed the child's safety. However, they may have helped. Plaintiff will contend that the safety switch would have worked, but that Autos did not install it in fear that passengers would forget to turn it off and on. Thus, it appears that the safety switch, if operated correctly by the users, would have made the airbags safer for children. In regard to the sensor, its technology was relatively new and untested. Defendant will argue and thus there is no guarantee that it would have made the car safer. Plaintiff, however, will argue that while it might not have been tested and [was] relatively new, it was a feasible alternative design that could have indeed made the Roadster safer. Additionally, Plaintiff will assert that Autos was even "aware" of the danger to children, and even "considered installing either of the two existing technologies.["] Autos will contend that neither the Fed nor State governments require a safety switch or sensor. However, this argument is invalid because they knew of the potential risk of the airbags and if they knew about the risk and did not remedy it, they should not have manufactured the Roadster. Because the safety switch and sensor were available technologies at the time that would likely have made the Roadster safer, there was an alternative design available to Autos.

Economic Feasibility of the Alternative Design

The alternative design must be one that is reasonable and economically feasible to the manufacturer.

The safety switch according to the facts would increase the Roadster's price by $5.00. The sensor would increase the Roadster's price by $900 per car. Plaintiff will first contend that for $5.00 extra per car, the safety switch was economically reasonable and that $5 would not have made a difference in the car's price and marketability, as the car is likely much more expensive already. Plaintiff will further assert that the sensor, while untested, was worth it to install for $900 extra per car. Defendant will contend that $900 was too much per car for an untested product and that $900 extra would hurt the Roadster's sales appeal and marketability. While this may be somewhat true, Plaintiff will argue that safety is priceless, and that $900 extra is relatively small in comparison to the overall price of a car such as the Roadster, and that saving a life or minimizing injury of a child or adult is worth every penny. For $5 more, the safety switch is economically feasible and Plaintiff has a valid argument that for $900 extra, the sensor is worth it if it has the chance of preventing injury or death while traveling in the Roadster.

<u>2) Manufacturing Defect</u>

Manufacturing defect may be asserted if the particular product that Plaintiff purchased was individually defective. Here, there is no evidence that Oscar's particular Roadster was individually defective, and thus Chloe cannot assert this theory.

3) Inadequate Warnings or Failure to Warn

Plaintiff may also show defect or that the product was unreasonably dangerous if Defendant failed to warn or gave inadequate warnings.

Chloe will contend that Autos failed to warn its purchasers of the risk to children by the airbags. As stated in the facts, "Autos Inc. was aware that airbags can be dangerous to children," and thus should have provided some warning to purchasers of the vehicle. Autos will contend that no warnings were necessary because "research showed that most riders were adults and that the airbags rarely hurt children who were properly belted..." Chloe will rebut this argument with the fact that children are everpresent and it should be obvious to Autos that children would ride in the Roadster as passengers and this is a fact that Autos should have considered, despite the research. Thus, because Autos knew of the risk to the children and the potential dangers, and failed to warn of them, they can be held accountable for failure to warn.

Conclusion: Chloe can show under a design defect theory that an alternative safer design existed. Additionally, Chloe can show that Autos failed to provide inadequate [sic] warnings as to the airbags' risk to children.

Foreseeable User

The consumer who was harmed by the alleged defect must be one that is foreseeable to the manufacturer.

Chloe, as a passenger in the Roadster, who was properly seated in the car, will contend that she was a foreseeable user, as it is foreseeable that the driver will have passengers in the vehicle from time to time. Autos will contend that Chloe, a ten-year old child was not a foreseeable user because "research showed that most riders were adults and that the airbags rarely hurt children who were properly belted..." However, this argument will fail for Autos because they were still aware that children would ride as passengers from time to time and thus Chloe was a foreseeable user.

Causation

Plaintiff must prove defendant was the legal and proximate cause of her injury.

Legal Causation

Under legal causation, plaintiff must show that "but for defendant's defective design, she would not have been harmed."

Thus, here we ask, but for the failure of Autos to install sensors or a safety switch or provide a warning to the users of the Roadster regarding the airbags and children, would Chloe have been hurt? The answer is no, because as the facts state, the airbags inflated as deigned and struck Chloe, "causing serious injury," and "she would not have been hurt if the airbag had not struck her." Autos is the legal cause of Chloe's harm.

Proximate Cause

Proximate cause examines whether the harm to plaintiff is foreseeable and whether there were any intervening forces.

Chloe was injured by the airbags as they [sic] inflated as designed as they [sic] struck her. Autos will contend that this was caused as a result of Oscar accidentally driving into a bridge. However, Chloe will successfully argue that accidents by drivers of the Roadster are foreseeable and frequent and that the whole purpose of airbags is to prevent or minimize injuries from such foreseeable accidents. Additionally, Chloe was properly belted in the seat, and because she was properly belted and the airbags operated as designed, Autos['] defect was the direct and proximate cause of Chloe's injury.

Damage/Harm

Plaintiff must prove damage. As discussed, as a result of the defect Chloe suffered serious injury to her head.

DEFENSES BY AUTO

Assumption of the Risk

Plaintiff assumes the risk of injury if he consciously and voluntarily assumes the risk and is aware of the danger, but still proceeds. This serves a complete defense to strict liability in most modern jurisdictions.

Autos will contend that Chloe and Oscar assumed the risk of harm by purchasing a two-seater convertible and because it was a convertible they knew or should have known that it was a dangerous vehicle. However, Chloe will rebut this claim by asserting that even if the car was a convertible, it should have and could have been designed safer and that she did not assume the risk of a defective airbag whatsoever. Autos['] defense is weak and will fail because Chloe never assumed the risk of injury by a defective airbag according to the facts.

2) NEGLIGENCE CLAIM AGAINST AUTOS

Chloe may also assert a claim of negligence against Autos. Negligence requires the showing of: 1) Duty, 2) Breach of Duty, 3) Actual Cause, 4) Proximate Cause, and 5) Damages.

Duty

A person is held to the duty of care to act as a reasonably prudent person under the circumstances.

Autos, a car manufacturer, will be held to act as the reasonably prudent auto manufacturer would in designing and manufacturing the Roadster.

Foreseeable Plaintiff - Chloe as a passenger was a foreseeable plaintiff under both the Cardozo and Andrews views as she was legitimately riding with Oscar in the vehicle at the time of the accident.

Breach of Duty

Breach of duty may be show[n to] be an actual breach or inferred via res ipsa loquitur.

Chloe will contend that Autos breached its duty of care to her by failing to make the Roadster safe and by failing to install the safety devices, such as the sensor and/or switch. Furthermore, Autos knew of the alternatives, as discussed above, and could have installed them. Autos will contend that doing so would be costly and that there were drawbacks to each. However, as discussed, the drawbacks and risks were worth it in comparison to the risk of harm and thus viable. Autos will contend that neither the Fed nor State governments require a safety switch or sensor. However, this argument is invalid because they knew of the potential risk of the airbags and if they knew about the risk and did not remedy it, they should not have manufactured the Roadster. As a result, by failing to make Roadsters and its airbags safe for children, Autos breached its duty of care to Chloe, who was harmed by the defect.

Actual Cause/Legal Cause

Rule: see supra. As discussed above, Autos is the actual cause of Chloe's harm.

Proximate Cause

Rule: see supra. As discussed above, Autos is the proximate cause of Chloe's harm.

Damage

See supra.

DEFENSES

Assumption of the Risk

Rule: supra. As discussed above, an assumption of the risk defense will fail.

Comparative Negligence

Comparative negligence is shown by demonstrating that plaintiff was negligent in its actions. Depending on the jurisdiction (pure or partial), the damages will generally be reduced in proportion to plaintiff's negligence.

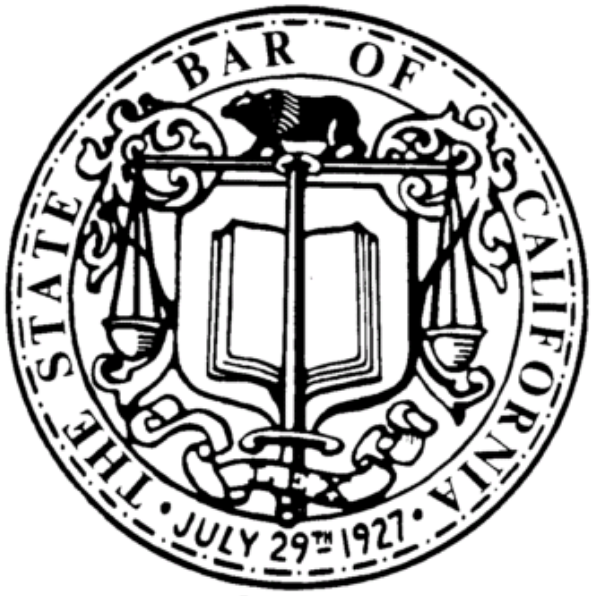
Autos will contend that because Oscar was negligent in causing the accident, as the Roadster ran into a bridge abatement [sic], he was contributorily negligent. While this is a valid argument, as the accident and release of [the] airbag was caused by Oscar, Chloe may contend that Oscar's negligence should not be imputed to her. This is true in most jurisdictions- that the driver's negligence is not imputed to a passenger's claim. However, if the jurisdiction imputes Oscar's negligence, his negligence will be reduced in proportion thereof and provide Autos with at least a partial defense.

Conclusion: Chloe has a valid negligence claim against Autos. Depending on the jurisdiction, however, Autos may reduce their damages via Oscar's comparative negligence.

3) IMPLIED WARRANTY OF MERCHANTABILITY

Under the implied warranty of merchantability, a product that is sold is impliedly warranted to be reasonably useful and safe for average use.

Chloe will contend under this theory that the Roadster, a two-passenger vehicle, should have been at least made safe for all that [sic] would be in the vehicle, including the driver and passenger. Because the airbags were not safe, and injured her, she will argue that the Roadster was not fit for regular use, as intended by its purchasers. Autos may try and contend that the Roadster was not designed to be safe for children because research showed that children were not regularly passengers in the Roadster. However, for reasons discussed above, this argument will fail. Chloe will be successful against Autos under an implied warranty of merchantability theory as well.



California
Bar
Examination

Essay Questions and Selected Answers

July 2006

Question 1

After paying for his gasoline at Delta Gas, Paul decided to buy two 75-cent candy bars. The Delta Gas store clerk, Clerk, was talking on the telephone, so Paul tossed $1.50 on the counter, pocketed the candy, and headed out. Clerk saw Paul pocket the candy, but had not seen Paul toss down the money. Clerk yelled, "Come back here, thief!" Paul said, "I paid. Look on the counter." Clerk replied, "I've got your license number, and I'm going to call the cops." Paul stopped. He did not want trouble with the police. Clerk told Paul to follow him into the back room to wait for Mark, the store manager, and Paul complied. Clerk closed, but did not lock, the only door to the windowless back room.

Clerk paged Mark, who arrived approximately 25 minutes later and found Paul unconscious in the back room as a result of carbon monoxide poisoning. Mark had been running the engine of his personal truck in the garage adjacent to the back room. When he left to run an errand, he closed the garage, forgot to shut off the engine, and highly toxic carbon monoxide from the exhaust of the running truck had leaked into the seldom used back room. Mark attributed his forgetfulness to his medication, which is known to impair short-term memory.

Paul survived but continues to suffer headaches as a result of the carbon monoxide poisoning. He recalls that, while in the back room, he heard a running engine and felt ill before passing out.

A state statute provides: "No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key from the ignition, setting the brake thereon and, when standing upon any perceptible grade, turning the front wheels to the curb or side of the highway."

1. Can Paul maintain tort claims against (a) Clerk for false imprisonment and (b) Mark for negligence? Discuss.

2. Is Delta Gas liable for the acts of (a) Clerk and (b) Mark? Discuss.

Answer A to Question 1

1)

1.

Paul v. Clerk

False Imprisonment of Paul

False imprisonment is an intentional tort. The elements for false imprisonment are that the tortfeasor must have intended to confine the victim in a bounded area and that the victim have no reasonable means of leaving the bounded area. The extent of the false imprisonment is usually not [of] importance[;] mere seconds can amount to false imprisonment. Courts often will forgo the intent requirement in regards to the tortfeasor if the victim suffered harm as [a] result of the confinement.

Here the facts indicate that Clerk intended to keep Paul in a bounded area until Mark, the store manager[,] was able to come back from his errand. Clerk had the requisite intent to confine Paul. Clerk will argue that the area was not bounded as he did not lock the door. Clerk will attempt to argue that Paul had a reasonable means of leaving the area[;] thus he cannot be guilty of false imprisonment.

Paul will reply that Clerk had the requisite intent and that it is not relevant whether the door was locked or not. The area was confined[;] Paul did not have a reasonable means of leaving as Clerk threatened to call the police on him. Paul will argue that even though the door was not locked, he was still confined for purposes of false imprisonment. Furthermore, Paul will argue that even with [sic] Paul did not have the requisite intent to confine him, the harm he suffered will be construed by the Courts as a substitute for intent.

Paul should succeed in his assertion of false imprisonment against Clerk barring any defense, discussed below.

Clerk's defense of Shopkeeper's Privilege

A defense to the tort of false imprisonment is that a storekeeper or his employees are allowed to detain an individual if they reasonably suspect that person of stealing. They are then allowed to detain that individual for a reasonable period of time in order for them to ascertain the validity of the theft. Courts have often held that reasonable usually cannot exceed 30 minutes, at time[s] have held 15 minutes was not reasonable, depending on the circumstances.

Clerk will argue that he was reasonable in his belief because he did not see actually see [sic] Paul pay for the candy, thus allowing him to assert the right. Clerk will also argue he

acted reasonably in taking Paul to the back room, and that leaving him for 25 minutes was not unreasonable. Clerk will argue the 25 minute stay was reasonable because he had to wait for the store manager to come back.

Paul will reply that Clerk's belief was unreasonable because Clerk was not paying attention in the first place, and that all Clerk had to do was look on the counter to see if the $1.50 was there. If nothing else, Clerk could have simply checked the register. Paul will then argue that the 25 minute detainment was unreasonable because of the type of room he was placed in. Paul will argue that putting him in a [room] that was full of carbon monoxide was unreasonable, even if it was only for one minute.

Paul should succeed in rebutting Clerk's defense of SP b/c it was not a reasonable suspicion and the time constraint was unreasonable.

Clerk's unlawful arrest of Paul

For purposes of demonstrating intent and unreasonable belief, Clerk's arrest of Paul can be analyzed. It has been held that when a citizen arrests another citizen, for purposes of a misdemeanor (which these facts indicate as the candy was only $1.50), require that the Clerk had been reasonable in his belief that the individual conducted the act, that act was done in his presence, and it had to be a breach of the peace.

Clerk may try to argue that it was done in his presence, and it technically was, but Clerk never actually saw it. Clerk may argue that regardless of [whether] he actually saw it, his belief was reasonable. Clerk may attempt to argue that a theft amounts to a breach of the peace and that he did not unlawfully arrest Paul.

Paul will argue that even if Clerk was reasonable in his belief, this was not a breach of the peace. Paul took $1.50 worth of candy from a gas station and threw the money on the counter. This simply cannot amount to a breach of the peace, no matter how strict a state's law might be.

Therefore, Clerk unlawfully arrested Paul.

Conclusion

Therefore, because Clerk intended to confine Paul, and did indeed confine Paul (and caused an injury[,] no less), that Clerk did not satisfy the elements of shopkeeper's privilege as the belief was unreasonable, as was the time constrained. Finally, Clerk's unlawful arrest of Paul also goes towards the intent of illegal confin[e]ment. Thus, Paul should succeed in a false imprisonment claim again[s]t Clerk.

Paul v. Mark

Negligence

Negligence is a tort that requires the following factors: Duty, Breach of Duty, Foreseeability (Actual/Proximate Causation), and Damages.

Negligence per se

Negligence per se occurs when there is a[n] ordinance that prohibits some type of conduct that occurred. If it's intended to cover the type of occurrence it speaks to, one may be guilty of it without demonstrating all the elements of negligence.

Here, the statute refers to stopping a car on the curb/highway, and turning the wheels. This would indicate it's to prevent cars from sliding if the parking brakes don't work. Thus, this statute was not intended to protect people from carbon monoxide poisoning.

Thus, negligence per se doesn't work.

Duty

Duty requires that the tortfeasor have some duty to victim. Generally speaking, we all have a duty not to act negligently. Essentially this is requiring that we act in a reasonable manner that does not put others in a[n] unnecessary state of harm. In order to make out a case for negligence, Paul needs to show that Mark owed him a duty.

Mark will argue that he has no general duty to everybody in the world. To hold him to such a high duty is improper. In addition, Mark will argue that the medicine he was taking made him forgetful, thus absolving [him] of his duty.

Paul will argue that nobody's asking Mark to have a duty toward the whole world, just those who enter his store[.] Paul will state that shopkeepers are held to a much higher degree than normal guys just walking on the street. Paul will also argue that Mark's tendency to forget while taking the medicine does not absolve him because he knows that the medicine makes him forgetful. Thus Mark must act in accordance with that knowledge.

In order to properly examine duty, it's necessary to look at the duties owed to a trespasser, licensee and invitee.

Trespasser

An undiscovered trespasser is owed no duty under the common law. Anticipated trespassers need to be warned of active operations and artificial conditions that are unreasonably dangerous.

Mark will try to argue that Paul was a trespasser because (b/c) Mark was being held for alleged shoplifting. Mark will argue that Paul was in an area that is not generally open to members of the public, thus his duties will amount to that owed to a trespasser only. Mark will argue that he was not aware of Paul's presence[;] therefore, he owned Paul no duty.

Paul will reply that holding him as an undiscovered or unanticipated trespasser makes no sense. He was discovered and most likely anticipated, although the facts do state the room was seldomly used. Paul will argue that he was owed, at worst, a duty that's granted to an anticipated/discovered trespasser. Thus, Mark will argue that he was entitled to a warning in regards to the carbon monoxide.

Licensee

A licensee is one who is invited onto the land of another as a social guest. They are owed to [sic] warnings regarding unreasonably dangerous conditions involving active operations, hidden but discovered dangers, artificial and natural conditions.

Because Paul was not invited as a social guest, whether into the gas station or the back room, the licensee standards do not apply to him and need not be discussed here.

Invitee

An invitee is one who has been invited onto the land of [sic] property of another for the property owner's benefit. The rule for invitees is that the property owner owes all the same duties that is [sic] owed to licensees, plus the owner needs to make reasonable inspections for unreasonable dangerous conditions existing on the premises.

Mark will argue that Paul was not an invitee because he had allegedly stole [sic]. Mark will argue that while Paul may have started off as an invitee, by stealing, he exceeded the scope of the invite and became a trespasser. Mark will argue that because of that, Paul is not entitled to the protections of an invitee.

Paul will argue that he was an invitee as he went to the station to buy gas. He was there for the benefit of Delta. Paul will argue that just because he allegedly stole, that does not change his status because he did not in fact steal, that Clerk false[ly] imprisoned him, and the false imprisonment cannot change the scope of duty owed to him.

Paul will then argue that because an invitee is entitled to have the owner inspect the premises for dangerous conditions, this means that there was a duty to inspect the back

room before sticking him in there. Paul will argue that carbon monoxide is an unreasonably dangerous condition.

Was there duty?

The duty owed to Paul was most likely that of a[n] invitee. He was there for Delta's benefit. The fact that Clerk thought he stole does not change that fact b/c Clerk's defenses do not work. Further, the medicine making Mark forgetful cannot be construed against Paul because Mark knew the medicine makes him forgetful[;] thus he had a duty to act extra carefully when on the medicine.

Breach of Duty

This examines whether the tortfeasor breached the duty that's was [sic] owed to the victim in this case.

Mark will argue no duty was breached because he had no duty in the first place. Mark will make the same arguments regarding duty as above. Mark will argue that if he had no duty, he cannot be guilty of breaching it.

Paul will argue that duty [existed] for the same reasons as above. Paul will argue that Mark owed him a duty because he was the store manager and further that Mark owed a duty b/c he knew the medicine made him forgetful.

Thus, there was breach of duty of [sic] Mark's part.

Foreseeability

There are two inquiries in regards to foreseeability/causation: 1) actual (but-for), and 2) legal (proximate cause). But-for cause can be quite broad and is usually easy to satisfy. Proximate cause is a bit more difficult as it requires that the victim be foreseeable. The most prominent test if [sic] the "zone of danger" (or Cardozo test), while the less used one is the Andrews test.

A but-for cause simply asks: but-for defendant's actions, would the injury have occurred? In this case, but-for is easy to satisfy. But-for Mark's actions of leaving the exhaust on, Paul would not have been injured. This test is extremely broad and almost anything can qualify as a but-for cause. Perhaps that is why the courts instituted a legal cause as well.

The Cardozo Test will consider proximate cause satisfied only if the individual was in the zone of danger. Thus, it requires that the chain of events leading up to the injury was

reasonably foreseeable to the defendant. It requires that there not be some superseding (i.e. extremely unnatural consequences that comes in the middle) cause.

The Andrews [test] is extremely broad. It merely says that as soon as a negligent act is done, the zone of danger basically expands to everyone and everything.

Using the Cardozo test, Mark will argue that Paul was not within the zone of danger (ZOD) because Mark simply had left the exhaust on his truck. Mark will argue that by leaving the exhaust on, it was not foreseeable that Clerk would take Paul into a seldom-used backroom and have the Carbon Mono leak into that room. Mark will further argue that Clerk's actions were a superseding cause because if Clerk hadn't taken Paul into the room, there would be no injury.

Paul will reply that he was in the ZOD because the backroom was next to the garage. Paul will say that leaving the exhaust was a legal cause because he was a foreseeable plaintiff. Paul will argue that it is foreseeable that an exhaust, which everyone knows emits carbon monoxide, will seep into an adjoining room. Paul will further argue that while Clerk did falsely imprison him, this does not amount to a superseding b/c generally unless it's an Act of God or crime by 3rd party[,] many acts by another 3rd party do not amount to superseding causes.

Under the Andrews test, Mark really had no arguments b/c it's essentially another but-for test.

Paul should succeed in demonstrating foreseeability/caus[a]tion because it seems pretty clear he was in the ZOD. Paul was placed in a room adjoining the garage[;] most people should have the knowledge that it's dangerous activity. Further, the acts of the Clerk probably will not be construed as a superseding cause, even though it is an intentional tort.

Damages

Damages here would amount to Paul's medical expense and whatever suffering that has occurred.

Defenses

Paul will attempt to argue that he was not contributorily negligent or did not assume the risk.

Contributory negligence requires that the victim do something that contributed to the negl[ig]ence, thereby depriving of his right to damages (in a c/n jurisdiction).

Mark will argue that Paul was c/n because he should have realized the[re] was CO and that any reasonable person would have ran [sic] out the door or at least pounded on the door.

Paul will reply that CO cannot be smelled, that it simply knocks a person out. Paul will reply that there was no way for him to know that there was CO[;] therefore he cannot be contributorily negligent.

Assumption of risk requires that the victim voluntarily assume the risk of whatever occurred to him.

The facts do not indicate that Paul voluntarily assumed any risk. While the door was unlocked, he could not have voluntarily assumed the risk that there would be CO leaking from the garage. Therefore, AOR is a bad defense for Mark to assert.

Further, comparative negligence will only serve to decrease some of Mark's liability. In some jdx's, one who is over 50% negligent cannot recover. In pure jdxs, P can always recover something, unles[s] she is 100% negligent. The facts do not seem to indicate any negligence on Paul's part[;] therefore Mark will be responsible for 100% of the negl[ig]ence, as it relates to Paul.

2. Vicarious Liability/Respondeat Superior

<u>Vicarious Liability/Respondeat Superior</u>

Generally, an employer is guilty for the acts of his employees, provided that it is within the scope of his employment.

In the case, Clerk was acting within the scope of his employment. He was trying to protect the store from being robbed. The store may try to argue by falsely imprisoning Paul, Clerk was acting outside of it. Further, store will try to argue that b/c Clerk was talking on the phone, he was also acting outside the scope of employment.

The store's arguments probably will not work because Clerk undoubtedly in [sic] given the privilege by his employer to detain those he believes is stealing. It would appear from the facts that Clerk was acting within the scope of his employment[;] surely his job entails detaining those who he believes was [sic] stealing from the store. Thus, the store cannot relieve itself of Clerk's false imprisonment tort.

Mark, on the other hand, left his truck on while running on a personal errand. The store will try to claim he was acting outside the scope of employment because he was on a detour. The general rule is that when an employee detours from his employment functions, the employer might not be held responsible.

The store will argue b/c Mark left on a personal errand, his actions cannot be attributed to them. This argument probably will not work b/c Mark left his truck at work. Mark did not take his truck on a personal errand and run somebody over. It is given that people

generally take their cars to work, and if that car poses a problem and causes injury to a customer, that is within the scope of the employment.

Therefore, the store will be held under the vicarious liability/respondeat superior theories.

Trespasser/Licensee/Invitee

All of the rules and arguments above apply to the Employer as well.

Since Paul was a[n] invitee, the Store (or its employees) owed a duty to inspect the premises and by failing to do so, Store is liable for the employer's acts.

Defenses

All the same defenses from above apply.

Answer B to Question 1

1)

I. Can Paul maintain tort claims against Clerk for false imprisonment?

In order to prevail under a claim of an intentional tort, such as false imprisonment, the plaintiff must show an action of the defendant, made with requisite intent, causation and damages. False imprisonment specifically requires the following: (1) an act or omission of the defendant that causes the plaintiff to be restrained to a bounded area. This can be done through a physical act or under an imminent threat. There must be no reasonable means of escape. (2) The defendant must have acted with specific intent to confine or general intent, meaning he acted with substantial certainty that he was acting in the proscribed manner. (3) It was the actions of the defendant that caused the harm to the plaintiff. The action must have been at least a substantial factor. (4) Damages. The plaintiff had to suffer some harm so he must have known of the restraint or suffered damage because of it.

Action of the defendant (C)

In this case, C did ask P to go with him to the back of the store, which P did. Though C may argue P was free to leave, P should argue that he only went to the back room under threat of having trouble with the police. He knew C had taken down his license number, and P arguably was willing to go into the back room so he could have a chance to explain himself. P was put into the room and C closed, though did not lock [,] the only door to the room, which contained no windows. This should be enough to meet the requirement that there be no reasonable means of escape. Even though P could have physically opened the door and may have been able to walk out, he was being held there under threat of having to deal with the police.

M may argue that the threat of calling the police should not be considered to be a threat that confined the P. If P was truly innocent, all he would have to do is give his story to the police. Plus, P should have known that his money was still on the counter, and if he could convince C or the police to look for [it], this story would

be shown to be true. Therefore, C would argue, P did not really have to stay in this back room [;] it was only P's desire to avoid dealing with the cops that caused him to be back there. This is probably not going to work because the [sic]

Intent

Here, P should argue that C acted with the specific intent to hold P in the bounded area. The facts do support this argument, because C did specifically tell P to go into the back room to wait for Mark, the store manager. C also intentionally made the statement that caused P [to] feel that he had to stay in the back room. Therefore, this element is met.

Causation

The causation element is also met because there is a direct link from C's actions to P being held in the store room. The facts state that P went into the back room after hearing C threaten to call the police.

C may try to argue that, while his action may have caused P to be bounded to the room, it did not cause P's harm because of the intervening force of M. This is discussed below in the section on defenses.

Damages

The facts state that as a result of being held in the back room for 25 minutes, P was knocked unconscious from carbon monoxide poisoning. Therefore, he did suffer actual physical harm at the time. He also continues to suffer headaches as a result of that, so he has ongoing damage. He also may have suffered damage even before being knocked unconscious. The facts state that he recalls feeling ill even before he passed out, so he may have been afraid or suffered emotional distress.

Defenses

Because P does not seem to have met the above elements for a claim of false impri[s]onment against C, C will need to offer up some defenses if he is to shield himself from liability. The following defenses should be considered by C:

Storekeeper privilege

Tort law does permit storekeepers to retain customers suspected of shoplifting. The idea is that storekeepers are permitted to try to recapture their chattels by using reasonable means and holding the suspected thief for a reasonable amount of time. The shopkeeper is protected against making reasonable mistakes as to whether or not the suspect actual stole anything.

In this case, C should argue that he was reasonable to suspect P of shoplifting. There are facts to support this claim [.] C did witness P pocked [sic] the candy and was not aware that P had paid. It is true that P had tossed money on the counter to cover the cost of the candy, but it was reasonable for C not to have seen this. This is because it is customary for customers to pay for items by going up to the cash register and being rung up by the cashier, and giving money directly to the cashier. Clerks are not used to having to look for money dropped on counters to be sure if someone has paid or not. Therefore, C was reasonable to think P was shoplifting, so he was covered by the privilege.

However, P has a very good claim to shoot down this defense. The detention by a shopkeeper asserting this privilege must be reasonable. Here, C hold [sic] P in the back room for 25 minutes while he was waiting for Mark (M) to arrive. Arguably, this is too long to hold someone in a windowless back room by themselves to discuss stealing a candy bar that cost $1.50. C will of course argue it was reasonable for C to make P wait for the manager, and that 25 minutes really is not that long. However, he was held in the back room and was never once checked on to be sure he was okay. This is arguably unreasonable. Also, the harm that came to P as a result of being in the room was clearly not reasonable. Therefore, C was outside the bounds of the storekeeper privilege and this defense is not available to him.

Superseding force

As discussed above, C may also want to argue that it was not his tortious act that caused the harm, but rather it was Mark's supervening actions. C would argue that if M had not left his truck running in the garage for so long, the exhaust would have not leaked into the back room and P would not have

suffered any damages. Therefore, it is M's negligence (either in merely running the engine or in failing to take his medication) that was the real cause of the harm.

The rule for causation in tort cases is that the defendant's act was a substantial factor. P should easily be able to show that C was a substantial factor in the harm, because C left him there by himself for long [sic]. Therefore, the superseding force will not absolve his liability.

Consent

C may also try to argue that P consented to the imprisonment. Consent is a valid defense against intentional torts. C would argue that P went to the back room of his own volition, because he made the choice to go back there rather than have the police be called by C.

The problem with this defense, P will argue, is that consent must be given voluntarily, and the actions of the defendant must not exceed the bounds of the consent. Here, the consent was not voluntary, because P was acting under threat of having the police be called, even though he did pay for his item. Also, even if P did arguably consent to going into the back room, he surely did not consent to being held for 25 minutes by himself and to suffer such physical harm.

Conclusion

Based on the above, it appears that P does have a tort claim against C for false imprisonment. Though there are defenses that C will try to argue, he will probably not succeed with any of them.

II. Can P maintain a tort claim against M for negligence?

A basic cause of action for negligence requires a showing of the following elements: (1) existence of a duty with an accompanying standard of care; (2) a breach of that duty; (3) defendant's actions were the but [-] for and proximate cause of the plaintiff's injury and (4) the plaintiff was actually damaged. Therefore, P must show all of these elements in order to prevail against M for negligence.

Duty and Standard of Care

A duty of care is not owed to all. However, a duty of care is owed to all people who can forseeably be injured by the actions of the defendant. In this case, the vicinity of P to the area of where M was running his engine would make him a foreseeable plaintiff. M may argue that no duty of care is owed to P because M had no idea P was back there, and had no reason to know because the store room was seldom used. However, this probably will not absolve M of his duty of care, because it is foreseeable that someone will be in the back of the store or garage at some point, and that leaving an engine running for so long in a closed area will cause harm to someone.

The standard of care owed is usually that of a reasonable person acting under similar circumstances and with ordinary prudence. This will be the standard of care applied in this case.

Breach

Now it must be determined if M's conduct fell below the standard of care. There are several ways that P can argue that it does. First, P could argue that M was negligent merely in leaving the engine running for so long in the closed area. Certainly, reasonable people know that they should not allow highly toxic carbon monoxide to fill a small space, especially when the small space is so close to a public business where it is certain people will be found. Second, P could argue that M was negligent because M failed to take his medication. A person who knows that they are likely to forget doing things that would make their actions safe (like, in this case, turning off [the] engine of his truck) arguably should not be engaged in those actions. Here, M must have known of his likelihood of forgetting such things, since he has a prescription for short-term memory impairments. Therefore, he was negligent in failing to remember to take the medication in the first place that would have allowed him to avoid putting P at risk. P should be able to show breach on both of these points, since no

reasonable person would leave their car on when it[']s confined to such a small place.

Finally, P may argue that M's action is negligence per se. Negligence per se may arise when there is a statute that provides for penalties, that states the conduct that is required, that is meant to address the sorts of injuries caused [by] the defendant, and that is meant to protect peo[p]le in the plaintiff's position. In this case, P would argue that the state statute is meant to protect people from suffering carbon monoxide poisoning, by requiring everyone to shut off their car before leaving it unattended. Therefore, M's action was covered by the statute, and P's injury was meant to be addres[s]ed by the statute. However, M should be able to strike down this argument fairly easily. M should argue that the point of such statute is to prevent vehicles from causing accidents because the vehicle rolls while being unattended. The language of the statute makes it pretty clear that this is the injury the statute is meant to protect against, since the statute specific[a]lly addresses setting the brake on the vehicle and curbing wheels so the vehicle does not roll. Nothing indicates the statute is meant to protect against carbon monoxide poisoning.

Causation

C will have to show M's actions were both the but[-]for cause and the proximate cause of his harm. It is the but[-]for, or legal, cause, because were it not for the negligence of the defendant, P clearly would not have suffered any injury. Nothing indicates that he would have suffered such harm just by being in the room. Also, it is the proximate cause. There is a direct link from the actions of the defendant to the harm suffered by P.

M will certainly try to argue that there were superseding forces that were the actual cause of P's harm. His best argument would be that it was C's false imprisonment of P that was the true cause of P's injury. However, superseding forces will not absolve a defendant of negligence unless they are unfor[e]seeable. Here, it should have been foreseeable [to] M that someone, at

some point, would go into the back room or even into the garage. The facts do state that the back room is seldom used, which may seem to support M. However, this does mean that the back room is sometimes used. Therefore, the superseding force was foreseeable and will not break the chain of causation.

Damages

As discussed above, P did suffer damages. These damages can be attributed to M's actions just like they can be attributed to C's intentional tort. The likely result is therefore that P will be able to collect from both C and M, as joint and several tortfeasors.

III. Is Delta Gas (DG) liable for the acts of (a) Clark and (b) Mark?

Though the facts do not specifically say it, C and M both appear to be employees of DG. Therefore, if DG is liable for the acts of C or M, they would be liable under the theory of vicarious liability. Vicarious liability states that an employer is liable for the torts of an employee if that employee is acting within the scope of the employment. The court will consider the time and place of the employee's act, and will also consider if the employee is acting for the benefit of the employer. In general, the scope is broad.

Liability for the tort of C

In this case, DG would argue that C was not acting within the scope of the employment. Certainly, DG would not authorize its employees to commit intentional torts, such as false imprisonment, against its customers.

However, the mere fact that DG did [not] authorize this action will not get it off the hook. All P would have to show to hold DG liable for C's act is that C was acting in the interests of the employee. It is clear that C held P only because he thought P had stolen something from DG. Therefore, C was acting to held [sic] the employer. This is going to be consider[e]d within the scope of employment, even though it was not specifically authorized. Therefore, is [sic] C is going to

be liable, so too will DG. P should also point out that C was on the clock and was at the place of employment when the tort occur[r]ed, strengthening the argument that this is within the scope.

Liability for the tort of M

The same rules will apply to determine if DG is liable for the torts of M. M's tort occurred when he was running the engine of his personal truck in the back room of the garage. Nothing indicates that M was on the clock at this time. Also, nothing indicates that M was doing this with any intention of helping employer. Rather, it appears he was doing this only for himself. Therefore, it is unlikely that DG will be liable for the act of M.

The best argument P could make to hold DG liable would be the close proximity of M to the place of employment. However, this probably will not overcome the facts that he was not on the clock and was not acting to benefit the employer.

Independent contractors?

If for some reason C and M are ICs and not employees, then a different standard would apply. Employers of ICs are generally not liable for the torts of ICs. However, they are liable if the tort involves a non-delegable duty, such as the duty of care owed to an invitee. In this case, P would be an invitee of the business, so he would be owed a very high standard of care. The employer would be charged with warning him of any latent dangers that the employer knows or should have known about. Clearly, carbon monoxide is a latent danger, since it is one that is not immediately apparent and cannot be seen. Also, P would argue that the defendants should be charged with knowing when there are gas leaks in the store. It would not matter that they did not have actual knowledge. The standard is that they should have known. Failing to warn of the latent danger would therefore be a breach, and DG would be liable for the torts of

M and C, even if they are construed as independent contractors and not employees.

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.

Question 2

Manufacturer designed and manufactured a "Cold Drink Blender," which it sold through retail stores throughout the country. The Cold Drink Blender consists of three components: a base that houses the motor, a glass container for liquids with mixing blades inside on the bottom, and a removable cover for the container to prevent liquids from overflowing during mixing. A manufacturer's brochure that came with the Cold Drink Blender states that it is "perfect for making all of your favorite cold drinks, like mixed fruit drinks and milk shakes, and it even crushes ice to make frozen drinks like daiquiris and piña coladas," and cautioned, "Do not fill beyond 2 inches of the top."

Retailer sold one of the Cold Drink Blenders to Consumer. One day, Consumer was following a recipe for vegetable soup that called for thickening the soup by liquefying the vegetables. After deciding to use her Cold Drink Blender for this purpose, Consumer filled the glass container to the top with hot soup, placed it on the base, put the cover on top, and turned the blender on the highest speed. The high speed rotation of the mixing blades forced the contents to the top of the container, pushed off the cover, and splashed hot soup all over Consumer, who was severely burned by the hot soup.

Consumer filed a lawsuit against Manufacturer and Retailer, pleading claims for strict products liability and negligence. In her complaint, Consumer stated that the Cold Drink Blender was not equipped with a cover that locked onto the top of the container in such a way as to prevent it from coming off during operation and that the failure to equip the blender with this safety feature was a cause of her injuries.

Manufacturer moved to dismiss the complaint against it on the following grounds:

> (1) Consumer's injury was caused by her own misuse of the Cold Drink Blender which, as implied by its name, was intended for mixing only cold substances.
>
> (2) Consumer's injury was caused by her own lack of care, as she overfilled the Cold Drink Blender and operated it at high speed.
>
> (3) The design of the Cold Drink Blender was not defective since It complied with design standards set forth in federal regulations promulgated by the federal Consumer Products Safety Commission, which do not require any locking mechanism.

Retailer moved to dismiss the complaint against it on the following ground:

> (4) Retailer played no part in the manufacture of the Cold Drink Blender and therefore should not be held responsible for a defect in its design.

How should the court rule on each ground of both motions to dismiss? Discuss.

Answer A to Question 2

Strict Liability Claim

A strict liability claim requires: (1) the defendant to be a merchant, (2) the product was not altered since leaving the defendant's control, (3) the product has a defect, (4) the plaintiff was making foreseeable use of the product, and (5) the defect caused the injuries and damages.

Merchant:

A defendant is a merchant if he is in the regular business of producing or selling the product sold.

In this case, the Manufacturer is in the business of producing and selling the blenders in question. The Retailer is in the business of selling the blenders. Thus, both the Manufacturer and the Retailer are merchants.

Not Altered:

There is no evidence to indicate that the blender was altered or tampered with since leaving either the Manufacturer's control of the Retailer's control.

Defect:

There are three types of defects: manufacturing defect, design defect, or failure to warn.

A manufacturing defect is a defect that makes the particular unit defective compared to all other produced units. In this case, there is no evidence that Consumer's unit is any different from other units.

A design defect is a defect that is inherent in the design of the product. It can be shown through the existence of an alternative design that can be implemented effectively to reduce the risk without adding too much cost to the product.

In this case, Consumer has shown that there is a design for a locking mechanism on the cover that can prevent the injuries here. Thus, unless the cost of producing the locking mechanism is prohibitively high, Consumer has established a design defect.

Failure to warn is a defect that occurs when a merchant knows of a defect, but fails to warn of it.

In this case, Manufacturer can argue that it has provided warning in the instructions to not fill the blender to within 2 inches of the top. However, Consumer can argue that the warning is not conspicuous such that a reasonable person would be able to see it. Further, the warning is not adequate to warn of the consequences of the action. Lastly,

while the manufacturer knows that the design is unsafe for hot content, it did not warn specifically against hot content. There, there is a good case for failure to warn also.

Foreseeable Use:

The plaintiff must be using the product in a foreseeable fashion, but need not be using the product in a manner as the producer intended to be used.

In this case, while Manufacturer intended to produce the blender for cold drinks only, Consumer can argue that it is entirely foreseeable that someone may use it for hot contents as well.

Causation:

Causation requires both factual causation and proximate cause.

There is factual causation for injuries based on the defects. Consumer can argue that "but-for" the lack of adequate warning or the lack of a hatch on the cover, Consumer would not be injured.

As for the proximate cause, Manufacturer can argue that the causation was not liable because Consumer was not making foreseeable use of the product. Therefore, Consumer's own negligence is an unforeseeable intervening cause.

On the other hand, Consumer can argue that it is entirely foreseeable that a consumer may want to use the blender for hot contents, or that the consumer may fill the blender to near the top. Most other blenders on the market are designed for use with both hot and cold content, so it is foreseeable that someone would use it that way even if it was not intended to be used that way.

Because Consumer's use is foreseeable, there is proximate causation also.

Damages:

Consumer showed that he has suffered damages in being severely burned.

Negligence:

Negligence requires: (1) duty, (2) breach of duty, (3) causation, and (4) damages.

Duty:

Under the majority Cardozo ("zone of danger") theory, duty is owed to all who may be foreseeably injured. Under the minority Andrews theory, duty is owed to everyone in the world.

In this case, by producing the blender and selling the blender, it is foreseeable that a consumer could be injured. Therefore, Manufacturer and Retailer owe a duty to Consumer under either theory.

Breach:

The standard of care is that of a reasonably prudent person. In cases where a reasonable person has superior knowledge of a fact not known by others, that person is held to the standard of a reasonable prudent person with the superior knowledge.

In this case, Manufacturer has the knowledge that the blender may cause danger if filled too close to the top. Therefore, Manufacturer is held to the standard of a prudent person with this special knowledge.

Retailer is held to the standard of a reasonably prudent person, assuming that he has no special knowledge.

Causation and breach are similar to those above for strict liability and not repeated here.

Manufacturer's Motions:

Typically, for a motion to dismiss, the evidence is viewed in the light most favorable to the non-moving party. With this principle in mind, and the general elements for strict liability and negligence in mind, I will analyze each of Manufacturer's motions.

(1) Motion to dismiss because of the Consumer's misuse:

For the strict liability claim – as discussed above in the elements for the strict liability claim, strict liability is attached when the defendant is making foreseeable use of the product. As discussed above, Consumer's use of the blender – filling it to the top and using hot contents – is foreseeable even if it is not intended by Manufacturer. Since consumers of blenders typically use it for both hot and cold contents, and some models allow contents to be filled to the top, it should be foreseeable that Consumer would use it that way. Therefore, Consumer's misuse does not relieve Manufacturer of the strict liability claim.

For the negligence claim: Duty is owed to all those who may be injured. Therefore, Consumer's misuse of the product does not relieve Manufacturer for its duty towards Consumers. As discussed above, the injury was caused by the blender and the injury was foreseeable. Therefore, the causation element is satisfied as well. Hence, as discussed above, whether Manufacturer is liable depends on if breached its duty towards Consumer, judged by the reasonable person standard with similar specialized knowledge. Hence, Consumer's misuse by itself does not relieve of the negligence claim.

Defense of Contributory Negligence:

In jurisdictions following the contributory negligence rule, any negligence on the plaintiff's part relieves the defendant of liability. If the case is tried in such a jurisdiction, Manufacturer could argue that Consumer was negligent in using a blender for cold drinks, as implied by its name, for hot soup. Thus, if the jury finds the consumer to be negligent, this would relieve Manufacturer of liability.

It is noted that Manufacturer is moving for dismissal here. Hence, Consumer's contributory negligence is a question of fact to be tried. Consumer is not negligent per se for using a blender with a name implied for cold drinks for hot soup. Therefore, even if they are in a contributory negligence jurisdiction, Manufacturer is still not entitled to dismissal.

It is also noted that this is only a defense for the negligence claim. The strict liability claim is strict liability, thus is not open to contributory negligence defenses.

Assumption of Risk:

The manufacturer can argue that consumer assumed the risk by operating the blender in a dangerous fashion, in contrary to common sense and the instruction. Therefore, the consumer assumed the risk of injury, and this relieves Manufacturer of liability.

In this case, while the Manufacturer implied that the blender is good for cold drinks by naming it the "Cold Drink Blender" and specifying that it is "perfect for cold drinks", Manufacturer has not warned that the blender could cause injuries if used for hot drinks. Further, while Manufacturer said it is perfect for cold drinks, it did not specify it cannot be used for hot drinks.

Therefore, Consumer can argue that since there is no warning of the risk while using the blender for hot drinks, and the warning is not apparent to a reasonable person, Consumer has not assumed the risk by using the blender for hot soup.

Defenses of Comparative Negligence:

In a comparative negligence regime, the liability of the defendant is reduced through the relative negligence of the plaintiff.

In this case, even if the plaintiff is negligent, this would only amount to a reduction of damages. This defense does not entitle Manufacturer to dismiss the claim.

(2) Motion to dismiss because of the Consumer lack of care:

Consumer's lack of care would amount to evidences used to establish that Consumer was negligent in operating the Blender.

For the strict liability claim: Under the strict liability claim, Manufacturer is strictly liable if all the elements are proven. (See elements above). Thus, Consumer's own lack of care, amounting to negligence on the consumer's part, is irrelevant to Manufacturer's liability under the strict liability theory. The assumption of risk doctrine is applicable, but fails here. (See discussion above.)

For the negligence claim: See discussion above for contributory negligence, comparative negligence, and assumption of risk. As discussed above, none of these theories allow Manufacturer to dismiss the claim.

(3) Motion to dismiss because there is no defect:

For the strict liability claim: As discussed above in the elements for strict liability, there is evidence that could lead a jury to believe there is a design defect or a failure to warn defect.

In this case, while evidence that Manufacturer's design complied with regulations could be evidence towards proving there are no defects in the locking mechanism, it does not establish conclusively there is no defect. Further, this does not resolve the question over the failure to warn defect (whether the warning was conspicuous enough).

As discussed above, in a motion to dismiss, the evidence is viewed in light most favorable to the non-moving party. Thus, because there is some evidence of defect, and the evidence of compliance with regulation is not conclusive on the question of defect, the motion to dismiss should be denied.

For the negligence claim: As discussed above, the standard of care is measured by a reasonably prudent person with similar specialized knowledge. Therefore, compliance with regulation does not relieve Manufacturer of either the duty or the standard of care.

It is noted that if the regulation is violated, Manufacturer could be held as negligent per se. However, the inverse is not true. Therefore, motion to dismiss for the negligence claim should be denied also.

(4) Retailer's Claim:

For strict liability: As discussed above (see above), the claim of strict liability just requires Retailer to be a merchant that put the article in the stream of commerce. There is no requirement for the Retailer to take part in designing or manufacturing. Thus, the motion to dismiss should be denied.

It is noted that Retailer could get indemnification from Manufacturer if they are held jointly liable, and Manufacturer is the negligent party.

For negligence: As discussed above, the standard of care for Retailer is that of a reasonably prudent person. Thus, under this standard, whether or not Retailer took part

in the design, whether it is negligent or not depends on what other reasonably prudent persons would have done (such as inspection and testing). Thus, the fact that Retailer took no part in the design or manufacturing does not relieve it of its negligence claim. Therefore, motion to dismiss should be denied also.

Answer B to Question 2

Strict Products Liability

Consumer's lawsuit against Manufacturer seeks to recover on a strict products liability theory. In order to establish such a claim, the consumer must demonstrate that (1) the defendant is a merchant, (2) there was either a design or manufacturing defect in the product, (3) the product was not altered after leaving the merchant, (4) the product caused the plaintiff's injury, and (5) the customer was using the product in a foreseeable manner.

In this case, the Manufacturer was a merchant because it was the company that designed and manufactured the product at issue. It then sold this product to retail stores. The Retailer was also a merchant because it presumably made its business by selling these types of appliances to consumers. There is nothing in the facts that indicate that the retailer was not a merchant of similar products in the course of its business.

Consumer must also assert that this product had a defect. A design defect is a flaw in the design of a product that makes it unreasonably unsafe. If there is a way to reasonably make the product more safe without lessening the utility of the product or prohibitively raising costs, then it may have a design defect. Additionally, the presence of the design defect must be the cause of the plaintiff's injury. Here, Consumer argues that there was a design defect because the blender did not include a locking cover. The absence of this safety feature was the cause of her injury, because if it had been in place, the top would not have come off and she would not have been burned by the hot soup. Consumer must demonstrate that installing such a lock would have been reasonably feasible, and would not impinge on the utility or costs of the blender. She could point to other blenders that have similar safety devices of the development of such devices in similar small appliances. Since installing a small lock would not be unduly costly and is generally available on blenders, then the product was defective because it lacked this reasonable safety feature. Additionally, the causation element is met because but for the omission of this feature on the blender, Consumer would not have been injured in this way. The lock would have prevented her injury.

Consumer must also demonstrate that the product was not altered once it reached her in the chain of commerce. There is nothing in the facts to indicate that upon leaving the manufacturer or the retailer, the blender was changed in any way, thereby satisfying this element.

Consumer will have the most difficulty in proving that she was using the product in a foreseeable manner. A plaintiff may recover if she can demonstrate that her use was foreseeable, even if it was not the use intended by the manufacturer. The defendants in this case will argue that they should not be liable because Consumer's use of liquefying vegetables for a hot soup was not foreseeable. The product was clearly called the "Cold Drink Blender" and marketed itself as a tool for making cold drinks and crushing ice. Consumer will counter this by pointing out that although the regular use of all blenders may be to crush ice or make daiquiris, it is certainly foreseeable that a person may also

decide to make other uses of the blender. There is no reason why a person would think that the blender was not fit to handle hot soups, and so she should not then be deemed to be using the product outside of its foreseeable use.

Under the above analysis, the Consumer can properly allege a prima facie case of strict products liability against both the Manufacturer and Retailer. The specific items in each motion to dismiss will be further discussed below.

Negligence

Under a negligence action based on products liability, a plaintiff must allege that there was a (1) duty of care, (2) that was breached, (3) the breach was the actual and proximate cause, of (4) harm suffered.

The standard duty of care is that of a reasonably prudent person in similar circumstances. Under the majority view, a person or entity owes a duty of care to those foreseeably harmed by their actions. Consumer will argue that the defendants breached this duty because it was unreasonable to manufacture and then sell a blender that did not have a locking feature. She will try to point out that a reasonably prudent manufacturer would not create a blender that did not have a lock, relying on evidence of commonly-held expectations of the marketplace when people make, sell, and buy blenders.

In order to show actual cause, the Consumer must show that but for the defendants' breach of duty, she would not have suffered her injury. She will argue that if they had not breached their duty and had included a lock, she would not have been burned. Additionally, she must show that the breach was the proximate cause of her injury. A breach is the proximate cause of an injury when a person is in the zone of danger created by the breach. It was foreseeable to the manufacturer or retailer that upon buying a blender without a safety lock, the top could fly off and a person could be injured. Consumer was in the zone of danger since it was foreseeable that her injury would be caused in this manner due to the lack of the safety device.

Finally, Consumer must show that she suffered damages as a result of the defendants' negligent act. Here, Consumer was severely burned by the hot soup. She suffered a personal injury.

Under the above analysis, the Consumer can likely establish a prima facie case of negligence. Specific defenses and the issues of each motion to dismiss are addressed below.

Manufacturer's Motion to Dismiss

1. Consumer's Injury Caused by Her Own Misuse

The manufacturer argues that it should not be liable because the Consumer herself misused the product. This argument goes to the prong of strict products liability requiring that a consumer's use be foreseeable. Under the above discussion, it was

foreseeable that a person who buys a blender would use it for many different blending purposes, not solely mixing cold drinks. Simply because you purchase an item that is labeled as a cold drink blender would not make a reasonable person believe that they could only use the product to blend cold items. Blenders are multi-purpose appliances and generally used to mix and blend a variety of products, including vegetables for a hot soup. Accordingly, it would be foreseeable that the Consumer would use the product in this way, and so the Manufacturer cannot rely on her misuse to avoid liability. Under the same analysis, the manufacturer would not prevail if it claimed that its breach was not the proximate cause of her injury because the injury was unforeseeable. It would be foreseeable that a person would use this blender for hot and cold products, so a person being burned by the contents leaking out when the top flies off would not be so unforeseeable as to defeat a finding of proximate cause.

The Manufacturer will also argue that the misuse of the product was negligent by the consumer. Under the traditional rule, contributory negligence could serve as an absolute bar to recovery on a negligence of products liability action. If the plaintiff herself was even slightly negligent, then all recovery could be barred. Under the modern rule of comparative negligence, recovery can be reduced proportionally according to the amount of negligence on the part of each party. If it was negligent for Consumer to use the product with hot soup, then Consumer's recovery may be limited. It will point out that even if it is foreseeable to use the blender for things other than cold drinks, pouring in hot soup that had the ability to severely burn a person was itself an unreasonable act.

Under the modern rule, this argument could successfully limit the amount of damages recovered by Consumer. However, the court should deny the motion to dismiss based on this ground because it does not negate the elements of strict products liability, negligence, or serve as an affirmative complete defense.

2. Consumer's Injury Caused by Her Own Lack of Care

The Manufacturer also asserts that consumer was negligent in that she overfilled the blender and then operated it at a high speed. The blender came with a warning cautioning a user not to fill beyond two inches of the top. The manufacturer will argue that by failing to observe this warning, the consumer was herself not making a foreseeable use of the product and was herself negligent.

A warning on a product cannot completely shield a manufacturer from a products liability claim. It would be foreseeable that despite this warning, a user would fill a blender close beyond two inches from the top, and then use it at the highest speed set on the machine. Such a use is likely common, and therefore should have been foreseen by the manufacturer. Accordingly, the Manufacturer cannot discharge all of its liability by claiming that the warning shielded it from an injury caused by this use. It was foreseeable that a consumer would use the product in this way, meaning that this use does not discharge the elements of a products liability or negligence action.

Again, the Consumer's lack of care may limit the amount of damages recovered on a

comparative negligence theory. Under the discussion above, since it was likely unreasonable for the Consumer to fill the blender to the brink with hot soup, then under the modern rule, her recovery should be proportionately reduced due to her negligent actions. The court should deny a motion to dismiss on this ground.

3. Design Not Defective

The Manufacturer finally asserts that the design was not defective since it complied with federal regulations. Compliance with government regulations is evidence of lack of a defect, but it is not conclusive. A manufacturer may still be liable for a design defect or negligence even if it comports with regulations. Even though the Consumer Products Safety Commission may not at this point require any locking mechanism, it may be unreasonable for the Manufacturer not to include the lock, on the basis of the current knowledge in the industry. A manufacturer cannot hide behind official regulations to avoid liability. If it was minimally costly to include the lock and did not effect the utility, then the lack of a lock can be deemed a design defect. Also, if it was a breach of duty to consumers not to include the lock, then its failure to provide one may be a negligent act by the Manufacturer.

Accordingly, the court should deny a motion to dismiss on this ground.

Retailer's Motion to Dismiss – No Part in Manufacture

The Retailer asserts that it should not be liable to the Consumer because it was not the party who manufactured the blender. In a strict products liability action, any link in the distribution chain may be liable. The fact that the Retailer did not design or make the blender will not shield it in this action. The Consumer need only establish the elements of a strict products liability are met and the Retailer may be held equally as liable as the Manufacturer.

Here, the Retailer was a merchant because it regularly dealt in the sale of these kinds of goods. The design was defective, under the analysis above. The machine was not altered once it left the Retailer's premises. Finally, the Consumer's use of the product was foreseeable. Accordingly, the court should not dismiss the strict products liability suit against the Retailer.

If the Retailer is held liable in the strict liability suit, it may seek indemnification from the Manufacturer. Indemnification is available when a party is held liable for injuries suffered by a plaintiff, but another party's actions are actually the cause of the injury. Since the Retailer was not responsible for the design defect and the Manufacturer was responsible, the Retailer should be able to recover any amount of damages it owes to the Consumer from the Manufacturer.

Retailer must also argue that it was not negligent, so that claim should be dismissed. Consumer may argue that Retailer breached its duty by not inspecting the item and discovering its defect, that failure to inspect was unreasonable, and that it caused her injuries. This is a more attenuated theory than the negligence action against the

Manufacturer. A Retailer should not be held responsible for inspecting every product that is properly packaged and labeled for sale in its own store. Although it may be held liable on a strict liability theory, there was likely no actionable negligence by the Retailer. Accordingly, the claim of negligence against the Retailer should be dismissed.

ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2008
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2008 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.

Question 1

Peter, a twelve-year old, was playing with his pet pigeon in a field near his home, which is adjacent to a high voltage electricity power substation. The substation is surrounded by a six-foot tall chain link fence topped with barbed wire. Attached to the fence are twelve 10 inch by 14 inch warning signs, which read “Danger High Voltage.”

Peter’s pigeon flew into the substation and landed on a piece of equipment. In an attempt to retrieve his pet, Peter climbed the surrounding fence, then scaled a steel support to a height of approximately ten feet from where the bird was stranded. When Peter grasped the bird, it fluttered from his hand, struck Peter in the face, causing Peter to come into contact with a high voltage wire, which caused him severe burns.

Peter’s father is contemplating filing a lawsuit on Peter’s behalf against the owner and operator of the substation, Power and Light Company (PLC), to recover damages arising from the accident.

What causes of action might Peter’s father reasonably assert against PLC, what defenses can PLC reasonably raise, and what is the likely outcome on each? Discuss.

Answer A to Question 1

The following courses of action might reasonably be asserted against PLC by Peter's father on behalf of his son:

I. Strict Liability for Ultrahazardous Activity

A defendant (∆) can be held strictly liable for damages caused to a plaintiff (π) where the ∆ is engaged in an ultrahazardous activity. An ultrahazardous activity is one that is 1) inherently dangerous, 2) uncommon to the geographic area, 3) cannot be made safe and 4) whose risk outweighs its social utility.

A. Inherently dangerous. Electricity is inherently dangerous. In this case, the substation was a high voltage station. This element is met.

B. Uncommon to the geographic area. Substations are often located in neighborhoods or near them. In this case, the station was located in a field near π's house, not close where it might be uncommon, for example, next to his house. Arguably, a substation in a field near a residential community is not uncommon. This element weighs against finding an ultrahazardous activity. This element [sic.]

C. Cannot be made safe. Arguably, high voltage electricity cannot be made safe.

D. Social utility vs. risk. The social utility of providing electricity to homes is clear. People need electricity for everyday purposes. Moreover while the activity cannot be made safe, the related risks can be lessened. In this case, fences, razor wire and signs were posted and used to prevent people from coming into contact. Therefore the social utility outweighs the risks.

On whole, the factors weigh against finding an ultrahazardous activity and holding ∆ strictly liable.

II. Negligence

In order to find ∆ liable for negligence, π must prove duty, breach, causation, and damages.

A. Duty

1. Foreseeable π? Here, a child from the houses near the station is certainly within the zone of danger presented by a high voltage station.

2. Standard of Care. Absent a special relationship, the Δ must use reasonable care. Here, there may be a special relationship with the π.

a) Anticipated Trespasser. Where a landowner foresees trespassers, the landowner has a duty to warn of known artificial conditions that present serious risks of bodily harm. In this case, the high voltage electricity is an artificial condition that presents a risk of serious harm. Therefore, Δ had the duty to warn. Δ met this duty by posting 12 signs to the fence warning of danger.

b) Attractive Nuisance. Where a landowner has an attractive nuisance on his land, the landowner may have the duty to make the artificial condition safe or have a greater duty than to just warn the trespasser.

1. Foreseeable to have children trespassers. Since the station is near his home it is foreseeable that children might trespass.

2. Unlikely to appreciate the danger. It is arguable that a 12 year-old boy is unlikely to appreciate the danger that high voltage electricity presents; however, younger children might not.

3. The cost to make safe outweighs the risk of harm. The risk of harm in this case is death from electrocution. However, given the social utility of the activity and the steps taken by Δ (fence, warnings, razor wire) one could argue that the appropriate actions were taken to satisfy the landowner's duty.

Taller Fence? π might argue that a taller fence was not that costly in

comparison to the risk. Here the fence was only 6 ft. Arguably a taller fence may have prevented π from entering the station.

Assuming the special duties of a landowner were satisfied, Δ only owed a duty of reasonable care to π.

B. Breach of Duty of Reasonable Care in Operating Substation

Here, Δ posted danger signs, enclosed the station in a fence; however, it only used a 6 ft. chain link fence. Kids climb fences often; therefore, reasonable care would dictate that a higher fence made of something less "climbable" was necessary to prevent entry to the substation. Arguably, therefore, Δ breached its duty to π.

C. Causation

1. Actual Cause. But for Δ's failure to erect a more formidable barrier, π would not have been able to come into contact with the electricity.

2. Proximate Cause. Where another force intervenes, Δ is only liable if the force is merely intervening and not superseding.

    a) Intervening. Here, the pigeon struck Peter in the face and caused him to make contact with the wire. This is intervening.

    b) Superseding. Acts of God, intentional torts, and crimes are intervening acts. Here, the flight of a pigeon could arguably be superseding, however, where Δ's negligence creates the situation which gives rise to the act, Δ can still be liable if it was foreseeable. Once a child is inside a substation, many acts could cause the child to become electrocuted. Therefore, perhaps this will be held to constitute proximate cause.

D. Damages

π sustained burns and undoubtedly related expenses. These damages were foreseeable, unavoidable, certain and [sic.]

E. Defenses

1. Assumption of the Risk. Here π scaled a fence posted with 12 warning signs and scaled a steel support. Arguably, a 12 year-old comprehended the risk of high voltage electricity and assumed that risk when entering the station. This would, if successful, preclude π's recovery.

2. Comparative/Contributory N. π could be held N. for failing to heed the warnings posted. This would preclude (contrib. N.) or reduce (comparative N.) his recovery.

Answer B to Question 1

Strict Liability

Peter's father (Father) can assert a claim of strict liability against Power and Light Company (PLC) to recover damages arising from Peter's accident. To establish strict liability, (i) the defendant is engaged in abnormally dangerous activity, (ii) no amount of due care can eliminate the dangerous conditions, and (iii) the activity or conditions are not common in the community.

Abnormally Dangerous Activity

Father can argue that PLC is engaged in abnormally dangerous activity on its property. In this case, PLC operated a high voltage electricity power substation. Father can argue that the substation is a participial condition created by PLC that is inherently dangerous. The high voltage substation is continuously conducting high amounts of electricity. Upon contact with the electric substation, a person can be shocked with a deadly amount of voltage. Furthermore, the operation of a high voltage power substation is not a low risk activity. The possibility and likelihood of injury due to electric shock is extremely high. Therefore, regardless of the utility of the substation, the operation of the substation is an abnormally dangerous activity.

On the other hand, PLC can argue that the operation of the electric substation is not an abnormally dangerous activity. The substation, while producing high voltages of electricity, is in a controlled, secure environment. The electricity is used to power the community, and it is not being used for any type of dangerous purpose other than to provide electricity. PLC can argue that providing electricity to a community is not an abnormally dangerous activity. Furthermore, while the high voltage substation is inherently dangerous, it is not abnormally dangerous. The substation is operated safely by PLC, and the risk of harm or danger only arises when a third party fails to observe the danger warnings and acts without regard to their safety when near the substation.

The court will likely agree with Father and find that the operation of the high voltage electric substation is an abnormally dangerous activity. Simply operating such a substation carries with it the high risk of danger. PLC's argument that the power is being used to benefit the community will not outweigh the risk that the substation poses to the general public.

Due Care Will Not Eliminate Danger

Father can argue that regardless of the due care the PLC may have used in securing the high voltage electric substation, the danger of electric shock was not eliminated. Although there was a fence around the substation, and warning signs posted on the property, the substation was still producing high voltages of electricity. The dangerous conditions were still present even though there were warnings. Father can argue that the only way that the risk of electrocution could be eliminated was to shut down the substation so that it would no longer produce high voltages of electricity. Therefore, regardless of any amount of due care by PLC, the substation was still extremely dangerous and capable of electrocuting people who came in contact with the substation.

On the other hand, PLC can argue that the danger in operating the substation arose from third parties who ventured onto the property and came into contact with the substation. The substation was inside a fenced area. The fence was six feet tall with barbed wire on top. PLC can argue that it completely restricted access to the substation to third parties. Therefore, since the substation was in a secure area, the risk of harm to those outside of the secured area was eliminated. By eliminating free access and contact with the substation, the substation posed no harm to the third parties not authorized or legitimately inside the secured fenced-in area near the substation.

The court will likely agree with Father and find that regardless of the erection of the fence and warning signs on the property, PLC still could not eliminate the danger of electrocution to persons coming into contact with the substation. Therefore, no amount of PLC's due care could eliminate the danger posed by the high voltage electric substation.

Not a Common Activity

Father can argue that operating a high voltage electric substation is not a common activity that occurs in the community so close to a residential area. Father can argue that while electric substations are common, they are not erected and operating near residential areas. In this case, PLC operated the high voltage electric substation adjacent to Father and Peter's home. The substation should have been operated in a remote part of the community where it would not pose a danger to the public. Furthermore, if PLC was to operate a substation near a residential area, it should only operate low voltage substations that do not have deadly amounts of electricity being produced from them. Therefore, PLC's operation of the substation next to Father's home was not a common activity.

PLC can argue that it had numerous substations situated throughout the community. The only way PLC can deliver power consistently and reliably to the whole community is to have high voltage substations near residential areas, where power consumption is high. Furthermore, PLC can argue that power companies throughout the area commonly place high voltage substations near densely populated areas. PLC can argue that by placing the substation in a

remote area, it would defeat the purpose of providing electricity directly to the areas that have high power consumption and electricity needs. PLC may even argue that the residential area was constructed after PLC built and began operating its substation. Therefore, operating the substation next to Father's home is common practice in the power generation industry and PLC commonly practices placing such substations near residential areas.

The court will likely agree with Father that PLC's operation of the high voltage substation near a residential [community] was not a common activity. Furthermore, even if Father's home was built after PLC began operation of the substation, PLC's operation of the substation was still not a common activity, and the operation should have ceased.

Assumption of the Risk

PLC can argue that Peter assumed the risk of electrocution. PLC can argue that a 12 year-old child of like mind and intelligence would not have ignored the warning signs posted on the fence and attempted to climb a fence topped with barbed wire. PLC can argue that a reasonable 12 year-old can read and understand warning signs, and would appreciate the danger posed by the substation.

Contributory Negligence

Contributory negligence is not a valid defense in strict liability cases.

Conclusion

Father will not prevail against PLC for strict liability since Peter assumed the risk of electrocution by climbing onto the substation. However, if the court finds that Peter did not assume the risk of electrocution, then Father may recover on Peter's behalf since PLC was engaged in abnormally dangerous activity by operating the high voltage substation, no amount of care by PLC could eliminate the harm of electrocution to third parties, and the operation of the substation was not a common activity. Father can recover compensatory damages from the injuries sustained by Peter as a result of being electrocuted by PLC's substation.

Negligence

Father can assert a claim of negligence against PLC for negligently operating the substation. A claim of negligence requires that (i) the defendant owed a duty to the plaintiff, (ii) defendant breached this duty, (iii) the breach was a cause-in-fact of plaintiff's injury, (iv) the breach was a proximate cause of plaintiff's injuries, and (v) plaintiff suffered damages. In this case, Father is bringing a claim of negligence against his son and injured party, Peter.

Duty

A defendant is liable for negligence only to those plaintiffs to whom they owe a duty. Under the Cardozo test (majority view), a plaintiff has a duty to all foreseeable plaintiffs who may be injured as a result of defendant's negligence. Under the Andrews test (minority view), a plaintiff has a duty to all plaintiffs who are injured as a result of defendant's negligence. In this case, Peter was injured as a result of being electrocuted by PLC's high voltage substation. Under the Cardozo test, Father can argue that Peter is a foreseeable plaintiff because it is foreseeable that children living near the substation would climb on the substation or otherwise come into contact with the substation, and be electrocuted. PLC can argue that it is not foreseeable that someone would climb over the six foot high fence with barbed wire, and ignore all warning signs posted by PLC. The court is likely to find that Peter was a foreseeable plaintiff, since PLC was aware of the danger posed by the substation, and it is foreseeable that children in the residential area near the substation would sneak into the secured area and be harmed. Therefore, under the Cardozo and Andrews tests, Peter is a foreseeable plaintiff, and PLC owed a duty of reasonable care to Peter.

Attractive Nuisance

Father can argue that PLC's substation was an attractive nuisance, and PLC breached its duty of care to Peter by failing to eliminate the harm posed by the substation. For a defendant's activities to be an attractive nuisance, (i) defendant must know that children frequent defendant's property, (ii) defendant is aware of dangerous conditions existing on the property, (iii) defendant failed to eliminate the dangerous conditions, and (iv) the cost of eliminating the dangerous conditions is outweighed by harm.

PLC Must Know that Children Frequent the Property

Father can argue that PLC knew, or should have known, that children play on the substation. Father can argue that the substation is in a field adjacent to the residential area. Therefore, children from the area could easily play near the substation, or inside the fence by sneaking into the property. On the other hand, PLC argues that it was not aware that children have entered the fenced-in area of the substation. PLC has not received any warnings of children sneaking into the secured area, nor had there been any past incidents of children being harmed by sneaking into the fenced-in area. Furthermore, PLC can argue that it was not aware that children lived in the residential area. The court will likely find that absent any evidence that PLC knew children had been sneaking into the fenced-in area, or that PLC should have known that children live in the neighborhood and play near the substation, PLC did not know that children frequented the property and played near the substation. However, in the event that Father prevails in showing that PLC was aware that children snuck into the

fenced-in area of the substation, we can continue the analysis for attractive nuisance below.

PLC is Aware of the Dangerous Conditions

Father can argue that PLC was aware of the danger posed by the high voltage substation. PLC was aware of the danger since it had posted signs stating "Danger High Voltage." PLC can argue that while it was aware that its substation posed the danger of electrocution to third parties, it was not aware of the danger being posed to any children in the area. However, Father will easily prevail since PLC did know that the substation was capable of electrocuting persons who came into contact with the substation.

PLC Failed to Eliminate the Dangerous Condition

Father can argue, as above with strict liability, that PLC failed to discontinue operating the substation. Thus, the risk of electrocution remained, despite the erection of a fence and posting of warning signs by PLC. The court will likely find that PLC did not eliminate the dangerous conditions since the harm of electrocution remained.

Cost Outweighed by Benefit

Father can argue that the benefit of eliminating the risk of death to children in nearby residential areas greatly outweighs any costs associated with discontinuing operation of the substation. Father can argue that PLC can simply move the substation operation to another less densely populated part of the community. On the other hand, PLC argues that the substation is strategically placed to provide reliable power to the community and its residents and businesses. The cost of discontinuing the substation would be great, and the adverse effects of unreliable power would be felt throughout the community by everyone. Furthermore, PLC would suffer a great financial hardship by having to shut down one of its high voltage substations.

Conclusion

The court will likely find that PLC was not aware that children frequented the property; thus, PLC did not breach any duties owed to Peter under the attractive nuisance doctrine. Even if Father proves that PLC was aware or should have known that children frequented the property, PLC may have a strong argument in showing that the cost of shutting down the substation is outweighed by the financial hardship it will face, as well as the hardship to the community for the loss of reliable power.

Breach – Reasonable Care

Father can argue that PLC breached a duty of reasonable care in failing to erect a more protective fence around the substation. In this case, the fence was six feet tall and had barbed wire around the top portion. Father can argue that since the substation was extremely dangerous since it produced high voltage power, a higher fence should have been erected. However, PLC can argue that it acted as a reasonable substation operator would have acted. It erected a high fence, with barbed wire at the top; thus, reducing the chance that even if someone climbed the fence, they would not be able to scale the top of the fence. Furthermore, the PLC posted conspicuous 10 inch by 14 inch warning signs which clearly stated "Danger High Voltage." The court will likely find that PLC acted reasonably, since it did construct a reasonable protective fence and posted warning signs advising of the danger posed by the substation.

Cause-in-Fact

Father can argue that but-for PLC's operation of the high voltage substation, Peter would not have been harmed. PLC can argue that but-for Peter chasing his bird into the substation area, Peter would not have been electrocuted. The court will likely find that PLC's operation of the substation was a cause-in-fact of Peter's injuries, since a defendant's conduct need only be one cause of the plaintiff's injuries.

Proximate Cause

Proximate is legal cause, and the plaintiff's injuries must have been a foreseeable result of the defendant's conduct. In this case, Father can argue that it was foreseeable that a child could sneak into the substation area, and be electrocuted while climbing the substation. On the other hand, PLC can argue that it is not foreseeable that a child would scale the six foot high wall, climb over the barbed wire at the top of the fence, then scale a ten foot high steel support in order to catch a bird, and in the process of doing so, be electrocuted by falling onto the substation. Father can argue that all that is necessary is that it was foreseeable to PLC that if someone was to enter the fenced-in area, they could be harmed by electrocution, regardless of how that electrocution came about. The court will likely find that Peter's electrocution by the substation was a foreseeable injury. Therefore, PLC's operation of the substation was the proximate cause of Peter's injury.

Intervening Cause

PLC may argue that Peter's chasing the bird was an intervening cause which cuts off PLC's liability. However, an intervening act must be unforeseeable

to cut off liability. In this case, Father can argue that it was foreseeable for a child to chase a pet into the fenced-in area. Thus, Peter's chasing his pet bird was not an intervening cause of Peter's injuries which cuts off PLC's liability.

Contributory Negligence

PLC can argue that Peter was contributorily negligent for chasing his bird into the fenced-in area, and that his injuries were due in part to his own negligence. PLC can argue that a 12 year-old child of like mind and intelligence would not have ignored the warning signs posted on the fence, and attempted to climb a fence topped with a barbed wire. PLC can argue that a reasonable 12 year-old can read and understand warning signs, and would appreciate the danger posed by the substation.

The court is likely to find that Peter was contributorily negligent since he failed to heed the warning signs posted by PLC. In a contributory negligence jurisdiction, Father will not recover at all since Peter's negligence cuts off recovery. In a pure comparative negligence jurisdiction, Father's recovery on behalf of Peter will be reduced by Peter's percentage of his own negligence. Finally, in a modified comparative negligence jurisdiction, Father will only recover on Peter's behalf if Peter's negligence is not more than 50%.

Assumption of the Risk

Similarly as above, PLC can argue that Peter assumed the risk by ignoring the warning signs and scaling the fence. Unless Peter could not read or was otherwise not mentally competent to appreciate the risk, Father will not be able to recover on Peter's behalf since Peter assumed the risk of electrocution.

Conclusion

The court is likely to find that PLC was not negligent in operating the substation. Furthermore, Peter most likely contributed to his own negligence, and he assumed the risk of electrocution. However, if they are found to be negligent, Father may recover damages for injuries sustained by Peter, including medical bills and pain and suffering.

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ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2009
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Question 4

ConsumerPro, a consumer protection group, published a manual listing the names, addresses, telephone numbers, and specialties of attorneys who represent plaintiffs in tort cases. The manual also included comments rating the attorneys. The manual was distributed by ConsumerPro to its members to aid them in the selection of an attorney should they need one.

Paul was listed in the manual as an attorney who litigates automobile accident cases. In the related comments, the manual stated that "Paul is reputed to be an ambulance chaser and appears to handle only easy cases."

Paul sued ConsumerPro for defamation, alleging injury to reputation and requesting general damages. ConsumerPro moved to dismiss for failure to state a claim on which relief could be granted, on the grounds that (1) the statement was non-actionable opinion, (2) Paul failed to allege malice or negligence under the United States Constitution, (3) Paul failed to allege special damages, and (4) in any event, the statement was privileged under the common law.

How should the court rule on each ground of the motion to dismiss? Discuss.

Answer A to Question 4

1. Statements of Opinion May Be Actionable in a Defamation Action

To state a claim for defamation, the plaintiff must allege (1) a defamatory statement (2) that is published to another. ConsumerPro alleges that the statements about Paul in its manual are not actionable defamatory statements because they are opinions. This is incorrect. Statements of opinion are considered defamatory (and actionable) if a reasonable reader or listener would have reason to believe that the declarant has a factual basis for his or her opinion. Here, a reasonable person reading the manual would have reason to believe that ConsumerPro has a factual basis for its statements concerning Paul. A reader would reasonably assume that ConsumerPro – a consumer protection group – researched the various attorneys before writing and publishing its manual, that it investigated their reputations and their prior experience, and that it based its assertions on facts it had discovered through this investigatory process. In such circumstances, statements of opinion are actionable. Accordingly, the court should not grant ConsumerPro's motion to dismiss on this ground.

2. Failure to Allege Malice or Negligence Does Not Defeat Liability Here

If the subject of a statement is a matter of public concern, the First Amendment requires a plaintiff in a defamation action to allege falsity and fault in addition to the elements listed above. If the plaintiff is a public official, public figure or limited public figure, the level of "fault" the plaintiff must prove is that the defendant acted with malice or recklessness. If the plaintiff is a private figure, he need only show that the defendant acted negligently. If, however, the subject matter of the statement is not a matter of public concern, the plaintiff need not prove malice, recklessness, or negligence. Even a non-negligent good faith publication of a defamatory statement on matters that are not of public concern will support liability for defamation.

Here, ConsumerPro may argue that the subject matter is a public concern because lawyers offer a service to the public, making their abilities and expertise relevant and important information for the public to know. This argument should fail. While an individual's qualifications to do a job may be relevant to specific people (or a specific group of people), it does not qualify as a mater of public concern that it [is] important information for the community at large. Accordingly, Paul did not have to allege fault (malice, recklessness, or negligence) here and ConsumerPro's motion to dismiss on this ground should also be denied.

3. Failure to Allege Special Damages Does Not Defeat Liability Here

In some defamation cases, the plaintiff is also required to allege special (i.e., actual economic) damages in addition to the elements discussed above. A plaintiff need not allege or prove special damages; however, in cases involving libel (written defamation) or slander per se (spoken statements concerning a person's ability to do his or her job, imputing unchastity to a woman, accusing someone of a crime of moral turpitude or stating that a person has venereal disease). Special damages are only a necessary element in complaints alleging regular slander. Here, the statements were made in writing and are therefore properly characterized as libel. Accordingly, Paul need not allege special damages, and ConsumerPro's motion to dismiss on this ground should be denied.

Notably, Paul may not be able to recover a substantial amount of money if he is unable to prove any special damages at trial, but failure to allege special damages is not a ground on which to dismiss a defamation action based on libel.

4. The Statements Are Subject to a Qualified Privilege

There are two types of privilege that may be asserted as a defense to a defamation action: Absolute privilege and qualified privilege.

Absolute privilege is available as a defense with respect to statements made by one spouse to another, and with respect to statements made by government officials (including lawyers) in the course of their duties. This privilege is not applicable here.

Qualified privilege is available when there is a socially useful context for the speech at issue. In such cases, statements will be privileged if (1) the speaker has a good faith belief in the truth of the statements and (2) the statements are relevant to and within the scope of the useful purpose for the speech. For example, a former employee providing a reference will have a qualified privilege defense to a defamation action if he believed the statements he made and refrained from injecting extraneous and irrelevant information into the communication. Here, ConsumerPro is providing a service to the public by providing information about lawyers to individuals who may require a lawyer's services. This is a socially useful context. The statements about Paul being an "ambulance chaser" and taking "only easy cases" are relevant to the purpose of the manual in that they provide information that a person looking to hire an attorney would be interested to know to inform his or her selection. Accordingly, the latter element of the qualified privilege defense is likely satisfied here.

Nevertheless, ConsumerPro's motion to dismiss on the ground of qualified immunity should be denied. A factfinder could find based on evidence presented at trial that ConsumerPro did not have a good faith belief in the truth of the statements. If so, the privilege would not be applicable and Paul could prevail at trial.

Conclusion

In sum, ConsumerPro's motion to dismiss should be denied in its entirety because none of the arguments asserted by ConsumerPro are meritorious.

Answer B to Question 4

Paul's motion to dismiss will be evaluated on the basis of the facts alleged in his complaint. The court will assume that the facts alleged by Paul are true and will determine whether Paul is entitled to relief on the basis of the facts as he alleges them.

Part One: Non-Actionable Opinion & Application of the Basic Definition of Defamation to Paul

Definition of Defamation

Paul sued ConsumerPro for defamation. Defamation requires a defamatory statement about the plaintiff that is published to a third person. A defamatory statement is one that tends to negatively affect the plaintiff's reputation. However, statements of opinion are usually excluded from the definition of defamatory statement. You may not hold someone liable for offering their opinion, unless the defendant gives the impression that the statement is based on verifiable facts known to the defendant.

Publication to a third person may be oral or written; the defamatory statement must be conveyed in some manner to someone other than the plaintiff. Truth is always a defense to defamation but, depending on the type of defamation alleged, the plaintiff may bear the burden of proving the untruth of the statement or the defendant may bear the burden of raising truth as an affirmative defense. Whether and what kind of damages plaintiff must prove depends upon the type of defamation alleged.

Here, Paul alleges that ConsumerPro's statement was defamatory and that it was published to the group of persons who read the ConsumerPro manual.

Defamatory Statement or Non-Actionable Opinion

To succeed in his claim, Paul must show a defamatory statement about him made by ConsumerPro. ConsumerPro stated in its manual that Paul "is reputed to be an ambulance chaser and appears to handle only easy cases." Since Paul is a lawyer, the allegation that he is an "ambulance chaser" reflects poorly on Paul's integrity and draws on stereotypes of lawyers propagated in the media. The statement suggests that Paul takes advantage of people by finding them at their weakest—immediately after an accident or illness—and trying to convince them to hire him. Moreover, stating that he only handles easy cases suggests that Paul is not a very good lawyer or that he is lazy and refuses to take challenges. Since the statement will negatively affect Paul's reputation, it could be considered a defamatory statement.

As to the first part of the statement, ConsumerPro will argue that its statement is merely a non-actionable opinion. It will point out that the statement does not address a particular incident. For example, if ConsumerPro alleged that Paul was seen at the hospital yesterday talking to an accident victim, that would be a statement of fact that is either true or untrue. Here, the statement is more general and just says Paul is reputed to be an accident chaser.

Paul will argue that the claim that he is "reputed to be an ambulance chaser" gives the impression that ConsumerPro's statement is based on fact. The opinion of ConsumerPro alone does not make a reputation. Rather, ConsumerPro gives the impression that it has talked to a group of people who all hold opinions about Paul and that the majority of the group believes Paul to be an ambulance chaser.

As to the second part of the statement, ConsumerPro will again argue that the statement that Paul "appears to handle only easy cases" is non-actionable opinion. ConsumerPro will point out that the statement cannot be proven true or

untrue because different people hold different views of which cases are easy and hard. Moreover, ConsumerPro will argue that the statement does not give the impression that it is based on any facts. Unlike the first statement, the second part of the statement does not imply that ConsumerPro's statement is based on the opinion of more than one person. Instead of referring to Paul's reputation (which implies many people's opinions), ConsumerPro directly asserts its own opinion by stating that Paul "appears" to only handle easy cases.

The court should conclude that the first part of ConsumerPro's statement is actionable because it gives the impression that it is based on facts. The statement could be verified by polling the relevant community and determining whether Paul indeed has a reputation for being an ambulance chaser.

The court should, however, conclude that the second part of ConsumerPro's statement is non-actionable because it is purely ConsumerPro's opinion. As explained above, it does not imply that it is based on any facts and it cannot be proven either true or false.

Conclusion: The court should deny ConsumerPro's motion to dismiss as to the first part of the statement (reputation as ambulance chaser) because it gives the impression that it is based on facts. It should grant the motion to dismiss as to the second part of the statement (only takes easy cases) because it is non-actionable opinion.

Part Two: Allegation of Malice

Whether or not a plaintiff must allege malice depends on whether the defamatory statement deals with public persons and public matters or not. When a defamatory statement involves a private person and a private matter, plaintiff need not allege any fault on the part of the defendant. However, if the statement involves a matter of public interest and a private person, the plaintiff must allege

and prove at least negligence on the part of the defendant. Finally, if the statement involves a matter of public interest and a public figure, the plaintiff must allege and prove malice. Malice requires a showing that the defendant made the statement either knowing that it was false or with recklessness to the truth or falsity of the statement.

Conclusion: As explained below, a court will conclude that the statement concerns a matter of public interest, but that Paul is a private figure. Therefore, Paul will be required to allege negligence or more on the part of the ConsumerPro. Because he did not do so, the motion to dismiss should be granted on this ground.

Matter of Public Interest

A matter of public interest is a topic that would be of general concern or interest to the community. ConsumerPro will argue that the statement is a matter of public interest because many people eventually need to hire attorneys. Consumers have a strong interest in knowing which attorneys will responsibly handle their cases and which will not. ConsumerPro will support its argument by pointing to the fact that members of the community join ConsumerPro, a consumer protection group, to learn more about the issues that ConsumerPro discusses in its manual. People go out of their way to access the information offered by ConsumerPro, suggesting that the information is of general concern to the community.

Paul, on the other hand, will argue that the matter is not of public interest. He might point out that ConsumerPro is only one group amidst the entire community, which shows that consumer protection issues are really of limited concern and interest only a small number of people. Paul will argue that, if consumer issues were really of public concern, they would be covered in the newspaper and ConsumerPro would not need to publish its manual.

Since the topic of ConsumerPro's statement is of interest to a number of people (ConsumerPro's members) and since the entire public has an interest in making an informed decision when it hires lawyers, the court will probably decide that the statement by ConsumerPro concerns a matter of public interest.

Public Figure

A public figure is one who lives their life in the public eye, for example, a politician or movie star. The person may have sought out fame or may have become notorious, for example, as a well-known criminal.

Paul will argue that he is not a public figure because he does not live his life in the public eye. Since the facts do not indicate that he is a famous lawyer or that he has had any particularly notorious cases, he probably does not give press conferences or appear on television. There is nothing to indicate that he even engages in public speaking, for example, at lawyer's conventions or continuing education events.

ConsumerPro will argue that Paul became a public figure by making himself available as an attorney. However, there are no facts to support this argument. Nothing suggests that Paul has sought out public attention or has unwillingly received it. Therefore, he is neither famous nor notorious. A court will conclude that Paul is not a public figure.

Since Paul is not a public figure but the statement does involve a matter of interest to the general public, Paul will be required to plead negligence on the part of ConsumerPro.

Did Paul Plead Negligence?

In order to plead negligence, Paul needs to allege that ConsumerPro did not act with reasonable care in making its statement about Paul. Paul has not alleged any particular actions by ConsumerPro in relation to the making of the statement. He alleges only that the statement was made. Negligence, on the other hand, requires more. For example, Paul could have pled negligence by alleging that ConsumerPro made the statement without engaging in a fact-checking process, even thought it is standard for consumer protection organizations to do three hours of research before publishing a review of an attorney. If Paul had alleged that ConsumerPro fell below the normal standard of care, he would have alleged negligence. However, he failed to do so. Therefore, the motion to dismiss should be granted on this ground.

Part Three: Special Damages

Defamation carries a variety of damages requirements, depending on the type of defamation alleged. Plaintiffs injured by slander, which is oral defamation, but [sic] allege and prove special damages unless the statement falls into one of the four slander per se categories. However, plaintiffs injured by libel, which is written defamation, generally need not allege special damages. However, when the defamatory statement involves a public figure, the plaintiff must allege special damages even for libel.

As explained in Part Two, the court will conclude that ConsumerPro's statement concerns a matter of public interest but that Paul is not a public figure. Because Paul is not a public figure, he will not be required to allege special damages.

Conclusion: Because Paul is not a public figure and is not required to allege special damages, the motion to dismiss on this ground should be denied.

Part Four: Privilege?

At common law, to protect the free flow of information, certain types of statements received a qualified privilege. If a statement falls within the privilege, a defamation plaintiff must show that the speaker knew the statement was false when it was made.

Statements made for the benefit of either the speaker or the audience fall within this qualified privilege. For example, a statement in a credit report would fall within the qualified privilege because it is made for the benefit of the audience of the credit report. Because the public has an interest in ensuring the accuracy and reliability of credit reports, the publishers of such reports receive a qualified privilege. The privilege encourages them to openly and honestly report blemishes on someone's credit because they will be protected from suit unless the publisher knows the statement is false when it is made.

Does the Statement Fall within the Privilege?

Paul will argue that ConsumerPro's statement does not fall within the privilege because a manual reviewing attorneys is not as important as something like a credit report. He will argue that the public has a weaker interest in the accuracy of consumer information manuals than they do in other sorts of documents and that the privilege should not be applied to ConsumerPro's statement.

However, ConsumerPro will prevail in its argument for privilege. ConsumerPro's statement was made for the benefit of its members: to help them make informed decisions about hiring attorneys. Moreover, the public has a strong interest in being able to access accurate consumer information when it hires attorneys or buys products. Because the accuracy of ConsumerPro's statement is important to the audience and the statement was made for the benefit of the audience, the

court will conclude that ConsumerPro's statement falls within the qualified privilege.

Did Paul Allege Knowledge of Falsity?

Paul will argue that it is clear that ConsumerPro must have known that the first part of its statement was false when it was made. The statement gives the impression that ConsumerPro polled the community to determine Paul's reputation. Paul will argue that since he does not have a reputation as an ambulance chaser, ConsumerPro could not possibly have based the statement on a poll. If ConsumerPro did not make a poll, it must have known that the statement was false.

ConsumerPro will prevail, however, because Paul did not allege that ConsumerPro knew that the statement was false when it was made. Assuming for the moment that the statement implies that it was based on a number of opinions, ConsumerPro could only have known its statement was false if it had conducted a poll and determined that Paul has a reputation as a wonderful diligent lawyer. Paul has not alleged that ConsumerPro had any knowledge, good or bad, about Paul's reputation at the time it made its statement.

Conclusion: ConsumerPro's motion to dismiss should be granted because ConsumerPro's statement falls within the qualified privilege and Paul has not alleged that ConsumerPro knew that the statement was false when it was made.

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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.

Question 1

Patty is in the business of transporting human organs for transplant in City. She is paid only upon timely delivery of a viable organ; the delay of an hour can make an organ nonviable.

David transports gasoline over long distances in a tank truck. Recently, he was hauling gasoline through City. As David was crossing a bridge in City, his truck skidded on an oily patch and became wedged across the roadway, blocking all traffic in both directions for two hours.

Patty was delivering a kidney and was on the bridge several cars behind David when the accident occurred. The traffic jam caused Patty to be two hours late in making her delivery and made the kidney nonviable. Consequently, she was not paid the $1,000 fee she would otherwise have received.

Patty contacted Art, a lawyer, and told him that she wanted to sue David for the loss of her fee. "There isn't a lot of money involved," she said, "but I want to teach David a lesson. David can't possibly afford the legal fees to defend this case, so maybe we can put him out of business."

Art agreed and, concluding that he could not prove negligence against David, decided that the only plausible claim would be one based on strict liability for ultrahazardous activity. Art filed a suit based on that theory against David on behalf of Patty, seeking recovery of damages to cover the $1,000 fee Patty lost. The facts recited in the first three paragraphs above appeared on the face of the complaint.

David filed a motion to dismiss. The court granted the motion on the grounds that the complaint failed to state a cause of action and that, in any event, the damages alleged were not recoverable. It entered judgment in David's favor.

David then filed suit against Patty and Art for malicious prosecution.

1. Did the court correctly grant David's motion to dismiss on the grounds stated? Discuss.

2. What is the likely outcome of David's suit for malicious prosecution against Patty and Art? Discuss.

Answer A to Question 1

Patty instituted a suit via her lawyer Art for losses incurred due to Patty's inability to deliver a kidney on time owing to a traffic jam. The traffic jam occurred when David's truck skidded on an oily patch and became wedged across the roadway. There are two issues that need to be determined. First, the validity of the court's decision to dismiss Patty's cause of action for damages based on strict liability owing to an ultrahazardous activity. Secondly, whether David will be successful in recovering against Patty and Art in a claim of malicious prosecution.

1. David's motion to Dismiss based on Failure to State a Cause of Action

David has instituted a motion to dismiss for failure to state a cause of action upon which relief can be granted. In the alternative, David argues that damages would not have been recoverable against David for strict liability from malicious prosecution. A motion to dismiss based on a failure to state a cause of action upon which relief can be granted is a 12(b)(6) motion in federal court. This motion can be filed as a preliminary motion to the filing of a complaint or contained within the answer. Along with failure to include an indispensable party it can be raised at any time prior to trial or at trial itself. The motion charges that the plaintiff has failed to adequately state a cause of action upon which relief can be granted. It requires the judge to accept that all the facts that are stated by the plaintiff are taken to be true and then requires a determination as to whether there exists an adequate basis for relief. In other words, even if everything that plaintiff asserted in the complaint is true, would that be sufficient to allege a cause of action against the defendant?

In the current case, in order to determine whether the emotion to dismiss was appropriately granted in Art's favor, it is necessary to examine Patty's allegations against David. Patty's lawyer, Art, determined that a negligence claim would not be viable against David. Likely because there is nothing to indicate in the facts that David engaged in any activity whereby he breached the standard of care towards a

foreseeable plaintiff. There is nothing to indicate that he was negligent in driving his truck, but rather he skidded on an oily patch in the middle of the road and then his truck swerved to block all lanes of traffic. As a result, Art decided to pursue Patty's claim on a strict liability theory for transporting an ultrahazardous activity.

Strict Liability for an Ultrahazardous Activity

Strict liability for transporting an ultrahazardous activity is an action whereby the defendant is engaged in an ultrahazardous activity. This is where the activity is so dangerous that the danger of its harm cannot be mitigated even with the exercise of reasonable care. Secondly, the activity has to be one that is not of common usage in the community. In a strict liability claim for ultrahazardous activity, in jurisdictions that still retain contributory negligence, this is not a valid defense to a strict liability claim.

In the current case, David transports gasoline over long distances in a tank truck. In the current case, he was transporting gasoline through the City. It is important to note that transporting gasoline through residential parts of a city is inherently an ultrahazardous activity because of the dangers that can occur if any gasoline spills, owing to the fact that gasoline is highly combustible and can cause serious injuries and damage to property in a matter of seconds. No amount of care can mitigate against these risks, and transporting gasoline through a residential community is not a matter of common usage in the community.

However, in the current case, when David was transporting the gasoline across the bridge, he skidded on an oily patch. There is no indication that he is responsible for the oily patch, rather, it was already spilled on the road when he arrived at the scene. As a result he skidded on the spill and his truck wedged across the roadway and blocked traffic in all directions. This blockage caused a traffic jam to develop in both directions and the delay of two hours caused Patty to be late in making her organ delivery. Yet the crucial distinction in this case is that the ultrahazardous nature of the gasoline was not the cause of Patty's damages. Even if David had been transporting a truck filled

with benign materials, such as flowers or children's toys, he still would have skidded on the oily patch and his truck would have wedged across the highway and caused the traffic jam. For strict liability to attach for transporting ultrahazardous activity, the nature of the harm or loss has to emanate from the ultrahazardous activity. This is not met in this case. There is nothing about the inherently dangerous nature of transporting gasoline that is the cause of Patty's harm.

As a result, even if the judge was to take all of the allegations that Patty made in her complaint to be true, she has failed to state sufficient facts necessary to constitute a cause of action for strict liability for transporting dangerous materials. Therefore, the judge was correct to grant David's motion to dismiss.

Patty's Damages are not recoverable

Moreover, David claimed that the damages that Patty claimed in her complaint were not recoverable. In this case, Patty sought to recover the $1,000 fee she would have been paid had she been able to deliver the kidney while it was still viable.

As already noted, under strict liability the damages have to accrue from the inherent dangerousness of the activity - which in this case would have been transporting gasoline. However, in this case, the nature of Patty's damages resulted from the truck skidding on the oily patch, and as previously mentioned this could have occurred to any truck, even one transporting regular household goods. As a result, Patty is not entitled to recover for damages based on a theory of strict liability.

Her only viable claim would have been under a negligence theory which requires a duty under the applicable standard of care to all foreseeable plaintiffs (which under the majority Cardozo theory is to all plaintiffs in the zone of danger). There has to be a breach of the duty, causation (both factual and proximate), as well as damages. In this case, David would be held to the standard of care of a reasonable person driving a big truck along a bridge. The facts do not indicate that he was negligent in any manner,

such as driving too fast, or driving while distracted. As a result, Patty would be unable to establish a prima facie case for negligence and would be entitled to no damages. It is likely that Art realized that the negligence claim would be a non-starter and as a result he decided not to pursue the claim.

In conclusion, the court was correct to grant David's motion to dismiss for failure to state a cause of action and, in any event, the damages alleged were not recoverable because Patty failed to assert an appropriate and viable cause of action.

2. David's Suit for Malicious Prosecution against Patty and Art.

David decided to file suit for malicious prosecution against both Patty and Art. To establish a prima facie case for malicious prosecution, the plaintiff is required to show that there was an institution of civil proceedings against the plaintiff. Second, there was a termination of the proceedings in favor of the plaintiff. There also has to be a lack of probable cause. Moreover, the institution of the civil proceedings has to be for an improper purpose and the plaintiff has to show damages.

David's suit for Malicious Prosecution against Patty

In David's suit against Patty, David can show that Patty instituted a claim against him for strict liability based on transporting an abnormally dangerous activity. Since the judge granted the motion to dismiss, there was a termination in his favor.

The third prong requires David to show that the proceedings were instituted for an improper purpose. In the current case, when Patty came to Art for advice she was clear that she wanted to sue David for the loss of her fee, i.e., the $1,000 she would have received if she could have successfully delivered the kidney. In her mind, she believed that she had suffered damages and that David was to blame because he had caused the traffic jam on the bridge. As a result, it is unclear whether her motive to bring the suit was based on lack of probable cause. As a layperson, she likely did not have the legal knowledge to ascertain the proper basis for determining probable cause, and she

came to her lawyer for advice to determine the merits of her case. As a result, it is likely that the court will find that Patty's decision to bring suit against David was based on her relying on the legal expertise of Art and she might have honestly believed that there was sufficient probable cause to bring the action.

The fourth prong requires bringing the suit for an improper purpose. This requirement is likely met in this case, because Patty acknowledged that there was not a lot of money involved in the action; however, she wanted to teach David a lesson and try to run him out of business. As a result, the primary motivation behind the suit was not to recover damages, but rather to seek revenge and damage to David. This is an improper purpose because the legal system is not to be used in a civil proceeding in order to extract a revenge against a defendant or for an improper purpose.

Lastly, the plaintiff has to show sufficient damages. In the current case, David was forced to respond to an action for strict liability and although the matter was dismissed under a motion for failure to state a cause of action, this still might have resulted in David losing days at work because of the lawsuit. There is also the loss of professional and social reputation from being forced to defend against a lawsuit. However, David would have to present evidence of any such pecuniary loss in order to meet the damages prong.

In conclusion, David would likely not succeed in his suit for malicious prosecution against Patty because he cannot show that she instituted the proceedings without probable cause. Patty likely relied on Art's advice that there was a viable claim for strict liability and, as a result, she thought there was sufficient merit in the action to proceed to court.

David's suit for Malicious Prosecution against Art

David also filed suit against Patty's lawyer Art for malicious prosecution.

Again, the first two prongs are easily met, because Art was the attorney that brought the strict liability action against Patty and there was a termination in Art's favor with the court's decision to grant the motion to dismiss based on failure to state a cause of action.

In the current case, the third prong, whereby the plaintiff has to show that the action was brought with a lack of probable cause, is likely to bring David more success against Art. An attorney is held to possess the required duty of competence, whereby he has to possess the legal skill, knowledge, preparedness and ability to pursue the case. In this case, Art realized that a negligence action would not be successful, but he still decided to pursue a claim for strict liability. This was the only plausible claim that he could bring against David and if he failed to adequately research the facts of the case based on the elements of strict liability, then he will be held liable for bringing a cause of action based on lack of probable cause. On the other hand, if Art honestly believed, with sufficient preparation and research in the case, that a strict liability cause of action might be viable in this case, then arguably there is sufficient probable cause. However, as previously noted under the first part, there was no connection between the ultrahazardous nature of transporting the gasoline and the accident that occurred in this case, and, as a result, Patty would be unable to recover damages based on a strict liability theory. As a result, Art should have realized this and counseled Patty against filing suit, and therefore, David will be able to successfully demonstrate the lack of probable cause in a suit for malicious prosecution against Art.

The fourth prong requires the plaintiff demonstrating that the suit was brought for an improper purpose. In the current case, Patty told Art that she knew that there was not a lot of money involved in the case, but that she simply wanted to teach David a lesson and run him out of business. A lawyer is held to a duty of candor and fairness to the court and an adversary. He is required to properly research the cause of action to

ensure that there is a viable cause of action. A lawyer signs Rule 11 motions asserting that there is a proper factual basis to the claim and legal contentions are accurate and that a claim is not being brought for an improper purpose. In the current case, Art should have counseled Patty against bringing a lawsuit for an improper purpose and made her aware of the legal basis of the claim and whether there were sufficient facts to bring a cause of action. Attorney representation can be expensive, and Art should not have taken a frivolous claim simply as a means of earning fees and wasting time. As a result, David will be able to show that the cause of action was brought for an improper purpose.

As previously noted, as long as David can show damages in the form of lost wages from days missed from work owing to the need to defend the lawsuit or other pecuniary losses, he will have sufficiently demonstrated the damages prong.

In conclusion, David will be successful in a claim for malicious prosecution against Art. Even though his case against Patty is not likely to be successful owing to the inability to demonstrate that Patty consciously knew that there was a lack of probable cause to the action. However, as an attorney, Art will be held to a higher professional standard, and he had an ethical duty to ensure that he only brings suit where there is a sufficient legal and factual basis and that the suit is not being brought for a frivolous purpose or to waste time or embarrass an opponent. As a result, he should be entitled to damages, based on the damages he incurred due to the inappropriate suit brought against him for strict liability.

Answer B to Question 1

1. Patty (P) v. David (D) – Motion to Dismiss Suit for Strict Liability

A motion to dismiss for failure to state a claim looks at the facts in a light most favorable to the party it is being asserted against. The court will then see if sufficient facts have been pled to sustain a prima facie case of the cause of action alleged. The court does not evaluate the merits nor go beyond the complaint.

In the present case, P filed a claim of strict liability for ultrahazardous activity against D. Therefore, the elements of the claim must be evaluated in light of the complaint to see if grant of the motion was proper. Additionally, the court noted the case would be dismissed because the damages alleged were not recoverable.

Strict Liability – Ultrahazardous Activity

Strict liability is tort liability without fault. It applies in cases of products liability, ultrahazardous activities, and wild animals. Here, the allegation is one of ultrahazardous activity. The elements of strict liability are 1) an absolute duty of care, 2) breach of that duty, 3) causation, and 4) damages.

Absolute Duty of Care – Is the activity an ultrahazardous activity?

For there to be an absolute duty of care (a duty that may not be met by reasonable protective measures), a court must decide if an activity is in fact ultrahazardous. An ultrahazardous activity is one where the activity is 1) highly dangerous even with remedial measures, and 2) not within common usage within the community. This is a question of law to be decided by the trial judge.

In the present case, D was driving a tanker truck filled with gasoline. P will argue that this is a dangerous activity, because no matter how safe D behaves the tanker is a giant gas bomb waiting to explode. D can argue that it is not that dangerous because, as the facts show, there was no explosion when the tanker crashed. However, because the

court will view the facts in a light favorable to P, the tanker is probably sufficiently dangerous.

However, the second element poses a problem for P. The activity must not be in common usage within the community. Here, D's tanker truck was transporting gas. This is an activity in common usage within all US communities, because gasoline is the primary fuel for automobiles, which is the most common method of transportation in the US. Additionally, gasoline must be transported by some means to service stations. Tanker trucks are the most common, if not [the] exclusive method of delivering gas to service stations in the US. Therefore, driving a tanker truck is an activity of common usage in City.

Therefore, the duty element has not been met, because driving a tanker truck is not an ultrahazardous activity.

Breach: if the duty element had been met, any damage caused by the ultrahazardous activity would be sufficient breach. Here, the truck crashed and blocked traffic for 2 hours.

Causation

Causation has 2 parts: 1) actual (factual) cause and 2) legal (proximate) cause. Both must be met for the causation element to be sustained.

Factual Cause

The test for factual cause is the "but for" test. This asked but for the defendant's conduct the injury would not have occurred. In the present case, but for D crashing the tanker on the bridge, P would not have been late for her delivery, the kidney would have been viable, and P would have been paid $1,000. Viewing the facts in a light most favorable to P, factual cause is met.

Proximate Cause

Proximate cause is a question of foreseeability. First, the court must ask what is dangerous about the activity. Here, a tanker truck filled with gas is dangerous because it could explode or cause a fire. Second, the court will isolate the breach. Here, the breach was a crash that resulted in blocked traffic on the bridge. Lastly, the court will match up the danger of the activity to the breach; if they do not match up, then the injury is not the type of harm that would result from the ultrahazardous activity. Therefore, it would not be foreseeable. In the present case, the danger of explosion or fire does not match the breach of mere traffic jam. Thus, P's injury was not foreseeable.

Damages

Strict liability compensates damages from personal injury or property damages. In the present case, the type of harm is economic damages. Economic damages are those damages which result from the loss like lost wages or lost business opportunity. Therefore, there is not sufficient damage that P may be compensated for. While she may argue that the breach damaged the kidney. However, the kidney did not belong to her. At the very least it belonged to the kidney donor or the recipient. Additionally, one cannot have ownership interest in human tissue (see 13th Amendment). Thus, there is no personal injury or property damage that P has pled to sufficiently make a prima facie case.

Conclusion

The motion to dismiss was proper, because P did not sufficiently plead facts to sustain a cause of action of strict liability for an ultrahazardous activity. Tanker driving is not an ultrahazardous activity. There is no proximate causation between the crash and the loss of $1,000. Additionally, the damages requirement is not met because it is mere economic damages. Additionally, the trial judge was correct to assert that P's alleged damages are unrecoverable.

2. D v. P and Art (A) – Malicious Prosecution

Malicious prosecution is a tort that protects the interest of only having process instituted against a party for proper purpose and only when there is a valid case. The elements are 1) institution of legal proceeding, 2) termination of case in plaintiff's favor, 3) absence of probable cause, 4) improper ulterior purpose for bringing legal process, and 5) damages.

Institution of proceedings: Typically, malicious prosecution involves the institution of criminal proceedings. However, institution of civil proceedings will sustain a cause of action as well. Here, P (under the advisement and representation of A) filed a civil claim for $1,000 in lost damages in strict liability for an ultrahazardous activity (see above). A civil complaint was filed against D. This is sufficient to meet the first element/institution of legal proceeding.

Termination: The second element, termination of the case in plaintiff's favor, is met because the case was dismissed on failure to state a cause of action. This was a termination in D's favor, because he filed the motion to dismiss. The case was terminated on the granting of the motion.

Absence of probable cause

Probable cause is the reasonable belief that there was a valid cause of action. In the present case, P relied on A's advice as her attorney to form her basis of probable cause. A told her that he believed there was a plausible claim for strict liability. Reliance on counsel will sustain a finding of probable cause. Therefore, this element is not met, as to P.

A, on the other hand, probably did not have probable cause. As discussed above, the claim of strict liability lacked sufficient facts to make a prima facie case. The complaint was just so bad that an attorney with minimal competence could not have a reasonable belief that there was a valid cause of action based on strict liability. Therefore, this element is met as to A.

Improper purpose is any purpose except that of justice. Here, the just purpose would be to make P whole again, after the loss of her $1,000. This is the point of tort liability: to make the plaintiff whole. In the present case, she wanted to "teach D a lesson." P and A will argue that this is not improper because D should be a safer driver. D may argue that strict liability has no punitive damages; therefore, strict liability is not to punish. Therefore, teaching a lesson is an improper purpose.

Additionally, and more flagrantly, P believed that D could not afford the legal fees, and bringing the strict liability case would cause him to go out of business. A acquiesced in assisting her in the case. This is an improper purpose because the $1,000 was not a lot of money to her, but it would be a total loss of D's livelihood. This is not a proper basis for suit because it is merely to harass and damage D.

Defenses: A may assert that he would qualify for immunity based on the prosecutor exemption. However, this will not happen because of the exception for state prosecutors filing criminal charges.

Conclusion: D will probably prevail against A. However, he will probably not prevail against P, because she had probable cause.

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ESSAY QUESTIONS AND SELECTED ANSWERS
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Question 1

Homeowner kept a handgun on his bedside table in order to protect himself against intruders. A statute provides that "all firearms must be stored in a secure container that is fully enclosed and locked." Burglar broke into Homeowner's house while Homeowner was out and stole the handgun.

Burglar subsequently used the handgun in an attack on Patron in a parking lot belonging to Cinema. Patron had just exited Cinema around midnight after viewing a late movie. During the attack, Burglar approached Patron and demanded that she hand over her purse. Patron refused. Burglar drew the handgun, pointed it at Patron, and stated, "You made me mad, so now I'm going to shoot you."

Patron fainted out of shock and suffered a concussion. Burglar took her purse and fled, but was later apprehended by the police. Cinema had been aware of several previous attacks on its customers in the parking lot at night during the past several years, but provided no lighting or security guard.

Under what theory or theories, if any, might Patron bring an action for damages against Homeowner, Burglar, or Cinema? Discuss.

Answer A to Question 1

Patron (P) v. Homeowner (H)

The issue is under what theories P might bring an action against H.

Negligence

Negligence is an action where a plaintiff asserts that a defendant breached a duty and caused damages. In order to prevail on a claim of negligence, the plaintiff must prove (1) Duty; (2) Breach; (3) Actual Causation; (4) Proximate Causation; and (5) Damages.

(1) Duty

Duty determines the level of care a defendant must exercise. Everyone owes a general duty to avoid harming others. In certain circumstances, an individual owes a higher duty of care. Under the Cardozo majority test, the duty is owed to those in the "zone of danger," meaning, those in the vicinity who may be harmed by the action. Under the Andrews minority test, the duty is owed to all foreseeable plaintiffs.

Applying the Cardozo test, H will claim that he did not have a duty to P, because she was not in his home when the event occurred. Under the Andrews test, P will claim that H did owe a duty because it was foreseeable someone could use the firearm to go out and shoot someone, or injure someone, or put someone into fear, as B did in this case. Depending on where H lives, and whether it is a community where burglaries often occur, P may succeed in showing it was foreseeable that a burglar could come in and take the handgun.

The court will likely agree with P, because it was foreseeable the gun could be used on a person, so H owed a duty to P.

Standard of Care

The next issue is what the standard of care is, meaning how H must exercise his duty.

The court determines the appropriate standard of care. While the standard of care might be adjusted based on such things as physical conditions or professional

occupations, the court does not consider mental or emotional individual characteristics in setting the standard of care.

In this case, P will claim that H owed a duty of a reasonable person in his circumstances, meaning the reasonable care of a handgun owner. H may claim that he owes less of a duty because for some reason he is particularly afraid of people breaking into his home. However, this argument will fail, because the court does not consider mental or emotional individual characteristics in setting the duty of care. It does not appear that there are any particular physical characteristics of H that alter this standard of care, or that he was a professional or a child, in which case the standard of care would be higher or lower.

Therefore, the standard of care is a reasonable handgun owner.

It should be noted that though H is a landowner, the issues of landowner liability do not apply to H in this case, because the injury was not to a person on his land (B), but rather to another person (P).

Negligence per Se

P may further attempt to invoke the doctrine of negligence per se. Negligence per se is a doctrine that allows the court to substitute the standard of care with the words of a statute. Where the defendant has violated the statute, that is sufficient to prove breach of duty. The plaintiff must still prove the three other elements of negligence, actual causation, proximate causation, and damages. In order for negligence per se to apply, the plaintiff must prove that (1) her harm was the type of harm the statute was designed to protect and (2) she was in the class of persons the statute was designed to protect.

In this case, P will try to apply the statute that provides that “all firearms must be stored in a secure container that is fully enclosed and locked.” She will claim that this is the standard of care.

As for the first requirement, P will argue that her harm is the type the statute was designed to protect, because it was designed to protect people from being injured by handguns. She was injured by a handgun. The court will likely agree.

However, as for the second requirement, H will argue that P was not in the class of persons, because the requirement that the guns be stored in a secure container seems to protect children in the home. It does not seem to protect people who will be harmed by guns that are stolen, because if that were the case, the requirement might be that guns be kept in a "hidden" location, or that they must be kept in rooms with locked doors, but not necessarily in "secure containers." P will argue that the statute is broader, and legislative intent may show that it was designed to protect all people who might be injured by guns. The court will likely agree with P and that she was in the class. Therefore, the standard of care will be the statute and H will have breached. P must still prove the other elements of negligence.

However, if the court finds that the statute does not protect P, P will need to prove Breach.

(2) Breach

Breach determines whether the defendant met the standard of care, as established above. The standard of care in this case is the care of a reasonable handgun owner.

P will claim that H breached this duty because he kept a handgun on his dresser by his bed, and a reasonable handgun owner would be aware of the risks of doing that and put it somewhere more secure. He would also comply with the statute. H may claim that it was reasonable to keep it there because it was for self-defense, but P will claim he could have kept it under the bed or at least with some sort of a safety lock on it so that someone who came in and stole it would not be able to use it. Additionally, she will claim he should have put it away while he was "out," so that it could not be stolen. This may depend on whether B had a home alarm system.

The court will likely agree there was a breach.

(3) Actual Causation

Causation is satisfied if the defendant's act was the "but-for" cause of the plaintiff's harm. Where more than one thing contributes, the causation is satisfied if the defendant's act was a "substantial factor."

In this case, P will argue that H's act was the but-for cause because if he had not kept the gun out, B would not have gotten it and would not have brought on her damages. H will claim that a burglar is likely to find a gun in someone's house, so even if he had not had it in his, B would have found a gun somewhere else and the harm would have occurred anyway.

The court is likely to find H's argument tenuous, and find that H's breach was the but-for cause.

(4) Proximate Causation

The next issue is whether H's breach was the proximate cause. This is likely to be H's strongest argument. Proximate cause determines whether it was foreseeable that the harm would occur and whether it would be fair to hold H liable.

In this case, H will argue that it was not foreseeable that someone would break in, steal the gun, and use it to commit a tort against someone else. Typically, the court finds that criminal acts of third parties are "superseding intervening causes," meaning that they break the chain of causation. Therefore, H will argue B's burglary and criminal assault should break the chain. P will argue that it was foreseeable this harm would occur, as discussed above, because people often steal guns when they break into homes. Where a homeowner had notice that he was in a dangerous neighborhood, it is more likely proximate cause will be found. Additionally, it would be relevant whether H's home had ever been broken into before.

H will also claim the chain of causation was broken because P was leaving a midnight movie in a dangerous neighborhood, so that made it more likely she would be attacked. This argument will likely fail, because people often see late movies without getting assaulted at gunpoint. H will also claim that P was not injured because of his leaving

the gun out, but rather because she "made [B] mad," and he was going to shoot her for that reason. If she had handed over the purse, he would not have taken out the gun.

Therefore, the court will likely agree with H and find no proximate cause.

(5) Damages

However, if P were to succeed in showing proximate cause, she would also need to show damages. In this case, she will claim that the damages were the shock she suffered, the concussion, and perhaps any emotional damages.

Damages must be foreseeable, certain, unavoidable, and caused directly by the defendant's action. The forseeability of P's harm is discussed above, and H may argue it was not foreseeable she would faint but rather that she would be shot. The damages from the concussion and medical bills are certain, but future damages like time away from work and emotional distress may be less certain. P could have mitigated the damages by not seeing a movie at that hour. Causation is discussed above.

Conclusion

Therefore, the court will likely find that there was no negligence on the part of H because there was no proximate causation.

Defenses

If negligence is found, H may assert defenses.

Contributory Negligence

Contributory Negligence is mostly abolished. However, if the jurisdiction retains it, the defendant argues that the plaintiff should receive no recovery because his [sic] negligence contributed to the harm. H would argue that P owed a duty to exercise care for her own safety, and failed to do so because she saw a movie late at night, was approached by a burglar who demanded her purse, and failed to give it to him. This was the but-for cause of her harm and also a foreseeable result of her failing to give over the purse. However, a court would likely find that a reasonable person would not necessarily give over their purse, because she might think that a security guard could

come help her or that the burglar was not armed. This would depend on whether P knew it was an area where attacks had happened before and if she saw the gun in B's pocket before he drew it.

On these facts, P was likely not negligent, so there was no contributory negligence.

Comparative Negligence

Comparative negligence reduces the plaintiff's recovery by the percentage of her negligence. Modified comparative negligence only allows the plaintiff to collect if her negligence was less than the defendant's.

For the reasons above, P was not negligent.

Assumption of Risk

This defense requires the assumption of a known risk. This would depend on whether P knew it was a dangerous area. It will also depend on whether she knew that B might be armed. It is unclear whether she knew these facts.

P v. Burglar (B)

P may bring various actions against B. It is important first to note that B may be guilty of several criminal acts, but they are not causes upon which P may bring an action for damages.

Assault

Assault is the (1) intentional (2) placing a plaintiff in fear of an imminent battery plus (3) causation and (4) damages.

Intent

Intent is desire or substantial certainty to cause a result. In this case, P will argue that B intended to place P in fear, because he said "I'm going to shoot you." He might have done it intending to frighten her into giving over the purse, but at least should have known it would cause fear.

Fear of an imminent battery

Battery is a harmful unconsented touching. P will argue that B's action put her in fear of this, because she saw the gun and through she was going to get shot. She was "shocked." Assault requires that the plaintiff be aware of the danger, and in this case P was. Therefore, this element is met.

Causation

P will argue that B's action caused the fear, and the court will agree.

Damages

As discussed above, P will claim that her damages are her concussion, her emotional distress, any medical bills, and perhaps time off work. As discussed above, these must be foreseeable, unavoidable, certain, and caused. There was nothing P could do to mitigate because she could not control fainting, and the harm was caused by B's act, so the requirements of unavoidability and causation are met.

In terms of certainty, it will be more difficult for P to prove her future time off work. Additionally, B may claim that it was not foreseeable she would faint and get a concussion. However, the defendant must take the plaintiff as he finds her, and, therefore, he is responsible for any damages that might occur, regardless of a plaintiff's extreme sensitivity. Therefore, P will succeed in proving damages, and may recover these damages from B provided that the court finds they are certain enough.

Conclusion

P will succeed in proving assault.

<u>Battery</u>

Battery is an unconsented harmful or offensive touching, harmful or offensive to a reasonable person. In this case, there was no touching, so this does not apply. P's hitting the ground does not count as a touching, because though B caused it, it was not direct enough.

Intentional Infliction of Emotional Distress

Intentional Infliction of emotional distress requires (1) extreme or outrageous conduct (2) intentionally or recklessly caused (3) that in fact causes extreme emotional distress.

Extreme Conduct

P will argue that B's saying "You made me mad so now I'm going to shoot you" is extreme and outrageous. It would be outrageous to an average person, because they might think they were going to die. They might think about their children or live lives, and be very disturbed. Therefore, this is met.

Intent

B need not have intended to cause extreme emotional distress, he just need have recklessly done so. Recklessness is extreme indifference and beyond gross negligence. A person would clearly know this action would cause extreme emotional distress.

Emotional Distress

P will claim this is met because she fainted, and the court will likely agree. It may be bolstered by psychiatrist testimony.

Conclusion

Therefore, P will succeed in proving this tort.

Negligent Infliction of Emotional Distress

This occurs where a defendant negligently inflicts emotional distress, and it causes physical damages. Because B's act was likely intentional, this will not apply. However, if it were found to be negligent instead, this would apply because P suffered physical manifestations – fainting.

Conversion/Trespass to Chattel

Conversion is an intentional and extreme interference with a plaintiff's property.

B intended to take the purse.

P will argue this applies because B stole her purse and took it away, which had many valuable in it. B will argue this was not extreme because she was able to get the purse back when he was apprehended by the police, so it was instead Trespass to Chattel, which is a minor interference with a plaintiff's property right. This may depend on whether all of P's belongs were in the purse at the time she got it back. She may argue that a purse is particularly important to a woman, so even taking it for a brief period is conversion. The court will likely determine this based on whether P got it back intact, or if it was permanently damaged. If the police did not return it, the suit will be conversion.

False Imprisonment

False imprisonment is intentionally holding a plaintiff captive, or preventing her from escaping. This occurs where there is no reasonable means of escape. P will argue that for the brief time she was held at gunpoint, she was falsely imprisoned. A plaintiff need be held for only a second. He need not physically tie her up; merely holding at gunpoint is sufficient.

B may argue that P provoked him and "made him mad," but this is no defense to this intentional tort.

Therefore, P will likely succeed on this charge.

Negligence

Negligence does not apply because, as discussed above, B's act was intentional.

Defenses

It is unlikely that any defenses will apply. D may try to claim self-defense, but there is absolutely no evidence that P attacked him in any way.

P v. Cinema (C)

P may have a suit against Cinema for negligence. There are 5 elements to negligence, as discussed above.

(1) Duty

Duty is defined above. As discussed above, some people owe higher duties, and one such category is landowners. Landowners owe a duty to protect people on their premises. While the modern trend is a duty of reasonable care under the circumstances, under traditional rules, duty depends on what kind of an individual is on the land.

No duty is owed to an undiscovered trespasser. A slightly higher duty is owed to a known trespasser, and a higher duty to a person on the land for social purposes. The highest duty is owed to someone known as an "invitee," who is on the land for profit. In this case, the court will find that P was an invitee, because she was there to see a movie, and therefore for a business purpose. The parking lot belonged to Cinema, so C was the landowner and owed a duty to P as an invitee.

A landowner owes a duty to an invitee to inspect for dangerous circumstances and make them safe or warn the invitees.

Additionally, applying either [the] Cardozo or Andrews test, P was in the zone of danger (the parking lot) and she was a foreseeable plaintiff.

(2) Breach

Breach is defined above.

In this case, P will argue that C's failure to protect its customers was a breach. P will argue that C should have installed lighting, security guards, or some sort of a fence to protect the premises. It could have also warned patrons, so that if P had known, she could have been more on her guard walking through the lot. She might not have refused to give over her purse.

Therefore, there was a breach.

(3) Actual Causation

C will claim its action was not the but-for cause, because the burglary and P's fainting might have occurred even if C had put in a security system. However, the court will likely find that if C had taken some sort of security measure, it would have indeed prevented this event.

(4) Proximate Causation

This is defined above.

C will claim the chain of causation is broken by the criminal act of a third party. However, this does not protect a landowner from liability where the risk was known to the landowner. In this case, C was "aware" of "several" previous attacks in the parking lot in past years. C may claim that they were spread out over many years. C may also introduce evidence that the neighborhood has become more safe recently, or that there is a greater crackdown by the police so it had less reason to worry. But absent this sort of evidence, P will argue that if there were "several" attacks, C should have done something more to protect. It was foreseeable there could be another attack, particularly because C shows movies at midnight, when crime is more likely to occur.

B's stealing the gun will not affect this, because it happened before the attack. It is foreseeable that a burglar would have a gun, regardless of how he obtained it. It is also foreseeable that a victim could faint and get a concussion, because people are frequently afraid of guns.

The court will likely agree with P, and find proximate causation because it was foreseeable. The court will also find it fair to hold C responsible, because it was in the best position to avoid the danger and prevent this from happening. Customers rely on their businesses to protect them. P could analogize to common carriers and claim that businesses should also owe a duty of care, because customers put themselves in their hands for protection.

(5) Damages

The damages analysis is the same as above, and it will be determined by the court on the same bases.

Defenses

The defenses of contributory and comparative negligence and assumption of risk do not apply, as discussed above.

Answer B to Question 1

Patron v. Homeowner

Negligence: Keeping the Handgun on Bedside Table

Patron will contend that Homeowner was negligent in failing to keep his handgun in a secure locked container as directed by the statute. In order to prevail in an action for negligence, Patron must prove that Homeowner owed him a duty, that he breached the duty, that his breach caused Patron's injury, and that he suffered damages.

Duty

Under the Cardozo view, a duty is owed only to foreseeable plaintiffs. Under the Andrews view, a duty is owed to the whole world. In this case, Patron will argue that it was foreseeable that a thief could steal an unsecured handgun and use it to perpetuate crime such as a robbery.

Negligence per se: Violation of Statute

When a statute proscribes certain behavior, the violation of that statute establishes a breach in the standard of care when the harm is of the kind that the statute is designed to prevent, and the plaintiff is among the class of people the statute is designed to protect. Here, Homeowner will argue that the statute is intended to prevent small children from gaining access to dangerous guns and hurting themselves or others. However, Patron can persuasively counter that it was also designed to prevent thieves or criminals from obtaining weapons that they would then use to perpetuate crime. The legislative history of the statute might shed some light on the purposes of the law. If its purpose includes preventing criminals from stealing unsecured weapons, then Patron, a crime victim, would be within the class the statute was designed to protect, and Homeowner's breach would establish per se negligence.

A reasonable Person would have Secured the Gun

Alternatively, Patron can argue that even without the statute, Homeowner was negligent in leaving the gun in a place where it was easily accessible to any burglars. He would argue that a reasonable person would foresee that the gun would be noticeable and would be stolen by a burglar. He will also argue that the mere

presence of the gun, which Homeowner kept to ward off intruders, indicates that Homeowner did in fact foresee the possibility of violent criminals entering his home.

Breach

Homeowner kept the gun on his bedside table. There is no indication that the gun was kept in a locked drawer, but rather out on his table. Therefore he violated the statute.

Causation

But-for Cause: Homeowner's act of leaving the gun on the table was the but-for cause of Burglar's assault on Patron. If he kept the gun in a locked container, Burglar would not have had access to it.

Proximate Cause: Homeowner will argue that Burglar's intervening criminal acts of breaking into his house, and then robbing Patron, were superseding causes of Patron's injury. However, an intervening act by a criminal will not interrupt the causal chain if it is foreseeable. As discussed above, it was foreseeable that a criminal could break into the house and use the gun on another unsuspecting victim. Therefore, Homeowner's argument will fail.

Damages

Patron suffered shock and a concussion as a result of Burglar's robbing him [sic]. Therefore, if Burglar's act is a foreseeable result of Homeowner's negligence in failing to secure his handgun, Homeowner can be liable for Patron's injury.

Patron v. Burglar

Burglar confronted Patron in the parking lot and demanded her purse. When Patron refused, Burglar pointed the gun at Patron and threatened her. Patron fainted, suffering a concussion, and Burglar took her purse and fled.

Assault

The prima facie case for assault is met when the defendant (1) performs an act that places the plaintiff in reasonable apprehension of imminent harmful or offensive

contact with his person, (2) the defendant had the intent to place the plaintiff in apprehension, and (3) causation. There must be some physical conduct, not mere words, to constitute assault.

Here, Burglar drew his handgun and stated "You made me mad, so now I'm going to shoot you." His words, combined with pointing the gun at Patron, created in Patron an apprehension that Burglar was going to immediately shoot her. Further, Burglar had the intent to make Patron believe he was going to shoot her. This act caused Patron to faint and suffer a concussion. Therefore, Burglar can be liable for assault.

Battery

Battery consists of (1) harmful or offensive contact with the plaintiff's person, (2) intent by the defendant to cause the touching, (3) causation.

Here, Burglar intentionally took the purse from Paton's person after she fainted. Taking an object from someone's person satisfies the offensive touching element. Further, the fact that Patron may have been unconscious when Burglar seized her purse does not negate the offensiveness of the touching he caused. Therefore, he can be liable for burglary.

Trespass to Chattels

Trespass to chattels occurs when the defendant (1) interferes with the plaintiff's possession of her chattel, (2) had the intent of performing the act that interferes with possession, (3) causes the interference, and (4) plaintiff suffers damages.

Here, Burglar grabbed Patron's purse and ran away with it, interfering with her right to possess it. He did so intentionally. The police later apprehended Burglar. If he still had the purse and it was returned to Patron, she may recover for any damages that resulted from her temporary loss of possession.

Conversion

Conversion occurs when the defendant (1) interferes with the plaintiff's possession of her chattel, and the interference is so extensive as to warrant payment for the full

value of the chattel, (2) has the intent of performing the act that interferes with possession, (3) causes the interference. When defendant's act amounts to an exercise of dominion and control over the chattel, conversion is more likely to be found.

Here, Burglar seized the purse with the intent to completely and permanently deprive Patron of possession. If Burglar's later apprehension by the police restored the purse to Patron's possession, she may not be able to obtain the full value. If, however, Burglar disposed of the purse before he was apprehended, Patron can recover the full Value of the purse and its contents at the time Burglar seized it.

Intentional Infliction of Emotional Distress

Intentional infliction of emotional distress occurs when the defendant (1) engages in extreme and outrageous conduct (2) with the intent to cause severe emotional distress, or is reckless as to the likelihood of causing severe distress, (3) causation, and (4) damages: severe emotional distress.

Burglar's conduct in pointing a gun at Patron, demanding her purse, and stating that he was going to shoot her is conduct "beyond all bounds of decency in a civilized society." Theft and threats to inflict serious bodily injury are extreme and intolerable. Burglar clearly intended to cause Patron emotional distress, as he likely hoped his threat and menacing her with the gun would convince her to hand over the purse. Patron fainted out of shock and suffered a concussion. She is likely to suffer emotional distress including fear of being out at night by herself following this robbery. Therefore, she can prevail under this theory.

Negligent Infliction of Emotional Distress

Patron could also prevail under a negligence theory because she suffered physical harm (shock and concussion) as a result of her emotional stress from her encounter with Burglar. However, because Burglar's conduct was at least reckless with respect to her emotional distress, she will not need to rely on a negligence theory.

In sum, Patron can recover for her physical injuries, emotional distress, and the deprivation of her purse.

Patron v. Cinema

Duty to make Safe for Invitees

Patron was robbed in a parking lot belonging to Cinema, just as she was exiting the Cinema around midnight after viewing a late movie. She will argue that Cinema breached the duty of care owed to her as an invitee by failing to provide lighting or a security guard in the parking lot.

A person who comes onto the land for the economic benefit of the landowner, or as part of the general public is invited onto the premises, is an invitee. Patron was an invitee because she entered Cinema's property, which was open to the public, and paid to see a movie. Cinema's duty to invitees is to make safe or warn of any latent dangers, manmade or natural, that are known or discoverable with reasonable inspection.

Cinema knew that there had been several previous attacks on customers in the parking lot in previous years, yet failed to provide any lighting or a security guard. Because the threat was known to Cinema, there was a duty to make a reasonable effort to enhance security.

Negligence

Cinema can also be liable under a negligence theory (see above). A duty of care is owed to all foreseeable plaintiffs, and Patron was a foreseeable victim of crime because she was exiting the cinema after midnight in an area where there was a known risk of assault. A reasonable theater owner would have provided either a security guard or bright lighting to discourage crime. Providing lights is [a] fairly low cost and would significantly improve safety. Therefore, Cinema's failure to do so was a breach of duty.

The lack of lights or a guard was a but-for cause of the attack because Burglar would not have been emboldened to attack Patron if there was a security guard present or if bright lighting would increase his risk of apprehension.

Proximate Cause: Cinema will argue that Burglar's intentional tortious and criminal act was a supervening cause of Patron's injury. However, as discussed above, a defendant can be liable where his negligence increases the risk of subsequent criminal acts. Here, the failure to provide lighting or a guard, despite the known attacks on other patrons, was a substantial cause of the burglary.

Joint and Several Liability

In a jurisdiction permitting joint and several liability, a plaintiff can recover the full amount of any damages proximately caused by the combined tortious acts of two or more defendants, whether acting independently or in concert, that result in a single indivisible harm. If this jurisdiction follows joint and several liability, Patron can recover from any of the defendants, and they can seek contribution from one another.

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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.

Question 4

Gayle is 16 years old and attends high school in School District.

One day, Gayle's teacher was relaxing in the teacher's lounge during the first ten minutes of class time, as he usually did, leaving the students unsupervised. School District had long been aware of the teacher's practice, but had done nothing about it.

That day, in the teacher's absence, Gayle walked out of class and out of school. She got into her car and drove to the house of an adult friend, Frances. Gayle had promised Frances that, for $10, she would help her move some paintings.

Arriving at Frances' house, Gayle carelessly parked her car several feet from the curb and entered the house. She came out later, carrying paintings to her car. In a patrol vehicle, Paula, a police officer, spotted Gayle's car. Frances caught sight of the patrol vehicle and told Gayle, "Quick, move your car to the curb."

Gayle jumped into her car just as Paula was walking towards it. Suddenly, without looking, Gayle swung her car toward the curb, hitting and severely injuring Paula.

After Paula was transported to a hospital, she was visited by her husband, Harry. Shocked at Paula's condition, Harry collapsed and suffered a broken arm in the fall.

1. Under what theory or theories, if any, might Paula bring an action for damages against (a) Gayle, (b) Frances, and (c) School District, and how is she likely to fare? Discuss.

2. Under what theory or theories, if any, might Harry bring an action for damages against any defendant, and how is he likely to fare? Discuss.

Answer A to Question 4

1. What theories may Paula bring [in] an action for damages against the following defendants:

(a) Paula v. Gayle

Negligence

In a negligence case, the plaintiff must show that the defendant owed a duty of care to the plaintiff. They also must show that the defendant's conduct breached the standard of care owed to the plaintiff and the breach was the actual and proximate cause of the injury to the plaintiff. The plaintiff must be able to show damages to recover in a negligence case.

Duty of Care

The defendant owes a duty of care to all foreseeable plaintiffs. Under the Cardozo view, foreseeable plaintiffs are those who are within the zone of danger. Under the Andrews view, the test is broader, and considers all plaintiffs to be foreseeable plaintiffs. In this case, Paul was a foreseeable plaintiff under the Cardozo view because as a driver on the street she was within the zone of danger of other cars on the street, including Gayle's parked car that was far away from the curb and onto the street. Similarly, Paula would be a foreseeable plaintiff under the Andrews view because all plaintiffs are foreseeable.

Police Officer Exception

Members of certain professions, like police officers and firefighters, cannot recover for injuries that are inherent in the risk of their job. Gayle may argue that as a police officer with a patrol vehicle, the risk of being hit by someone's car is inherent to the job. Paula will argue that being hit by a car is a general risk that everyone on the street takes, and is not a special risk that comes along with being a police officer. If Paula is successful

in rebutting the exception, she must prove that Gayle acted below the standard of care expected.

Standard of Care

The standard of care determines the particular duty of care the defendant owed to the plaintiff so it can be determined whether the defendant breached the duty or complied with the duty. Generally, in a negligence action, the plaintiff must exercise the level of care of a reasonably prudent person in the plaintiff's position. Since Gayle is a child, she will argue that the child standard should be used. Under the child standard of care, the child must exercise the level of care of a child of similar age, intelligence, education, and experience. Paula will argue that the adult standard should be applied because Gayle was engaging in an adult activity. Because driving a car is an adult activity, Paula is correct and the court will hold Gayle to the standard of a reasonably prudent person in her position.

Breach

Paula must show that Gayle breached a duty owed to her by acting below the standard of care. Paula will argue that Gayle breached a duty to her by parking far away from the curb, and suddenly, without looking, swinging her car to the curb. This is wrongful because a reasonably prudent driver always looks both ways before they move their car on the street, to look for other vehicles. Moreover, Gayle knew Paula was in the vicinity since Frances told Gayle that a police officer was around and suggested she move her car. Thus, this element is met.

Causation

The breach must be the actual and proximate cause of the plaintiff's damages for the defendant to be held liable.

Actual Cause

An act is the actual cause of an injury when it is the but for cause. If the injury would not have occurred, but for the defendant's act, the actual causation element is satisfied.

Paula will argue that but for Gayle jumping into the car and swinging it toward the curb without looking, Paula would not have been hit by Gayle's car, and would not have been injured. The court will agree. It should be noted that Frances' act of yelling at Gayle to move her car was not a superseding force that cuts off Gayle's liability because it occurred before Gayle's negligent act. Thus, this element is also met.

Proximate Cause

The defendant also must prove that the act was the proximate cause. To be the proximate cause, the act must have been foreseeable at the time the act was committed. Here, this was a direct cause case. As soon as Gayle swung her car toward the curb, Paula was hit and injured. There was no superseding intervening act that would cut off Gayle's liability. Thus, Gayle's breach was the actual and proximate cause of Paula's injury and if Paula can prove damages, she will recover.

Damages

The plaintiff must prove her damages. Under the "eggshell" plaintiff rule, the defendant must take the plaintiff as she finds them and is liable for the recovery no matter how surprisingly great it is considering the particular plaintiff. Here, Paula was injured from Gayle's car.

Compensatory Damages

The purpose of compensatory damages is to put plaintiff in the position she would have been in had the injury not have occurred. Paula may recover general damages for her injuries as well as the cost of the treatment of the injuries at the hospital. If she lost earnings, she may recover special damages subject to the certainty, avoidable, and mitigation principles.

Defenses

There are no applicable defenses because there is no indication Paula was contributorily negligent, assumed the risk, or comparatively negligent in a jurisdiction that recognizes these respective principles.

Conclusion

Gayle is liable for negligence against Paula and Paula may recover the damages noted above.

(b) Paula v. Frances

Negligence

Paula will have to prove the same elements above to hold Frances liable for negligence.

Duty/Standard of Care

Paula was a foreseeable plaintiff under the Cardozo view because Paula was within the zone of danger as a driver on the street. When Frances told Gayle to move her car, it was foreseeable that Paula was within the zone of danger. Paula is also a foreseeable plaintiff under the Andrews view because all plaintiffs are foreseeable using this standard. Since Frances is an adult, she must exercise the level of care that a reasonably prudent person in her position would. Paula will argue that Frances owed a duty of care to Paula because Frances, as an adult, should have supervised Gayle and made sure she never carelessly parked her car far from the curb, and made sure she was careful when trying to move her car to the curb. She may also argue that Frances had a duty to make sure that Gayle was not skipping school.

Frances will argue there is no duty to act affirmatively. Frances, as an adult friend, is not responsible for Gayle's actions, and therefore had no duty to supervise her. The only time a duty to act affirmatively arises is when there is a close relationship (usually a familial one), when the defendant puts the plaintiff in peril, when the defendant undertakes to rescue the plaintiff or when there is a duty imposed by law or by statute. A duty also arises when an employer is vicariously liable for employees.

Vicarious Liability

Paula will argue that because Gayle promised to pay Frances $10 for moving her paintings, Gayle was an employee of Frances, making Gayle vicariously liable for

Gayle's torts. Vicarious liability attaches to an employer, when the employee commits a tort while performing an act in the scope of their employment. In this case, Gayle was loading paintings into her car when Frances told Gayle to move her car so the police would not see the car parked illegally. Because Gayle was performing an act in the scope of her employment with Frances, Frances may be held vicariously liable for the negligent torts of Gayle.

Breach

Paula will argue that Frances breached a duty by allowing her employee to park in the middle of the street and telling her to move her vehicle to avoid the police. She will say this is wrongful because someone could have been injured by Gayle moving her car so quickly toward the curb. However, Gayle had no duty to review the way her employee parked her car before she arrived at Frances' house to do the job.

Still, because Frances is vicariously liable for the torts of her employee, she will be liable for Paula's injuries and damages in the same manner that Gayle will be liable, as indicated above. Because Frances did not independently breach a duty owed to Paula, it is unnecessary to continue with the causation and damages analysis since she will only be liable for Gayle's negligence which was analyzed above.

(c) Paula v. School District

Negligence

Duty/Standard of Care

The same rules above apply here. Paula was a foreseeable plaintiff under the Andrews view because all plaintiffs are foreseeable. Under the Cardozo view, it is less clear whether Paula was in the zone of danger. Paula will argue that she was in the zone of danger because Gayle left school in a car and Paula was a driver on the road. School District may argue Paula was not in the zone of danger because Paula was not on school property, or anywhere near the property. Moreover, Gayle is 16 years old and

presumably has a license to drive a vehicle. Thus, there is no clear indication that the School should have a duty to protect third parties from a licensed driver. However, because students are in custody of schools during school hours, it is foreseeable that children who are not in school at the time they are supposed to be will injure a third party. Thus, School District likely owed a duty to Paula under both the Andrews and Cardozo views.

School District owed the duty of care of other reasonably prudent school districts.

Vicarious Liability

Because the school district itself did not commit a tort, Paula will have to hold it liable on a theory of vicarious liability. As mentioned above, an employer is liable for the torts of its employees during the scope of their employment. Gayle's teacher was on school hours, relaxing in the lounge. Class had already started, thus she was in the scope of her employment when she left the students unsupervised and School District will be vicariously liable.

Breach

Paula will argue that School District breached the duty of care owed to Paula when it knowingly allowed Gayle's teacher to leave Gayle's class unsupervised. This is wrongful because children in high school need to be supervised. School District will argue that Gayle is 16 and is almost an adult; thus it was not wrongful to leave her unsupervised for only ten minutes. Although this is a close call, because schools are responsible for students during school hours in the same manner that a parent is responsible for a child during other hours, Gayle's teacher, and the school district through vicarious liability, probably breached a duty.

Actual Cause/Proximate Cause

School District was the but for cause because but for the negligent supervision, Gayle would not have been allowed to leave the property. School District will argue the teacher was not the proximate cause because Gayle's actions of hitting the teacher in

the car was a superseding intervening act. Because it was not foreseeable that a student would leave school and drive negligently into a police officer, School District will not be liable and Paula cannot recover damages.

Defenses

There are no defenses for the same reason noted above.

2. Harry's Theories

Negligent Infliction of Emotional Distress

To make a claim for negligent infliction of emotional distress, Harry must show that the defendant was negligent, and that he was part of a near miss situation, or a bystander on the scene who witnessed a close family member's injury. He also has to show some manifestation of a physical injury.

Gayle and Frances were negligent. Harry was not in a near miss situation himself, and he was not a bystander present on the scene. Although he suffered a physical injury, it is not enough to make out a case for bystander emotional distress because he did not collapse until he saw Paula in the hospital, which was not the scene of the accident.

Answer B to Question 4

Paula v. Gayle

Negligence

Paula has a good cause of action for a negligence claim against Gayle. To make out a prima facie negligence case, Paula must show that Gayle (1) owed a duty to Paula, (2) breached that duty, (3) the breach was both the cause-in-fact and proximate cause of Paula's injuries, and (4) that Paula sustained damages.

Duty

Under the Cardozo standard, plaintiffs owe a duty of due care to all foreseeable victims of their conduct. Under the broader Andrews standard, plaintiffs owe a duty of due care to everyone else in the world. The law defines "due care" as that of a reasonably prudent person. However, since Gayle is only 16, she will argue that she be held to a lesser standard: that of a reasonably prudent person of like age and experience. Paula will contend, however, that since Gayle was engaged in an adult-oriented activity, that of driving an automobile, that the law should make no exception for Gayle's age. Courts have consistently held that children engaged in adult activities must perform those activities with the care of a reasonable person, so Gayle will not be able to lower her standard of care to take her age into consideration.

Breach

A duty is considered breached when the defendant's conduct falls below the standard of care. Here, Gayle swung her car towards the curb "suddenly" and "without looking," conduct which clearly falls below the standard of care. Automobiles are inherently dangerous and heavy, and proper vision and care are required. Moreover, since Frances caught sight of the patrol vehicle and told Frances, "Quick, move your car to the curb," it likely put Gayle on notice that someone was coming, making her sudden and quick movement of the car without looking that much more unreasonable. Paula will probably have no problem proving this element.

Another theory of breach would be that Gayle breached when she "carelessly" parked too far away from the curb, as a reasonable person would have parked next to the curb.

Causation

Courts have traditionally divided the causation element into two parts: (1) cause in fact and (2) proximate cause. Under the cause in fact, the traditional test is whether the harm would have occurred "but for" defendant's breach. Under proximate cause, the harm will be said to proximately cause the injury if the harm is a foreseeable result of the breach. Here, Paula will be able to establish both cause-in-fact and proximate cause. If not for the fact that Gayle quickly turned her car into Paula, it would not have "hit and severely injured" her. As for the proximate cause, the very reason prudent care is required while driving a car is because they are extraordinarily heavy and can cause severe damage to people and property they come into contact with. This makes the danger of hitting someone clearly a foreseeable result of driving negligently. Paula will satisfy both elements of causation.

On the second breach theory, that Gayle parked too far from the curb, the proximate cause prong will be harder to satisfy. It is true that, had she parked closer to the curb, Paula would not have had to get out of her car, and therefore the "but for" cause is met. But not parking near a curb is not reasonably prudent because you do not leave space for other cars on the road, and generally accidentally hitting someone is not something thought of as a foreseeable risk of parking too far from the curb. However, since Paula satisfies both elements under the first theory, she will probably stick with that one, and jettison the second theory of breach.

Damages

In a negligence action, the plaintiff must prove damages. The damages need not be economic, but must be real. Here, Paula will once again have no problem making out a case for damages because she was "severely injured" and taken to a hospital.

Defenses

Comparative Negligence

Gayle will try to argue that Paula was comparatively negligent because Paula saw the car near the curb and could likely have seen Gayle walking towards the car. After all, she would be hard to miss carrying some paintings. Gayle would also point out that since Frances called out "Quick, move your car to the curb," that Paula had notice that the car was about to be quickly moved to the curb. Therefore, by standing within a reasonable distance from a car that Paula knew was about to be quickly moved, Paula was also negligent. Paula will reason that as a police officer she has a duty

Fireman's Rule

Under the fireman's rule, firefighters and police officers who engage in dangerous activities in connection with their jobs are barred from bringing suits for injuries sustained from those activities. The rationale is that the nature of the job is such that the police assume the risk of their jobs. Under this theory, Paula will not be able to recover for damages incurred if she was acting in connection with her job. Since she was coming to the curb to talk to Gayle about her car being illegally parked, it is clear that she was doing something in connection with her job. On this theory, Paula will probably be barred from recovery.

Battery

Paula may be able to make out a battery action against Gayle, but it will be more difficult. Battery is defined as the (1) intentional, (2) harmful or offensive contact (3) with Plaintiff's person.

Intentional

Contact is intentional if the conduct is voluntary and there is a substantial certainty that the contact will occur. This is the most difficult for Paula to prove. There is nothing in the facts to indicate that Gayle acted voluntarily, or that she had any intention of hitting Paula. While her conduct was likely negligent and maybe even reckless, it does not contain the requisite intent. So while elements 2 and 3 will easily be met--hitting

someone with a car is indisputably harmful, and the car hit Paula directly--the first element will not be proven, and the battery action will fail as a result.

Paula v. Frances

Agency

In order for Frances to be liable for Gayle's negligence, there needs to be an agency relationship between Frances and Gayle. This may be established under the doctrine of Respondeat Superior.

Under the doctrine of Respondeat Superior, employers are liable for the torts of their employees, so long as the conduct was within the scope of employment. So Paula must first prove that Gayle was an employee of Frances. If so, Paula must then establish that Gayle was acting within the scope of her employment when she injured Paula. If it is found that Gayle was merely an independent contractor, Paula must prove that either the duty was non-delegable or that [sic].

Employee versus Independent Contractor

The major test to determine whether someone is an employee or an independent contractor is whether the employer had a right to control the method and manner of the work. Factors that the court looks to include the degree of control, whether the pay was hourly or by piece, whether the employer furnished the tools and other items, whether the job was for the benefit of the employer's business, and the length of the working relationship.

Here, the job was done at Frances' house, was for a seemingly short duration, and does not appear to have much supervision. Moreover, the fact that Gayle received a one-lump sum of 10 dollars for the work suggests that it was not an employee relationship, but rather an informal, independent contractor type relationship. There is nothing to suggest a long-term commitment, and the movement of paintings is the type of job that needs to be done only once in a great while. Additionally, there was no benefit to

Frances' business objectives because the paintings were being moved from Frances' home. This is in fact a prototypical independent contractor relationship.

Scope of Employment

Assuming Gayle is considered Paula's employee, [sic].

Negligence

Paula might also be able to make out a negligence action against Frances' own negligence. For the negligence framework, see above.

Duty

See above.

Since Frances is an adult, she owes that of a reasonable person. Clearly she saw that Paula was approaching the car, otherwise she would not have shouted to Gayle to quickly move her car. Therefore, Paula was a foreseeable victim.

Breach

See above.

The theory would be that Frances breached the duty of reasonable care by instructing a sixteen year-old to "quickly" move her car to avoid being cited for a minor traffic ticket. A reasonably prudent person would not have instructed an impressionable minor to move such heavy machinery "quickly."

Causation

See above.

As for cause-in-fact, Frances will argue that even in the absence of her instruction, Gayle would have likely moved her car quickly and hit Paula. Paula will counter that Gayle was in fact acting under Frances' instructions and would not have moved the car quickly unless Frances did not tell her. Since Gayle "jumped" into her car right after being told to move it quickly, it is more probable than not that Gayle was acting at the direction of Frances, and therefore Frances' instruction was the "cause in fact" of

Paula's injury. However, Frances probably has the better argument on the issue of "proximate cause." While instructing someone to move their car quickly might not be the most prudent thing to do, it is likely not foreseeable that the mere suggestion that someone act in haste will result in a haste so overwhelmingly that it would cause injury to someone who, at the time of your instruction, was in their own car. Paula will argue that when police officers see something suspicious or in violation of the law, it is reasonable to expect them to get out of their cars. However, while true, this is probably not enough to overcome the foreseeability on the part of Frances.

Damages

See above.

Defenses

Frances will avail herself of the same defenses that Gayle did.

Paula v. School District

Agency

Paula will argue that the school district is acting as the agent.

Negligence

Paula once again will have a negligence claim against the School district. Her claim will be based on the school district's own negligence in allowing their students to roam freely.

Duty

See above. Here, however, it is unlikely that Paula is a foreseeable plaintiff. The chain of events leading from Gayle's ditching school to Paula's injury is extraordinarily remote, and has several intervening forces.

Breach

See above. Paula will claim that the district breached their duty by knowing that the teacher relaxed in the teacher's lounge during the first ten minutes of class time, and permitting him to do so. The reasonably prudent school district would make sure the teachers are supervising the children so they do not leave or otherwise misbehave.

Causation

See above. Here, Paula will claim that, but for the teacher's negligence in leaving the students unsupervised--and but for the school's negligence in allowing the teacher to do so--the injury would not have occurred. Once again, however, Paula has the problem of proximate cause. While the school district understands that schools have to protect their students, and the students could have dangerous propensities if permitted to leave school grounds, the situation here is pretty remote from those duties. However, if the jury finds that the student is likely to commit some harm while ditching school, Paula could be a foreseeable victim of that harm.

Damages

See above.

Defenses

The district will avail themselves of the same defenses that Gayle and Frances did, above.

Respondeat Superior

Paula may also have the claim that the school is negligent due to the teacher's negligence. Since the teacher was an employee of the school district (see respondeat superior discussion, above), the district is vicariously liable for his conduct. The teacher here is likely an employee of the school because the manner of his work is substantially controlled by the district. Moreover, since he was on school property and during school hours, the harm will be said to be within the scope of his employment. The rest of the analysis is substantially the same as the school district's own negligence, above.

Harry v. Gayle

Negligent Infliction of Emotional Distress

Harry can possibly bring a negligent infliction of emotional distress action against Gayle. Under this theory, Gayle is liable for (1) negligent conduct (2) in plaintiff's presence, and (3) plaintiff suffers subsequent physical symptoms.

Negligent Conduct

See above.

In Plaintiff's Presence

This is where Harry will have trouble. Since Harry did not see the accident, and only later saw Paula in the hospital he was not in the presence of the negligence, nor was he in the zone of physical danger.

Physical Symptoms

Under Negligent Infliction of Emotional Distress, plaintiff has to suffer subsequent physical manifestations of the distress. Here, since Harry collapsed at the sight of Paula's condition, breaking his arm, he should be able to prove subsequent physical manifestations. And since the broken arm was a result of the collapse, under the eggshell-skull principle, he would be able to recover for all damages.

However, since he cannot prove he was in the plaintiff's presence, he will not be able to recover.

Harry v. Frances / Harry v. School District

Harry can claim Negligent Infliction of Emotional Distress under the theories of respondeat superior and vicarious liability, the analysis of which will be identical to the analysis above, and will lose once again due to his lack of presence.

Therefore, Harry will be unlikely to succeed against any of the parties for his damages.

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ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2013

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2013 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.

Question 4

Darla is in the pest control business. She develops and produces fumigation gas for her own use. She also sells the gas to consumers. Some of her competitors do not sell gas to consumers because consumers sometimes do not follow safety instructions.

Darla sold a container of fumigation gas to Albert for use in ridding his apartment of insects. Although she had intended to produce gas of standard toxicity, she had unknowingly produced gas of unduly high toxicity. Albert used the gas and succeeded in killing all the insects in his apartment. Because he used the gas carelessly, some made its way into the apartment of his neighbor, Paul. The gas caused Paul to suffer serious lung damage and to fear that he would contract cancer as a result.

1. Is Darla liable to Paul? Discuss.

2. If so, may Paul obtain damages from Darla for fear of contracting cancer? Discuss.

ANSWER A TO QUESTION 4

Darla is in the pest control business and produces fumigation gas for her own use, and sells it to consumers. She unknowingly produced gas of unduly high toxicity which ended up causing Paul, a neighbor of the user Albert that bought gas from her, lung damage and fear of contracting cancer. Although Albert, who was in privity with Darla as he purchased the gas from her, was negligent in his use, there are several theories that Paul can employ to hold Darla liable for her personal injuries.

Paul can potentially sue Darla on theories of an abnormally dangerous activity that caused Paul harm, strict products liability, negligent products liability, implied warranty and express warranty and misrepresentation theories, as well as intentional tort theories.

Abnormally Dangerous Activity

A defendant will owe a plaintiff a strict duty of care, regardless of the conduct of the particular defendant, when the defendant undertakes an abnormally dangerous activity. An abnormally dangerous activity is one with a high risk of harm, that is not commonly found in the community, which has a risk that cannot be eliminated with due care. The utility is usually lower than the risk of harm. The defendant is liable if the dangerous character actually and proximately causes the plaintiff damages.

Here, Darla is in the business of developing and producing fumigation gas, which she sells to consumers. Fumigation gas contains toxins that carry a risk of harm inherently. Darla will argue this is not an inherently dangerous activity, because fumigation gas is safe in normal amounts of toxicity, and is commonly used to control pests. She will argue it is "common in the community." Paul can counter that toxic gas always carries with it a high risk of harm, and unduly high levels of gas is not common in the community. Paul will argue that the gas is so dangerous that D's competitors will not sell it to consumers for fear that warnings are not enough to abate the danger.

Darla can point out that the risk can be eliminated with due care, as people call pest control and have fumigation all of the time, and this is safe. Paul will argue that no matter the due care, chemicals always carry risk of harm to people.

Causation

Paul will argue that the dangerous character was the but-for cause of his harm, because but for the dangerous toxins, he would not have suffered lung damage and fear of contracting cancer. However, in terms of proximate cause, Darla will argue that Albert, the user of the gas, used it carelessly and the fact that the gas made its way to Paul's apartment was a supervening cause. Paul will counter that while this may have been a supervening cause, only unforeseeable intervening acts will break the chain of causation, and Albert's negligence was foreseeable, since Darla herself knew that "consumers sometimes do not follow safety instructions." It is likely that Albert's negligence does not absolve Darla here. Thus, the dangerous character of the chemicals can be said to be the actual and proximate cause of Paul's harm. If Darla's production of the fumigation gas is an "abnormally dangerous activity" then Darla is liable to Paul on this theory.

The issues of proximate cause and causation will be detailed below under the other theories of liability.

Strict Products Liability

A defendant is strictly liable in tort when the defendant manufactures, distributes, and/or sells a product that is unreasonably dangerous and thus "defective" and the dangerous character actually and proximately causes harm to a plaintiff.

Duty and Standard of Care

A defendant owes a strict duty of care to all foreseeable plaintiffs. The focus in necessarily on the character of the product, and not the actions or due care of the defendant, in a strict liability analysis.

First, it is necessary to see if P and D are proper parties. A proper defendant for strict products liability is a commercial seller of a product. This includes all parties in the chain of distribution. Here, Darla is in the pest control business. She develops and produces fumigation gas for her own use and sells it to consumers. She will argue that since she produces it for her own use, she is not a "commercial" seller and falls outside of the strict liability framework. However, Paul will rightly point out that since she "sells the gas to consumers" she is a property defendant here.

Proper plaintiff-- Strict products liability does not require privity, or a contractual relationship between the defendant and the injured party. A proper plaintiff is thus a buyer, a user, or even a bystander that is harmed. Here, Paul was not a user or purchaser of the gas; his neighbor Albert was. Albert's careless use of the gas resulted in the gas making its way into Paul's apartment and causing him lung damage from breathing the fumes. Since Paul is a "bystander" harmed by the dangerous character of the product, Paul is a proper plaintiff and has standing to sue Darla.

Defect

The defendant, Darla, is liable for a defect in the product that is unreasonably dangerous. There are three types of defects in products liability: a manufacturing defect, a design defect, and a failure to warn defect which is a subset of a design defect.

Manufacturing Defect

A manufacturing defect is a defect caused during the manufacture of the product, whereby the product becomes unreasonable dangerous as a result of a problem during the manufacturing process. The defect is a result of a "one off" problem where the product emerges more dangerous than the other products that are manufactured with it.

Here, Darla may be liable for a manufacturing defect. She intended to produce fumigation gas of standard toxicity, which is presumably safe for human use when properly manufactured, as she is in the pest control business and sells to consumers. However, Darla unknowingly produced gas that was of unduly high toxicity, and sold it to Albert. Since this gas was "unduly toxic" this can demonstrate a product that was made to be unreasonably dangerous, as a result of the production process, and is different than the normal gas.

A manufacturing defect is demonstrated by the "Consumer Expectations Test" which essentially asks, would an ordinary consumer find the product to be more dangerous than they would anticipate? Here, while adult consumers are likely aware of the attendant dangers of toxic pest control fumes, Paul can argue that consumers do not expect that they will suffer serious lung damage as a result of someone spraying to kill some bugs in their apartment. This is likely a good argument for Paul. However, Darla can argue that consumers DO expect that fumigating can cause damage if they breathe in the fumes, and it is common sense that someone should not use too much gas. Darla will point out that the same is true for other items, such as household bleach. Paul likely has the better argument here, as consumers that spray for insects would probably not expect that the gas has "unduly high toxicity." Therefore, Paul has enough facts to prove a manufacturing defect here.

Design Defect

A design defect occurs when a product as designed is unreasonably dangerous, and is measured in terms of whether there is a "reasonable alternative design" for the product that makes it more safe without impairing its utility and function and without making it unduly expensive so as to price the defendant out of the market. It may be the case that Darla's product of the gas was a design defect in terms of the way the chemicals were used. If she used a different chemical combination, she may have been able to avoid the problem of accidentally making it too toxic. However, there are no facts to show this, and it appears that Darla simply made one batch of gas too toxic. There does not appear to be a reasonable alternative design, because pest control fumigation gas is inherently toxic.

Failure to Warn Defect

If there are either no warnings or inappropriate warnings on a dangerous product, this is a type of design defect. Here, it is not clear if there were warnings and what they were. However, because Darla's competitors do not sell the gas to consumers because they don’t always heed instructions, there is some evidence that the gas does come with instructions. However, more facts would be needed to show that there were inadequate warnings here.

Causation

Actual Cause

There must be a showing not only that the product was dangerous but that the dangerous property actually caused the harm to the Plaintiff. The defect must have been present while the product was in Darla's control.

Here, but for the high toxicity levels, Albert's overuse of the product would not have caused the harm to Paul, or so Paul will argue. It is not clear if overuse of the normal gas would have caused the same problem. However, it is likely that the unduly high levels of toxicity caused the harm to Paul, when the fumes from Albert's apartment from Albert's spraying for bugs wafted into Paul's apartment. Therefore, Paul can likely argue that the dangerous defect was the actual, but-for cause of his harm.
It appears that Darla did have control of the product while it was defective, because it can be inferred that when she produced the gas with such high levels of toxicity this was the gas she sold to Albert, who used it and injured Peter.

Proximate Cause

The harm must also have been proximately caused, meaning that it was foreseeable that the harm would occur, and that the defendant created the scope of risks. A strict products liability defendant is liable for all foreseeable misuses of a product, so a misuse that is foreseeable will NOT cut off the chain of liability because it is not an unforeseeable independent or abnormal dependent event such as would break the chain.

Darla will argue that Albert's negligence was an independent intervening cause and she should not be liable for Albert's negligent use of the gas. However, it is foreseeable that users may accidentally use too much gas, or do this purposefully without understanding the true harm. In fact, this was so foreseeable that Darla's competitors have in fact refused to sell gas to customers, because customers sometimes do not follow directions. This demonstrates the danger of the product and the fact that consumers are likely to misuse the gas, and harm themselves or others. Thus, Paul will be able to show that Darla's product was the proximate cause of his harm, despite the fact that Albert was negligent.

Damages

Paul suffered serious lung damage as a result of ingesting the gas fumes. He also worried that he would contract cancer as a result. Typically, products liability actions will only allow a recovery of personal injury or property damage but Paul's emotional distress may also be parasitic to this. This will be addressed below. However, Paul did suffer his requisite damage to recover.

In sum, Paul can likely recover on a strict products liability theory.

Defenses: Assumption of the Risk?

Darla can invoke this defense, which means that one knows of a risk and voluntarily proceeds in spite of it. Paul did not know of the risks, and was an innocent bystander. Therefore, there is no defense.

Contributory Negligence

The plaintiff's conduct is not an issue and cannot be a defense in strict liability, because the focus is on the character of the property, not the parties' conduct.

Negligent Products Liability

Negligence focus on the conduct of the defendant, and not just the character of the property.

Duty

A commercial producer owes a duty of reasonable care to foreseeable plaintiffs, who are plaintiffs in the "zone of danger" per Cardozo in Palsgraf. Here, Paul was arguably in the zone of danger. Even though he was not a user, it is foreseeable that the fumes

could leak out and harm people that are nearby, including neighbors. Darla will argue it is not foreseeable that someone in a different apartment would be harmed; however it is foreseeable that the toxic gas can waft.

Standard of Care

Darla owed a duty to act as a reasonably prudent producer of fumigation gas would act under the circumstances. Since others in the pest control business do not sell gas to consumers, this is evidence of a lack of prudence on her part. She unknowingly produced high levels of toxins in her gas, and should have had safety controls, monitoring, and someone to check the gas before it went out. She likely breached her standard of care here.

The analysis of causation and damages is the same as above; therefore, Darla is likely liable for strict liability as well.

Contributory Negligence

Paul was not negligent here, and thus this will not reduce a potential recovery.

Paul can recover for negligent products liability.

Implied Warranties of Merchantability

A product is deemed merchantable for its intended purpose. Therefore, Paul may be able to argue a breach here, if the product was not fit for its intended purpose and was too dangerous. However, this is likely not the issue; the spray worked well and as intended, because it killed all of the bugs in Albert's apartment here. Therefore, Paul cannot recover on this theory.

Express Warranties/Intentional Torts/Misrepresentation

Here, it does not appear that Darla made any representations to Paul at all, since she did not interact with him. Therefore, he cannot recover on express warranty or misrep theory.

Darla may be liable for battery if she knew to a substantial certainty that she would cause Paul harm but there does not appear to be evidence of this.

(2) Can Paul obtain damages for fear of contracting cancer?

Proper damages for products liability in strict liability or tort involve personal injury and property damage only. Emotional distress can constitute a personal injury, but even if it did not, it is 'parasitic' to Paul's actual physical injury of lung damage so it would likely be awarded on this theory. If fear of contracting cancer is "emotional distress" which it likely is, then it is a proper measure of damages.

Damages must be foreseeable, certain, definite, and unavoidable.

Paul can recover if his emotional distress is reasonable and foreseeable. Here, it is foreseeable that Paul would fear contacting cancer after ingesting toxic gas and suffering severe lung damage. An average person would have this fear especially since it is certain that he developed severe lung damage.

Paul could face problems proving his damages with definiteness/certainty. It is difficult to quantify this measure, and Darla will argue as such. However, a jury would weigh his suffering, and the credibility and likelihood of his distress, and award a number. Juries award damages for pain and suffering routinely, and could award damages based on "fear."

Paul did not need to mitigate here, since he was not a wrongdoer, and he cannot easily mitigate fear, unless he sees a therapist to reduce his fear, which would also cost money and be a measure of damages.

Therefore, it is likely that Paul would also recover damages for fear of contracting cancer, if this constitutes "emotional distress."

ANSWER B TO QUESTION 4

1) Is Darla liable to Paul?

Paul may bring a variety of claims against Darla including a claim based on strict liability, products liability, and negligence.

Strict Liability

A claim for strict liability may be made when the defendant is engaged in an abnormally dangerous activity, in which case he/she owes a strict duty of care to the plaintiff, and that activity causes harm to the plaintiff. Whether an activity is considered an abnormally dangerous one requires a determination of whether the activity is common in the community and whether the defendant, taking all reasonable and proper measures to ensure safety of the activty, the risks involved in the dangerous activity cannot be completely protected against.

In this case, Darla is engaged in the business of developing and producing fumigation gas which she uses for her own purposes in addition to selling to consumers. While some of her competitors do not sell the gas to consumers because consumers sometimes do not follow the safety instructions, the use of fumigation gas to rid one's home or business of pests may arguably be considered a matter common in the community. In this case, Albert did in fact use Darla's gas to rid his house of pests and thus an argument can be made that while the risk danger of using the gas cannot entirely be protected against, it likely is a matter common in the community, thus, a claim for strict liability will likely fail if P brings one against D.

Strict Products Liabilty (SPL)

For a claim of SPL, a defendant must be a commercial supplier of a good who supplies a dangerously defective product into the stream of commerce that causes, both actually and proximately, the harm to the plaintiff that results in damages.

Commercial Supplier

In this case, D is in the pest control business in which she manufactures and distributes fumigation gas. While she does use it for her own use, she also sells the gas to consumers. In this case, she sold the gas to Albert who used it to kill the insects in his apartment. Thus, Darla would owe a strict duty to Albert, but also to Paul. The fact that the gas injured Albert's neighbor Paul, who was not in privity of contract with Darla for the sale of the gas is of no consequence because a commercial supplier owes a strict duty to all foreseeable consumers/users or people who may come into contact with the product. Here, despite the fact that Paul did not purchase and use the gas himself from Darla, this will not prevent him from pursuing a SPL claim against her. Because D may be considered a commercial supplier, this element is met.

Defective Product

A consumer may attempt to show that a commercial supplier supplied a dangerously defective product by claiming that the product contained either a manufacturing defect (using the consumer expectation test), a design defect (feasible alternative tests), or an inadequate warning defect (information defect, which is a subset of a design defect.). In this case, Paul should argue that there was a manufacturing defect in the fumigation gas because Darla had produced gas of unduly high toxicity, and the ordinary consumer would have expected the gas produced to be of standard toxicity.

Manufacturing Defect

As discussed above, using the ordinary consumer expectation test, Paul will argue that a reasonable consumer would not have expected Darla to supply the market (and here Albert) with fumigation gas that had an unduly high toxicity level as compared to the standard toxicity levels that are generally supplied. The fact that Darla produced the higher toxic gas unknowingly and unintentionally is of no consequence in a SPL suit because the supplier owes a strict duty of care to the reasonably foreseeable consumer (here Paul), and breach of that duty (by supplying the dangerously defective product) is enough to make out the prima facie case for duty and breach of the standard of care.

Inadequate Warning

Alternatively, because the facts indicate that some of D's competitors do not sell gas to consumers because the consumers sometimes do not follow safety instructions, there may also be an issue of inadequate warning here; however, there is no evidence that D did in fact fail to supply a warning against the dangers of using the gas, so P's best argument would be to argue that the product was dangerously defective on account of the manufacturing defect.

Causation-actual cause

The injury sustained by P must also be the actual cause of the supply of the defective product. In this case, D's supply of the product to Albert (A) actually caused the harm to P because but for the sale and use of the product in A's apartment, P would not have been harmed. Rather, the issue that D will argue here is that she is not the proximate cause (or legal cause) of P's injuries on account of A's misuse of the product.

Legal Cause (Proximate cause)

Proximate cause is a legal limit on a D's liability, whereby courts will only cut off a D's liability to P's when it exceeds the foreseeable scope of liability. In this case, D will argue that A's misuse of the product in that A carelessly allowed the gas to seep into his neighbor P's apartment, should absolve her of liability because a reasonable person using the product would ensure that it would not injure others. However, this argument will likely fail because a commercial supplier must take into account a user's foreseeable misuse of the product, and such a misuse occurred in this case. It is foreseeable that a user of highly toxic pest control gas may injure other individuals on account of his negligent use of it. Thus, because a court would reject the argument that A's negligent misuse was an intervening and superceding cause that should cut off D's liability to P, this element will also be met.

Damages

Finally, a P must have suffered some form of cognizable damages in order to affect a recovery. Because Paul suffered serious lung damage, a personal harm to his body, he will meet this requirement and his claim against D based on SPL will likely succeed.

Defenses--assumption of risk and contributory negligence

D might try and argue that P assumed the risk of being injured by A's use of the pesticide; however, for an assumption of the risk defense to work, the individual must have knowingly and voluntarily assumed the risk of the activity involved. Here, there are no facts to suggest that P assumed any risk whatsoever, let alone voluntarily accepted such risks. Thus, this defense will fail.

Alternatively, D will argue that A was contributorily negligent in allowing the gas to injure his neighbor; however, as discussed above, this defense will not work in a SPL case because the negligence of the user is not taken into account when there was foreseeable misuse of the product by the user.

Negligence claim against D

The prima facie case for negligence includes duty, breach of that duty by falling below the requisite standard of care, causation (actual and proximate) and damages.

Duty

Under the Andrews minority view, a person owes a duty to everyone; thus D would owe a duty to P in this case. However, under the Cardozo majority view, a person only owes a duty to all those foreseeable persons within the zone of danger. Under this view, D would also owe a duty to P because the fact that P's apartment was located next to A's apartment (from which the gas leaked out of and into P's apartment), it is likely that P was within the zone of danger as to the use of the toxic chemicals and also was a foreseeable plaintiff because D would reasonably foresee that someone's neighbor may be injured by use of the toxic chemicals, especially in the context of apartment homes

which are generally separated by walls and hallways from each other. Thus D owed a duty of care to P in this case.

Breach-Standard of Care

D owed a duty to P and the standard of the duty would be to act as a reasonably prudent manufacturer and supplier of toxic chemicals used for pest control. Here, P will argue that D's actions fell below the requisite standard of care because D negligently produced a much higher toxic gas than she had intended to produce, and a reasonably prudent supplier of such gas would either test the levels of the gas before placing them in the market and selling them or, at the very least, having certain safeguards available to ensure that the gas level of the product produced would not exceed certain specifications. Because P can argue that D likely breached its standard of care in this case, P will have to show that his injuries were also the cause of his damages as well.

Actual Cause

P will argue that but for D's supply of the negligently manufactured product to A, P would not have been injured. Because as discussed above this element is met, P must show that D is also the legal cause of his injuries.

Proximate cause

D will argue, again, that A was in fact the legal cause of P's injuries because of his misuse of the product, and that such misuse was an unforeseeable intervening and superceding cause of P's injuries and should thus absolve D of any liability to P. However, for the reasons discussed above, this argument will likely fail because it is entirely foreseeable that an apartment owner who shares his residency in close proximity to other tenants might injure those tenants by misusing a toxic substance in an attempt to kill the pests in his apartment. Thus, P will be able to succeed on this element as well.

Damages

Again, P must prove that he suffered damages that the law recognizes as compensable. Here, P suffered lung damage and because this is a form of personal injury for which the law provides a remedy, P will be able to easily meet this element.

Thus, P has also made out a prima facie case for negligence against D as well.

Defenses

Contributory negligence

A P's contributory negligence traditionally barred his claim for recovery against the D; however, many courts have adopted a form of comparative negligence to lessen the harshness of the result with regard to the complete bar on P's claim. In this case, D might try and argue that P was contributorily negligent because he should have been able to recognize the smell of the gas or that something was causing him discomfort in his apartment, and should have sought fresh air by going outside or moving out temporarily. However, there aren't any facts to suggest that the gas had an odor; for all intents and purposes, it might have been an odorless gas. Moreover, P might have been asleep while A used the gas and would not have noticed its effects on him. Because there is very little in the facts to suggest that P was contributorily negligent, this defense will likely fail for D to assert. Similarly, an assumption of the risk defense will also fail for reasons discussed above.

2) May P obtain damages for Darla for fear of contracting cancer?

The issue is whether P can recover damages against D for his emotional distress. The claim that P would bring against D is one for negligent infliction of emotional distress, since the elements of an intentional infliction of emotional distress are not applicable here.

Negligent infliction of emotional distress (NIED)

The elements for an NIED claim occur when a defendant negligently causes emotional distress to a plaintiff on account of the D's actions. Traditionally, an NIED claim required the P to suffer some form of physical harm, and not merely some intangible emotional harm out of fear that the courts would receive a large influx of junk cases for unsubstantiated claims. Here, P will likely be able to recover his emotional distress, i.e. fear that he will contract cancer from the exposure to the gas, because he has in fact suffered a physical manifestation of the harm in the form of the lung damage that he has seriously suffered. Thus, because P can show that he has suffered physical harm to his body, he will also be entitled to recover for his emotional distress as well.

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2014

CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 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.

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

Question 6

Owner owned and operated a small diner where Cook and Waiter worked. After closing one day, Cook called in sick for the following day. Owner knew that an acquaintance, Caterer, owned and operated a catering business. Owner asked Caterer to fill in for Cook. Owner told Caterer: "I want you to run the kitchen for one day. I will pay you your standard catering fee. I just need somebody who knows what he's doing." Caterer agreed, telling Owner, "I'll bring my own knife set, but I assume the kitchen is fully equipped."

Owner did not check Caterer's references. If he had, he would have learned that Caterer's business had once been shut down by the health department.

Caterer went to Owner's diner and started to cook. Patron, a customer, ordered chicken wings from Waiter. Waiter gave the order to Caterer.

A notice posted on the kitchen wall, entitled "Health and Safety Code Section 300 Notification," stated: "To avoid food poisoning, all poultry products must be cooked at a minimum temperature of 350 degrees." Upon observing that the oven was set at 250 degrees, Waiter informed Caterer that the oven should be set at 350 degrees. Caterer responded: "Just worry about waiting tables, and leave the cooking to me." Caterer did not raise the temperature of the oven, and removed the chicken wings shortly thereafter.

Waiter served Patron the chicken wings. Patron ate the chicken wings and suffered food poisoning as a result.

Under what theory or theories, if any, might Patron bring an action for negligence against Caterer, Waiter, and/or Owner, and what is the likely outcome? Discuss.

QUESTION 6: SELECTED ANSWER A

In a negligence case, the plaintiff must show duty, breach, causation, and harm. When the defendant's conduct creates an unreasonable risk of harm to others, a duty of due care is owed to all foreseeable plaintiffs; the defendant must act as a reasonable person to protect foreseeable plaintiffs. Under the majority Cardozo view this duty is owed to all foreseeable plaintiffs, while under the minority view it is owed to all plaintiffs. When the defendant's conduct falls below the relevant standard of care, the defendant has breached his duty. To show cause, the plaintiff must show actual cause (that the plaintiff's injury would not have happened but for the defendant's conduct) and proximate or legal cause (that the plaintiff's injury was foreseeable in that it was a result of the increased risk created by the defendant's conduct/within the normal incidents of the defendant's conduct). Finally the plaintiff must prove that they suffered damages. Here, Patron will be able to satisfy this final requirement of harm/damages with respect to all possible defendants because Patron suffered food poisoning as a result of eating the chicken wings.

Patron v. Caterer

Patron can bring a negligence claim against Caterer for negligently serving Patron undercooked chicken wings. First, Patron could establish the first element of a negligence claim by arguing because Caterer was cooking food to serve to customers at a diner, he owed a duty to all customers who would be eating at the diner to exercise due care/act as a reasonably prudent person in the preparation of their food. Because Patron was a customer at the diner, Caterer thus owed a duty of care to Patron. Caterer breached this duty in multiple ways. First, Caterer failed to exercise due care by not reading and heeding the notice on the kitchen wall that to avoid food poisoning, all poultry products must be cooked at a minimum of 350 degrees. This notice was easy to understand and seems to have been conspicuously posted, and thus a reasonable cook in the kitchen would have read and followed the warning. Second, Caterer was unreasonable in ignoring Waiter's warning that the oven was only set at 250 degrees.

As a cook by profession, Caterer should have known the necessary temperature to cook food at to avoid food poisoning, and even if he didn't there was a notice in the kitchen stating what temperature poultry must be cooked at. Furthermore, as a cook Caterer should exercise due care in making sure that the oven is set at the proper temperature, and even if he were for some reason excused for not noticing that the oven was at the wrong temperature, the fact that Waiter explicitly warned Caterer that the oven was at 250 degrees would negate any possible excuse. Thus, Caterer breached the duty of due care he owed to Patron by cooking the chicken wings in an oven which he knew was only set at 250 and when he knew that the Health and Safety Code required poultry to be cooked at a minimum of 350 degrees.

Moreover, the fact that a Health and Safety Code mandated a minimum temperature of 350 degrees gives Patron another theory on which to show duty and breach. In this case of a violation of a regulation such as this Health and Safety Code, a plaintiff can take advantage of the statutory presumption of negligence. If a plaintiff can prove a defendant violated a statute, that the plaintiff was within the class meant to be protected by the statute, and that the harm caused to plaintiff was of the harm meant to be prevented by the statute, then the duty and breach elements of a negligence case will be presumed. In this case, Caterer clearly violated the statute by cooking the chicken at 250 degrees. The statute explicitly states that it is meant to avoid food poisoning, so the harm caused to plaintiff was indeed the harm meant to be prevented by the statute. Finally, the statute is a Health and Safety Code that is posted in restaurant kitchens, indicating that restaurant patrons are the class of people meant to be protected by the statute. Thus, all the elements are satisfied and Patron can use Caterer's breach of this statute to show duty and breach.

Actual causation is easily established because if Patron had not eaten the chicken wings, she would not have gotten sick ("but for" consuming the chicken wings, she would not have suffered harm). Proximate cause is also straightforward in this case; it is very foreseeable that serving someone chicken wings that have been undercooked will cause that person food poisoning, especially if the person cooking the chicken wings is

a professional caterer. Finally, as stated in the introductory paragraph, Patron can easily establish damages because she got food poisoning. Thus, Patron is likely to prevail on a negligence claim against Caterer.

Patron v. Waiter

Patron can also bring a negligence claim against Waiter under the theory that he negligently served her undercooked chicken wings or negligently failed to warn her of the possibility that the wings were undercooked.

Patron would argue that as a waiter, Waiter has a duty to his customers to not serve them food that he knows has a substantial likelihood of causing food poisoning, whether or not he himself is responsible for cooking the food. Alternatively, Patron could argue that Waiter had a duty to warn his customers if he was serving them food which he had reason to believe could cause food poisoning. Waiter would counter that because he was not responsible for cooking the food, he did not have a duty to Patron. However, while it is true that Waiter probably didn't have a duty to make sure that the food was cooked property because it was not his job to cook the food, as a professional waiter he did at least have a duty to either not serve food he had reason to believe would cause food poisoning, or to warn Patron that the food might cause food poisoning. This is because a restaurant patron reasonably relies on their waiter to serve them food that the waiter believes to be safe for consumption. If Waiter had no reason to believe that the chicken would cause food poisoning, he would not have breached his duty to act as a reasonable person with respect to his customers. However, here Waiter knew that the oven was only set at 250 and that the cook had ignored his warning to adjust the temperature. Under these circumstances, a reasonable person exercising due care would not have served the chicken wings, at least not without warning their customer. Thus, Waiter breached his duty to Patron by serving her chicken wings when he knew that they were not cooked at the required temperature.

Patron would argue that actual cause is established because if waiter hadn't served her the chicken wings, she would not have eaten them and gotten sick. Waiter would try to argue that if he hadn't served the chicken wings, a different waiter working that day would have brought them to the table, and he is therefore not a "but-for" cause of Patron's injury. However, the most likely interpretation of this situation is that because Waiter knew that the chicken was undercooked, his duty was not simply to refrain from bringing the chicken to the table but rather to make sure that Patron was not served the chicken or was warned about the chicken; because he was employed as a waiter at the restaurant where Patron was eating and knew of the danger, he cannot avoid liability on that argument. Patron would thus be able to establish actual cause: but-for Waiter's failure to prevent Patron from being served or failure to warn her, Patron would not have eaten the wings and gotten sick. Patron would also be able to establish proximate cause: Waiter knew the oven was only set to 250 degrees and that Caterer had ignored Waiter's warning. It was thus foreseeable that the chicken would be undercooked, foreseeable that if Waiter served the chicken to Patron, Patron would eat the chicken, and foreseeable that if Patron ate the chicken she would get sick. Thus, Patron could establish proximate cause. Damages could be established as above.

Therefore, Plaintiff would also likely win in a negligence action against Waiter for negligently serving her chicken wings that he knew were likely to cause food poisoning.

Patron v. Owner

Patron could bring a suit against Owner either for vicarious liability for Caterer's negligence, vicarious liability for Waiter's negligence, or direct negligence for negligently hiring caterer.

An employer is vicariously liable for the negligence of its employees in the course of their duties. An employer will not be liable for negligence of their employees outside of the duties, nor will someone generally be liable for the negligence of an independent contractor (rather than of an employee). However, someone will still be liable for the

negligence of a contractor if the negligence involves a non-delegable duty or an ultrahazardous activity.

Thus, the first question is whether Caterer is an employee or an independent contractor. A court will address this issue by analyzing the degree of care and control Owner exercised over Caterer, taking into account factors such as the length of employment, the nature of the duties, the amount of responsibility retained by and amount of discretion exercised by the employee/contractor, and the nature of payment. In this case, the fact that Caterer was only filling in for Owner for one day while Cook called in sick, was asked only to "run the kitchen for one day," brought his own knives, was paid a one time payment of his standard catering fee, independently owns and operates his own catering business, and does not appear to have been supervised in his duties all support a finding that Caterer was an independent contractor. The fact that aside from the knives Caterer relied on Owner's "fully stocked" kitchen supports an argument that Caterer was an employee; so does the nature of the job, as generally a cook in a restaurant is an employee of the restaurant; however, these facts are not sufficient to support a finding that Caterer was an employee. Thus, Caterer would be found to be an independent contractor.

Therefore, if Patron were to pursue a claim that Owner was vicariously liable for Caterer's negligence, Patron would have to argue that Caterer was performing a non-delegable or inherently dangerous/ultrahazardous function. The latter exception does not apply because while cooking food at a restaurant does have some inherent risks regarding kitchen safety and food poisoning issues, these are not sufficient for a finding that it is ultrahazardous. However, Patron has a chance of prevailing on the argument that the duty of ensuring that food cooked and served to restaurant patrons is cooked to health and safety code specifications is a non-delegable duty. Common carriers and store/restaurant owners are held to have a particularly high duty of care to their customers, and as such some duties are non-delegable. One example of a non-delegable duty is the maintenance of taxicabs: even though taxi drivers and mechanics are independent contractors, the taxi company may not escape liability for negligence in

the maintenance of their fleet of cars by claiming that they are not liable for negligence of independent contractors on public policy grounds. Another example of a non-delegable duty, and one that is more relevant to this case, is the maintenance of a store to keep it safe for customers. In that case, if for example a store owner hires an independent contractor to repair a dangerous condition in the store that creates a hazard to customers, the store owner can still be found vicariously liable for the independent contractor's negligence under the theory that maintaining the safety of the premises is non-delegable for public policy reasons. By analogy, the owner of a restaurant could still be found liable for the negligence of an independent contractor regarding ensuring that food is cooked according to health and safety code requirements, because restaurant owners owe a particularly high duty of care to their customers and therefore such duty is non-delegable on public policy grounds.

Therefore, Patron has a good chance of prevailing on the argument that Owner is vicariously liable for Caterer's negligence on the grounds that the duty of ensuring that food served at Owner's restaurant is cooked according to health code specifications is non-delegable. Of course, for Owner to be vicariously liable, it must also be established that Caterer himself was negligent. As discussed above, Patron has a strong case that Caterer was indeed negligent; therefore, this will not be a bar to arguing that Owner was vicariously liable.

Next Patron could argue Owner is vicariously liable for Waiter's negligence. Here there are no facts indicating that Waiter is an independent contractor. Owner might try to argue that the fact that waiters generally earn most of their wages in tips supports a finding that Waiter is an independent contractor and not an employee. However, this is not very persuasive and court would probably find Waiter to be an employee. Thus, if Patron did prevail on her claim against Waiter for negligence, she could also prevail on a claim against Owner for vicarious liability; however, if Waiter were found not to be negligent, Patron would have no such claim against Owner.

Finally, Patron could argue that Owner was directly negligent in hiring Caterer because he did not check Caterer's references. First Patron would have to establish duty. Patron could successfully argue that Owner had a duty to his customers to exercise due care in selecting his employees and independent contractors. Patron could also successfully argue that Owner breached that duty by not checking Caterer's references. A reasonable restaurant owner would check the references of a Caterer before hiring him. Owner would argue that here he was only hiring Caterer for one day, that Caterer owned and operated his own catering business which was evidence that he was a competent caterer, and that Caterer was an acquaintance of Owner so perhaps he had independent, circumstantial knowledge of his competence. However, these arguments are not persuasive; it would not have taken long to check Caterer's references, and given the nature of the work he was being hired to do, it was still reasonably prudent to check his references even though he was only being hired for one day.

Patron would argue that Owner's breach of duty in failing to check Caterer's references was the actual cause of her harm because the facts state that if Owner had checked Caterer's references, he would have learned that Caterer's business had once been shut down by the health department. To prove actual cause, however, Patron would still have to argue that had Owner found this out he would have then chosen not to hire Caterer or would have chosen to supervise Caterer more carefully. The court will likely permit this inference in Patron's favor, and she will thus be able to establish actual cause.

Patron would argue that Owner's breach was also the proximate cause of her harm because it was foreseeable that by hiring Caterer without checking his references, Owner was taking the risk that Caterer was incompetent and could cause harm as a result of his incompetence. Patron would probably succeed on this element. It is established practice in the service industry to check references before hiring. Thus, it is foreseeable that a failure to check someone's references could lead to the type of situation at issue. Finally, damages would be established as above. Thus, Patron is likely to prevail on a direct negligence claim against Owner.

QUESTION 6: SELECTED ANSWER B

In all negligence actions, the plaintiff must establish a prima facie case for negligence, which generally is composed of four elements:

(i) defendant owes a duty to plaintiff,
(ii) that duty is breached,
(iii) the breach is the actual and proximate cause of the injury, and
(iv) damages to the person or property.

All four elements must be established to succeed on a negligence claim.

The duty owed to the plaintiff is a general duty to all foreseeable plaintiffs. Further, the majority (Cardozo) is that the duty extends only to plaintiffs within the foreseeable zone of the danger. Conversely, the minority (Andrews) is that the duty extends to all plaintiffs. Also important to the first element is what the duty actually is: the standard of care. There are many different standards of care that will be discussed below.

Whether a duty and standard of care is breached is fact specific, but can look to industry custom, regulations or health codes, and any other relevant information.

For causation, plaintiff must establish both actual and proximate cause. Actual cause is causation in fact; but for the defendant's actions, the plaintiff's injury would not have occurred. Proximate cause is a limitation on liability, and says that the injury must be foreseeable; the defendant is generally liable for all harm that is the normal incident of and within the increased risk of his conduct.

Lastly is damages, which must be to the person or property.

The analysis for these elements in part differs depending on who the action is against; thus, they will be discussed accordingly.

(1) Action for Negligence against the Caterer: The action can be based on negligence or arguably negligence per se; both will be analyzed below.

(i) Duty to Patron: Here, Caterer is working in a restaurant and cooking food that is to be served to customers. Thus, he owes a duty to all customers because they are foreseeable plaintiffs and within the zone of danger of his negligent conduct, meaning they will eat his food and get sick. The standard of care here could be a variety of things, but regardless of which the court chooses, the Caterer will have breached it.

The first possible standard of care is the common law one: a person must act as an ordinary, reasonable, and prudent person would act in the same circumstances as the defendant. Such a standard does not take into account the mental capacity of the defendant, but may take into account any physical incapacities. The court may also take into account any expertise or knowledge that he has, such as being a caterer or chef. This is the most likely standard of care.

The second possible standard of care is that of a professional: which requires that a person act with the knowledge and skill of a professional in good standing in his community. It is arguable that a caterer is a professional, but less likely.

The last standard of care is Negligence Per Se which will be discussed with breach.

(ii) Breach of the Duty:

Looking to the first possible standard of care, Caterer clearly breached it by not checking the temperature on the oven despite the warning from both the clearly present Notification which he observed and from the waiter's comment to him. A reasonable and prudent person would have done so in light of these circumstances, and even without such obvious notifications, it would also be required because it is generally common knowledge that undercooked chicken is dangerous.

The second possible standard of care will have a similar outcome. This is an even higher standard of care, which the Caterer cannot meet. If a caterer or chef is considered a professional, then a reasonable and prudent caterer or chef would surely

check the temperature and have the right temperature for cooking meats, especially chicken.

Lastly is negligence per se. Negligence per se is that the generally common law standard of care may be replaced when there is a government regulation, statute, or as is here a health notification, that imposes a criminal penalty, which includes a fine. If negligence per se is established, then it is conclusively presumed that the negligence elements of duty and breach are satisfied. To establish negligence per se, the regulation must be violated without excuse, the plaintiff must have been within the protected class meaning the type of person the regulation sought to protect, and lastly that the plaintiff suffered the type of injury that the regulation sought to avoid. The first issue with negligence per se is whether the Notice constitutes a regulation or statute imposing a criminal penalty. It may not and if it doesn't, then negligence per se does not apply. It is possible it will not because nothing in the facts shows there is a penalty for such a violation. Conversely, usually there are large fines for violating these health code notifications and so it may be ok. Thus, if it does satisfy the first element of negligence per se, it has obviously been violated because caterer cooked the chicken at 250 instead of 350 degrees. Further, there was no evidence of an excuse the 250 degree-cooking. Next plaintiff was clearly in the protected class the notice sought to protect; the notice sought to protect patrons from getting sick. Lastly, plaintiff suffered the type of injury the notification sought to avoid; food poisoning. Thus, it is very possible that the court will determine negligence per se applies. But regardless of the outcome with negligence per se, it will likely be held that Caterer breached his duty under the common law negligence standard of care.

(iii) Causation: actual cause and proximate cause. Looking first to actual cause, defendant's negligent act of undercooking the meat was the cause in fact for plaintiff's injury. But for the undercooking of the meat, plaintiff would not have gotten food poisoning. Secondly, is proximate cause. Defendant's act directly proximately caused plaintiff's injury because it was foreseeable that serving undercooked meat to a patron would make the patron sick. Thus, the causation element is satisfied.

(iv) Damages: damages will be clearly established because plaintiff suffered food poisoning as a result of his negligence.

Thus, it is likely that the Patron would succeed in his action for negligence against the Caterer.

(2) Action for Negligence against the Waiter: The patron may have a claim for negligence against the waiter as well, essentially because the waiter observed the caterer's undercooking and ended up serving the food without confirming with the caterer that his mistake had been remedied. Again, for the waiter to be liable, the patron will have to establish the four elements of negligence.

The first element of duty: The waiter likely owes a duty to the patron because the patron is a foreseeable plaintiff within the zone of danger for his act of possibly negligently serving undercooked meat. Further, the standard of care would likely be the common law standard of care because none of the other standards of care apply to a waiter, which is a non-professional. Thus, the standard of care is that of an ordinary, reasonable, and prudent person in the same circumstances as the waiter.

The second element of breach: It is arguable that the waiter breached his duty to the patron. One the one hand, a reasonable and prudent person, after observing that the oven was set too low and the hearing caterer's defensive response to his inquiry, would likely make sure after the order was completed that the owner had remedied his mistake and changed the temperature of the oven because a reasonable person would be aware of the dangers of serving undercooked chicken to a patron. A reasonable person might also notify the owner of the carelessness to which the caterer is cooking, especially since he will only be working there one day. Conversely, a reasonable and prudent person might assume that after warning the caterer of the oven-temperature error, that he would simply correct his error and that the caterer's snappy response merely derived from his embarrassment at undercooking a chicken. Thus, the court

could really go either way in determining whether the duty was breached, but it seems more likely that the court would determine that it was breached.

The third element is causation: The actual cause will be satisfied because but-for the waiter serving the undercooked chicken, the patron would not have gotten sick. However, the proximate cause is more difficult to establish, but still likely will be. Although the waiter did not undercook the meat, his negligence (if it is found) contributed to the patron's injury. The waiter's act is likely said to be an intervening force or negligent act. The waiter's failure to ensure that the chicken was cooked properly contributed to the patron's injury and was within the normal incidents of and the increased risk of his conduct. Thus, while more difficult because it is a more tenuous cause, it is likely the court will determine this element to be satisfied.

The fourth element is damages: this will be satisfied because the patron suffered food poisoning.

Thus, it is likely the patron will succeed against the waiter for a negligence claim.

(3) Action for Negligence against Owner: The patron may have a view actions for negligence against the owner of the restaurant. The first being an ordinary negligence claim under vicarious liability. The second being direct negligence for the negligent hiring and or supervision of the employee. All will be discussed.

The owner can be liable for the negligence of his employees, and even possibly the acts of independent contractors, under vicarious liability. Vicarious liability says that the master may be liable if the acts of his servant were within the course of employment. Generally, an owner or master will not be liable for the intentional torts of his servants or employees, unless the intentional tort was natural in the nature of the job, performed at the request of the master, or for the master's benefit. Here, there is nothing to suggest an intentional tort, but rather negligence.

Above, it has been established that the caterer was negligent, and thus, his negligence may be attributed to the owner. The first important determination is whether or not the caterer is an employee or an independent contractor. This is important because the vicarious liability of the owner differs depending on this. Generally, to determine whether someone is an employee or independent contractor, the courts look to several factors: degree of skill required in the job, who provided the tools and facilities, duration of the relationship, did principal control the means of performing the task, was there a distinct business, etc. Applying those facts to this case, it would appear that the Caterer was more likely an independent contractor. The reason being that the employment was only for one day, it was because the owner's normal cook was out for the day, the owner did not operate that much control over the caterer, the caterer had his own distinct business, and the caterer brought his own knives. Thus, if the caterer is determined to be an independent contractor of the owner, the owner generally is not liable unless one of the two exceptions apply.

An owner is liable for the acts of his independent contractor in two situations: (i) when the independent contractor is performing an inherently dangerous task and (ii) when because of public policy, the principal's duties are non-delegable. The latter of the two exceptions likely applies here. Public policy requires that an owner of an establishment that invites and charges members of the public for certain services must reasonably maintain their premises and ensure they are safe. Thus, just because the caterer was an independent contractor, does not mean that the owner could delegate the duty to maintain his restaurant and make it safe. Thus, the owner will likely be vicariously liable for the negligence of the caterer.

It should be noted, that if for some reason the court finds that the caterer was actually an employee of the owner because he was using the owner's kitchen and cooking the owner's menu items, then the owner would also be liable because the negligence occurred within the scope of his employment: it occurred while cooking on the job for a patron of the restaurant.

The owner may also be vicariously liable for the negligence of the waiter (if the waiter is found to have been negligent), because the waiter is an employee and the negligence occurred while acting within the scope of his employment.

The patron could also sue the owner for his Direct Negligence. Even if the owner is not vicariously liable, he can be directly liable for his own negligence. All persons are generally personally liable for their own negligence. Here, the direct negligence would arise from the owner's negligent hiring and arguably negligent supervision of the caterer. The owner owes a duty to his patrons to employ persons that are qualified and will perform the job responsibly. The patron will argue that the owner negligently hired the caterer because he gave him the job when the caterer was only an acquaintance. Further, the owner did not check the Caterer's references or ask around, which a reasonable person would have done; and if such acts had been done, he would have learned that the Caterer's business had once been shut down by the health department for violations. It was the owner's negligent hiring that was the actual, and very likely, the proximate cause of the plaintiff's injuries. Thus, the patron will likely succeed in this direct negligence claim against the owner.

The patron could also sue the owner for his Direct Negligence for negligent supervision of his employees. This is less probable because although the facts do not state that the owner inspected the caterer's work and watched him perform, it is not unreasonable for an owner to not check the every move of a caterer or chef. That being especially true when the caterer is performing such a standard task as cooking chicken. Thus, while the owner owed a duty to supervise, it was likely not breached. The duty here takes on the standard of care required for invitees: which is that the owner must make reasonable inspections to discover all non-obvious and dangerous artificial and natural conditions. That standard of care does not cleanly apply here, and even if it does, it is not apparent that it has been breached. Further, his failure to supervise may not be the proximate cause, because of the caterer's intervening act that was likely not the normal incidents of a failure to adequately supervise. Thus, it is likely the patron will lose on this claim.

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.

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 construction 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.

ESSAY QUESTIONS AND SELECTED ANSWERS

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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 parol evidence rule will bar this argument.

Parol Evidence
Parol evidence bars introduction of oral or written agreements make [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.

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 promissee 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 promissee[,] 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 advice [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.

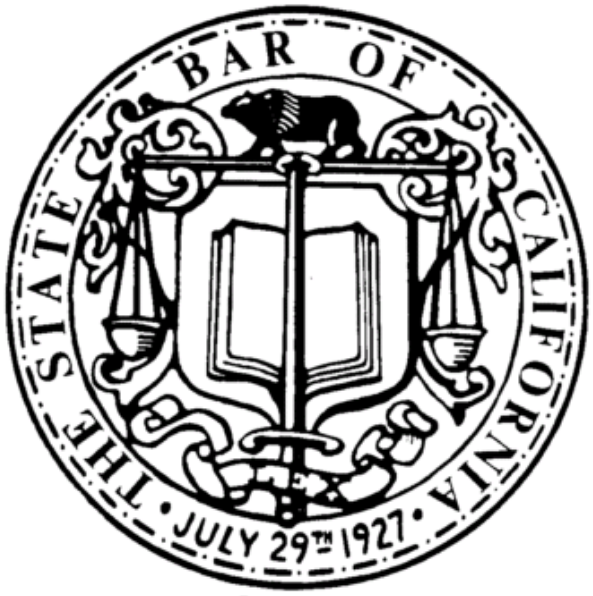
This rule may not apply here because Larry was not representing Marla at the time of the business transaction, at least as far as the limited facts [are] known. Furthermore, Larry did properly separate his law practice and his SS business. It is in a separate office and [there is] no indication the two 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 respec[t] 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 Statue 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[in]g 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 a[r]gue 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. Morever, 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 mitigiate 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.

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 bout 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) unavoidability; 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 Statue 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

This publication contains the six essay questions from the July 2008 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.

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 then 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 grater hardship to B if the contact 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 contact in writing.

S's defenses – unclear hands, laches, unconsionability, 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 contacts 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.

<u>Valid Contract</u>
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 unconsionability/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.

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. <u>Was the State court's denial of Diane's neighbors' application for a permanent injuction correct?</u>

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.

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 if falls under the statute. Although there's an offer in writing, the acceptance of C wan 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, Ca 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 form 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 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.

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.

Recission

The court will assert recission 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 recission 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 contact.

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

CALIFORNIA BAR EXAMINATION

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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 tile, 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 of 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.

Question Number	Subject
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 remover 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.

Question Number	Subject
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 seem 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.

<u>In Tort</u>

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

CALIFORNIA BAR EXAMINATION

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Question Number	Subject
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.

<u>Incidental Damages</u>

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 award 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 hours 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.

Question Number	Subject
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-judgement 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).

Real Property

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2001 CALIFORNIA BAR EXAMINATION

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QUESTION 2

Artist owns a workshop in a condominium building consisting of the workshops and sales counters of sculptors, painters, potters, weavers, and other craftspeople. The covenants, conditions and regulations (CC&Rs) of the building provide for a board of managers (Board), which has authority to make "necessary and appropriate rules." Board long ago established a rule against the sale within the building of items not created within the sellers' workshops.

Artist accepted a three-year fellowship in Europe and leased the workshop to Weaver for that period. The lease prohibited an assignment of Weaver's rights. Weaver used the workshop to produce custom textiles.

A year into the term, Weaver transferred her right of occupancy to Sculptor for one year. Sculptor moved into the workshop with his cot, electric hotplate, and clothes. He also brought several works of art that he had created during a stay in South America and offered them for sale along with his current works. Sculptor mailed his rent checks every month to Artist, who accepted them. Both Weaver and Sculptor knew the terms of the CC&Rs and Board's rules when they acquired their interests in the workshop.

Three months after Sculptor moved in, Board told Sculptor to stop selling his South American pieces. He refused to do so and thereafter withheld his rent and complained that the regulation was unreasonable and that the building's heating was erratic.

1. What action, if any, may Board take against Artist to enforce the rule against the sale of Sculptor's South American pieces? Discuss.
2. Can Artist recover from Weaver the rent that Sculptor has refused to pay? Discuss.
3. Can Artist evict Sculptor from his occupancy? Discuss.

ANSWER A TO ESSAY QUESTION 2

1. Action Board may take to enforce rule against sale of South American pieces

Whether the Board may enforce the rule against the sale of Sculptor's South American pieces depends on whether the covenant contained in Artist's lease runs to Sculptor. First, it must be determined if Sculptor ("S") is properly occupying the workshop. If S is not allowed to be in the workshop because of A's lease with the Board, the Board may be able to evict S.

Assignment/Sublease of A's workshop to S

An assignment occurs when a tenant transfers the complete tenancy in a lease to another party. The original tenant has no right to reoccupy the leased premises under an assignment. A sublease occurs when a tenant leases the premises to another tenant for a period of time less than the complete lease that the original tenant has with the Board. Artist had a three-year lease from Weaver in the workshop. Because A only transferred a right of occupancy for one year to S, this is a sublease, and not an assignment. The Board will argue that the lease expressly prohibits these types of transfers. However, the lease only prohibits assignments and does not mention subleases. When the lease is silent as to one or the other, the courts will strictly construe the lease as only prohibiting that which is named in the lease. Therefore only assignments are leased since that is all that is named in the lease. Furthermore, the fact that A accepted rent checks may prohibit the Board from taking any action.

Enforcement of Covenant -- Equitable Servitude

The Board will argue that the covenant agreed to by A when he purchased the workshop should also govern any interests between those that are using the workshop in place of A. Because this covenant is being enforced as an injunction (to stop S from selling South American art), it will be easier for the Board to enforce than if they were trying to recover damages. Because the covenant will stop A from selling South American art, it is being enforced as a burden against A. For the burden to be enforced against A, there must be intent between the original parties, there must be a writing satisfying the Statute of Frauds, notice between the parties, and the covenant must touch and concern the land.

Intent between original parties

The Board and Artist intended that the covenant be binding. The Board has the authority to make "necessary and appropriate" rules that are binding on those occupying the building. Since the Board established the rule "long ago" the original parties, A and the Board, intended the covenant to be followed.

Statute of Frauds

As long as there is a written agreement signed by S, the Statute of Frauds is satisfied. This appears to be satisfied since there are no facts suggesting a written agreement was not entered into. Also, since the transfer between A and W is for more than one year, it had to be in writing. Because a tenancy is an interest in land, the Statue of Frauds must be met.

Notice between the Parties
Both Weaver and S knew about the terms of the CC&Rs when they acquired their interests in the workshop. Therefore, all parties were on notice of the restriction.

Touch and Concern
The most challenging requirement for a burden to run with the land between occupiers the Board must meet is that the covenant touches and concerns the land. Here, a promise not to sell items not created within the sellers' workshops does not seem to touch and concern the land. In order for a covenant to touch and concern the land, the land must be benefitted in some way. The only people that are benefitted from such a covenant are those that own workshops in the building. They may argue that such a covenant does touch and concern the land because it makes their workshops more valuable. If this is the case, then the Board may have satisfied all the requirements to enforce this restrictive covenant. By not selling artwork not created in their workshops, the artists that own workshops there may have a protective interest. If selling only local work increases the value of their units, the covenant touches and concerns the land. It seems likely that purchasers of artwork would like (sic) to be able to buy a variety of work, so it is unlikely (sic) that this covenant actually increases the value of the workshops. Therefore, this covenant does not touch and concern the land and therefore does not run with the land.

Breach of Covenant -- Damages
The Board may also attempt to recover damages against A for failing to abide by the covenant. In addition to the elements discussed above, in order to enforce a covenant and recover damages there must also be vertical privity between the parties. This means that the parties must share an interest in land. The Board is just responsible for managing the complex, and does not appear to own the building. Therefore, no interest in land is shared, and there is no vertical privity.

Estoppel
S will argue that the Board is estopped from enforcing the covenant since they have waited three months after he moved in before requesting S to stop selling his South American pieces. S will argue that because they did not do anything, he assumed it was okay to sell that art.

Laches
S will also argue that too much time has elapsed for the Board to enforce the covenant. They waited three months before asking him to stop, and therefore should be barred from enforcement because of laches (defense that occurs when [sic] passage of time).

2. Ability of Artist to recover rent
Artist will be able to recover rent from Weaver if Weaver remains liable under the lease between A and W. As discussed above, the lease between A and W only prohibited assignments. Courts strictly interpret such provisions, and therefore will allow a sublease. S's

interest in the workshop is a sublease since he did not take the full term of the original lease, but only took a one-month occupancy. Although W may not be in privity of estate with A during the time that S is in possession of the workshop, he is in privity of contract. A will argue that W is in privity of estate as well as contract. Privity of estate is present when two parties share an interest in land. Because this is only a sublease, A will argue that W still shares an interest in the workshop with A and that there is privity of estate. Privity of contract between A and W exists because A and W signed the original lease. W remains liable for any defaults of his subleasees since he is still in privity of contract with A. S has a duty to pay rent, and W has a duty to pay rent to A. Therefore A should be able to recover from W the rent S has refused to pay.

There is a duty to pay rent imposed on all tenants, unless this duty has been excused. S will argue that A breached an implied warranty of habitability by providing better heating to the condo. However, because this condo is being used for commercial purposes, A does not owe a duty of habitability. While A must maintain basic utilities, such as heat, it is understandable that the heating [will] be erratic in a commercial building. Heat is often turned down at night and during the weekend in order to save energy. Therefore, it is not a breach of habitability, and S must still pay rent.

3. Ability of Artist to evict Sculptor

Artist may evict S if S was not in rightful possession of the workshop, or if S has breached any duty owed to A. As discussed above, S is in rightful possession of the workshop, as a subleasee. Therefore W owes a duty to pay rent unless A has breached any of his duties owed to tenants.

Implied Warranty of Habitability

The implied warranty of habitability only applies to premises that are leased for residential purposes. It appears that this workshop was not leased for a residential purpose, and therefore no duty of habitability is owed. Although the workshop is located in a condominium, which is traditionally regarded as a residential property, the fact that all the other units in the condominium are used as workshops and sales counters of sculptors, painters, potters, weavers, and other craftspeople suggests that the condominium was not rented for residential purposes. Furthermore, the fact that S moved into the workshop, bringing with him his cot and electric hotplate, suggests that the condo did not contain a stove and therefore was not intended to be used as a residence.

Unreasonableness of Regulation

The covenant was agreed to by the owners of the building and the Board has the authority to enforce it. If the covenant was properly instituted by the Board it is not unreasonable. Although the authority that gives the Board the power to pass such covenants, "necessary and appropriate rules," seems vague, the covenant is clear. Only items created in the building are offered for sale. This is probably an appropriate rule considering the interests of the other artists that work in the building. The fact that W and S knew of the terms before accepting the

lease implies that they consented to the covenant.

Erratic Heating

When a property is to be used as a residence, the landlord is under an implied warranty of habitability. One of the warranties is that heat be provided to a building so that it is liveable. However, as discussed above, it does not appear that this workshop was intended to be used as a residence. It would make sense that the heat would be erratic in a commercial office space. In normal office space, heating is often turned off at night and weekends, times when workers are not usually there. This would be appropriate in this case. Even [if] A is found to owe a duty of habitability, the fact that there is erratic heat does not excuse the tenant from withholding rent. If anything, the tenant will be allowed to abate the rental price by the amount it costs to repair the heater. The landlord should repair the heater first, but if the landlord has been notified and fails to repair, the tenant is allowed to repair and abate the purchase price. Therefore, S was still owed a duty to pay rent.

Breach of Quiet Enjoyment

S will also argue that there was a breach of quiet enjoyment when A did not provide constant heat to the building. As discussed above, this was probably not breached since erratic heat can be expected in commercial buildings. It would also be helpful, though, to know if erratic means the heat is not working during the day (times when it is expected that people would be using the building). Even so, S should only be allowed to abate rent, not discontinue payment of rent.

Privity of Contract

S will argue that he only owes rent to W, and not A, because he is a subleasee and therefore not in privity of contract with A. However, he is in privity of estate, and therefore owes the owner of the property rent. If W is also not paying rent (assuming this is the case, since S is not paying rent), then A can evict W, which would also have the effect of evicting S. If W continues to pay the rent to A, despite the fact that S is not paying rent to W, then A will not be able to evict S on the grounds that he is not paying rent.

Breach of Covenant

As discussed in part one, the covenant not to sell art not created in the workshop probably does not extend to S, since it does not touch and concern the land. If the court does find the covenant to extend to S, such that he is bound by the covenant, A will have grounds for eviction based on the fact that S is violating the covenant.

ANSWER B TO ESSAY QUESTION 2

1. What actions, if any, may Board (B) take against Artist (A) to enforce the rule against the sale of Sculptor's (S) South American pieces?

B, as a representative body of the condominium, has been granted the authority to make necessary and appropriate rules. B also presumably has the authority to enforce the CCRs of the condominium on behalf of the individual owners. The rules regarding sale of items not created in Seller's workshops are long established. Where the board of a condominium has established rules under proper authority for a condominium (i.e. under authority in the CCRs, which are generally recorded), the board may enforce these rules as either a restrictive covenant or an equitable servitude if the proper requirements are met.

Artist's liability for Sculptor's (S) acts

A, as the owner of S's workshop may be liable for S's violation of the CCRs. The B may seek to enforce the CCRs as either a restrictive covenant or equitable servitude if proper conditions are met.

Real Covenant

In order to enforce a restrictive covenant against a party (enforce the burden), the burdened party must have notice, the parties creating the restrictive covenant must have intended the restrictive covenant to continue indefinitely and against successor parties, the restrictive covenant must touch and concern the land, and both horizontal privity and vertical privity must exist.

Where these conditions are met, the party seeking to enforce may seek a money judgment.

Intent

When the B created the rule, they likely intended it to continue and to bind successor parties. The condominium has established an identity and enforcement of this rule is an important part of maintaining that identity.

Notice

Where the party creating a condominium has established CCRs, the parties purchasing units in the condominium may be determined to have constructive knowledge if the CCRs are recorded or included or provided as part of the purchase transaction.

Here, A had notice of the terms of the CCRs when he acquired his interest in the condo. So, he had constructive notice.

Touch and Concern

Real covenants that touch and concern the land are those that generally relate physically to the property in a way that increases its value. Here, the rule relates to what may or may not be sold on the property. While this is not necessarily physically related to the property, it is part of the overall function of the condo as a location for artisans. While A may argue that this does not touch and concern the land, a court would likely view it as being closely related to the purpose and function and therefore find that the rule touches and concerns the land.

Vertical Privity
Vertical privity exists where the party is a recipient of the same possessory interest as the person who agreed to the restriction. A owns the workshop and is therefore in vertical privity with whatever party originally agreed to the rule.

Horizontal Privity
For horizontal privity to apply, the party agreeing to the restriction must have had a common property interest with the other party. Here, the original purchaser would have received property from the owner of the condominium. Also, all owners of workshops possess an interest in property that was once a single ownership interest.

Therefore horizontal privity is present.

The B may enforce the rule as a restrictive covenant and sue A for money damages.

Equitable Servitude
A party may enforce a restriction as an equitable servitude against a burdened party when the restriction touches and concerns the land, the parties creating the restriction had intent that it run against subsequent parties, and the burdened party had notice.

As discussed above, the rule touches and concerns the land, was intended to burden subsequent parties, and A had notice.

The B may enforce the rule against A as an equitable servitude and seek to enjoin the sale of South American goods on the premises.

2. Can Artist (A) collect from Weaver (W) the rent that Sculptor has refused to pay?
As the landlord, A may collect rent from a party with whom he is in privity of estate or privity of contract.

The duty to pay rent runs with the land and is an independent covenant of the tenant.

Here, although W has sublet his property, he is still in privity of contract with A and has a duty to pay rent. W would only be able to avoid this obligation if A agreed to a novation, which has not occurred.

W may try to argue that he is not obligated to pay rent because he has been constructively evicted (he would argue this based on the assertions of his sublessee) from the workshop due to the unreasonableness of the regulation and the erratic heating. However, in order for a tenant to assert constructive eviction under the landlord's covenant of quiet enjoyment, the tenant must move out of the premises within a reasonable time. Both W and S would also likely fail on the basis of the reasonableness of the regulation since it is being enforced by a third party. Finally, both W and S may be estopped from asserting the unreasonableness of

the rule because they had notice when they accepted their interests.

In sum, A will be able to recover from W because they are in privity of contract, the tenant has a duty to pay rent, and W's defenses would not likely succeed.

3. Can Artist evict Sculptor from his occupancy?

A will likely attempt to evict S based on the prohibition against assignment and the violation of the rule on sale of outside goods. Both of these are likely to fail and so A will have to attempt to terminate his lease with Weaver or evict Weaver in order to retake possession.

Prohibition Against Assignment

Prohibitions against assignment are enforceable. However, courts construe these prohibitions narrowly and will not interpret a prohibition against assignment to prohibit a sublease. A court will also be quick to find a waiver of a prohibition against assignment.

Here, the lease with W prohibited assignments, not subleases. W has subleased his property to S since W will retake possession for the last year of his own lease. In addition, A accepted rent checks from S and thereby likely waived any right he might have had. A will not be able to evict S due to the prohibition against assignment.

As a sublessee, S is not subject to restrictive covenants and so A may not evict S on this basis either. A sublessee is not viewed as being in either privity of estate or privity of contract.

If A attempts to evict S based on nonpayment of rent, he will also likely lose for the same reason that a landlord is not viewed as being in privity of estate with a sublessee.

A will likely have to sue W for damages and attempt to evict W. An eviction of W would also evict S since all rights of a sublessee are derivative of the sublessor.

ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2002 CALIFORNIA BAR EXAMINATION

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QUESTION 2

Able owned Whiteacre in fee simple absolute. Baker owned Blackacre, an adjacent property. In 1999, Able gave Baker a valid deed granting him an easement that gave him the right to cross Whiteacre on an established dirt road in order to reach a public highway. Baker did not record the deed. The dirt road crosses over Whiteacre and extends across Blackacre to Baker's house. Both Baker's house and the dirt road are plainly visible from Whiteacre.

In 2000, Able conveyed Whiteacre to Mary in fee simple absolute by a valid general warranty deed that contained all the typical covenants but did not mention Baker's easement. Mary paid Able $15,000 for Whiteacre and recorded her deed.

Thereafter, Mary borrowed $10,000 from Bank and gave Bank a note secured by a deed of trust on Whiteacre naming Bank as beneficiary under the deed of trust. Bank conducted a title search but did not physically inspect Whiteacre. Bank recorded its deed of trust. Mary defaulted on the loan. In 2001, Bank lawfully foreclosed on Whiteacre and had it appraised. The appraiser determined that Whiteacre had a fair market value of $15,000 without Baker's easement and a fair market value of $8,000 with Baker's easement. Bank intends to sell Whiteacre and to sue Mary for the difference between the sale price and the loan balance.

The following statute is in force in this jurisdiction:

Every conveyance or grant that is not recorded is void as against any subsequent good faith purchaser or beneficiary under a deed of trust who provides valuable consideration and whose interest is first duly recorded.

1. What interests, if any, does Baker have in Whiteacre? Discuss.

2. What interests, if any, does Bank have in Whiteacre? Discuss.

3. What claims, if any, may Mary assert against Able? Discuss.

ANSWER A TO ESSAY QUESTION 2

1. Baker's Interest in Whiteacre

Easement

An easement is an interest in land that grants someone a right to use the land of another. An easement can be created in a number of ways. One way an easement can be created is by express writing. Here, Able gave Baker a valid deed granting the easement for the right to cross Whiteacre to reach the public highway. Therefore, the easement was created at that time.

An easement will be perpetual in duration unless otherwise specified in the instrument creating it. Here, Able did not include any termination date for the easement. Therefore, the easement to Baker was to be perpetual in duration.

There are two types of easements: easements appurtenant and easements in gross. An easement appurtenant is one that involves two adjacent parcels of land where one piece of land is used to benefit the other. The benefited estate is called the dominant estate, while the burdened estate is called the servient estate. Here, Blackacre is the dominant estate and Whiteacre is the servient estate.

An easement, even though perpetual, can be terminated by the parties. A dominant estate can release the servient estate from the easement by writing. The writing would have to meet deed formalities to satisfy a valid release. The easement can also be abandoned. However, it cannot simply be an oral abandonment. The oral abandonment must be coupled with some action by the dominant estate showing that they are abandoning the

easement. The servient estate can also terminate the easement by prescription. Here, none of these actions of termination have occurred. So, at first glance, Baker's easement across Whiteacre should still be in existence.

Recordation

An interest in land can be protected by recodation. At common law, an interest in land was protected by the first in time, first in right doctrine. The problem with the doctrine was that it did not protect bona fide purchasers. Modern law has produced recording systems and recording statutes that spell out the protection afforded to those that record their interests. At common law, since Baker was first in time the easement, then his interest would be protected against subsequent purchasers. But, as we are told, there is a statute in this jurisdiction that controls.

An important concept in recordation is the concept of the bona fide purchaser ("BFP"). BFPs are granted special status in many recordation statutes. A bona fide purchaser is one who purchases for value and without notice of any other interests. There are three types of notice. Actual notice is, of course, characterized by the actual knowledge on the part of the purchaser of the previous interest. Constructive notice is that which comes about by there being a deed or interest recorded in the buyer's direct chain of title. Finally, there is inquiry notice. Inquiry notice comes about whenever an inspection of the property or title records would lead a reasonable purchaser to launch a further inquiry. Here, we are told that Baker did not record his deed granting the easement. Therefore, we know that Mary and Bank could not have had constructive notice of easement. However, we are also told that the easement road leading to Baker's house on Blackacre was plainly visible from Whiteacre. This visibility is enough to put a subsequent purchaser on inquiry notice. Therefore, Mary and Bank are not BFPs.

There are three types of recordation statues. There is a race statute which will protect the first person to record their deed or interest regardless of their status. There is a notice statute which will protect any bona fide purchaser who records against any subsequent purchaser who is also not a bona fide purchaser. There is also [a] race-notice statute which will protect a bona fide purchaser, but only if he is the first to record. Notice and race-notice statutes give protection only for BFPs; therefore, we know that if the statute in this jurisdiction is a notice or race-notice statute, then Mary and Bank will not be

protected against Baker's easement. Baker's easement, rather, will protected [sic] by the common law rule of first in time, first in right. The statute here a race statute [sic]. It will protect any good faith purchaser for value or beneficiary under a deed of trust as long as they recorded first. Here, we know that Mary was a good faith purchaser for value. We are also told that Mary recorded her deed. Therefore, the statute will protect her interest in Whiteacre and will make Baker's deed void as against Mary.

Necessity

An easement can arise by necessity. Necessity arises when one parcel of land is cut off from any viable road or passageway. If the land is cut off, an easement by necessity will arise across an adjacent piece of land for right of way to the highway or other means of travel. The servient estate has the right to place the easement anywhere on the property as long as it is reasonable. Here, if the voiding of Baker's deed of easement will cut off Blackacre from any public highway, then an easement of necessity will arise and he will still be able to cross Whiteacre. However, the holder of Whiteacre will be able to place the easement wherever they wish as long as it is reasonable.

2. Bank's Interest in Whiteacre

Deed of Trust

A deed of trust acts like a mortgage. The title is held by a trustee until such time as the loan is paid back and then title reverts back to the landowner. Because this acts like a mortgage, courts will treat it like a mortgage and will require the procedures of a mortgage. These procedures will include a judicial proceeding (foreclosure) before a sale of the property to satisfy the loan. The deed of trust will also be a recognized interest in property, as is the mortgage. Therefore, it can be recorded and protected like a mortgage.

BFPs

As stated earlier, we know that a BFP is a purchaser for value that takes without notice of a previous interest. Here, we are told that Bank does not make a physical inspection of Whiteacre before making the loan and taking their interest. If they had done so, as a reasonable party would have, then

they would have seen the dirt road leading to Bakers' house. Therefore, Bank was inquiry notice and is not a BFP.

Shelter Rule

Under the shelter rule, a subsequent purchaser can be sheltered under a BFP's protection. This means that if a jurisdiction has a statutory scheme that only protects BFPs, that there is still a loophole that will allow a non-BFP to get protection. The subsequent purchaser must take in a line descending from the BFP. If the subsequent purchaser takes from BFP, he can use the BFP's protection under the statute for himself. The purpose of the rule is protect [sic] the alienability of the property for the BFP. Here, we know that Mary is not a BFP. We also know that the statutory scheme does not require that one be a BFP. However, if we did have a notice or race-notice statute, then Bank would not be protected under the shelter rule because Mary is not a BFP.

Recordation

As stated above, one who holds an interest in land can protect that interest by recording it pursuant to the recording statutes of its jurisdiction. Here, we know that the recording statute applies to the beneficiary of deeds of trust. Here, Bank was the beneficiary of the deed of trust on Whiteacre. The statute requires valuable consideration be paid for the interest. Here, Bank loaned Mary $10,000 for its interest in the deed of trust. Bank also recorded its interest. When Bank recorded its interest, it made Baker's deed of easement void as to Bank's interest. Therefore, Bank has an interest superior to Baker's.

Foreclosure

Bank's deed of trust was secured by Mary's interest in Whiteacre. As stated before, the deed of trust acts like a mortgage so it will be treated as such by the courts. This will require a foreclosure proceeding. Once the proceeding has been established, Bank will be able to force the sale of Whiteacre to satisfy its claim. Because Baker's easement will be void as to Mary and Bank, there will be no deficiency against Mary.

3. Mary v. Able

Easement

An easement on a servient estate passes with the servient estate. Therefore, when Whiteacre passed from Able to Mary, Mary took subject to the easement. However, the recordation statute has saved Mary from this.

At common law, a seller of land did not have to disclose anything to the buyer. The buyer took at his own peril under the doctrine of caveat emptor. However, a general warranty deed did require disclosures.

General Warranty Deed

Able passed Whiteacre to Mary on a general warranty deed. A general warranty deed comes along with six covenants of title. There are three present covenants and three future covenants. The present covenants are the covenants of: seisin, right to convey, and against encumbrances. These present covenants are breached, if at all, at the time that title is passed. The future covenants are the covenants of: warranty, quiet enjoyment, and further assurances. The future covenants are breached, if at all, at some later time when another party makes a claim of paramount title.

Covenant Against Encumbrances

The covenant against encumbrances basically says that the title will be free of any encumbrances not previously disclosed by seller. Encumbrances include easements, restrictive covenants, and mortgages, among other things. Here, Able did not disclose the easement held by Baker. This was a breach of the covenant against encumbrances at the moment that title passed. Therefore, Mary can sue for this breach and can collect any damages that she suffered as a result.

ANSWER B TO ESSAY QUESTION 2

Baker's interest in Whiteacre:

Easements:

An easement in a non-possessory interest in land that allows the easement holder to use the property of the true owner. Baker's easement can be described as an easement appurtenant. Whiteacre is the servient estate. Blackacre is the dominant estate. As the holder of the easement appurtenant, Baker can use the road over Whiteacre to travel from Blackacre to the public highway.

Unless they qualify as easements by necessity or by prescription, easements must be in writing to be valid, and must satisfy the statute of frauds. Here, Able granted Baker a valid deed, which will satisfy the writing requirements. Therefore, it appears that Baker has a valid express easement to use the road over Whiteacre for access to the public highway.

Additionally, easements are presumptively perpetual. They are terminated by the terms of the instrument themselves, by express writing, by abandonment, by condemnation of the servient estate, or by merger of the servient and dominant estate. None of those things appear to have occurred here, so Baker's easement has not been terminated.

Failure to record:

Although Baker appears to have a valid easement, his failure to record may affect his rights here. Recording statutes, such as the one in this jurisdiction, are primarily for the purpose of protecting subsequent BFPs. They do not effect the validity of land transfers themselves. Thus, despite his failure to record, Baker had a valid easement when Able conveyed the deed to him, assuming it was properly delivered and accepted.

Mary as a BFP

The next issue is whether Baker's easement fails against a challenge by Mary, because she purchased the dominant estate, Whiteacre, after Baker did not record his deed to the easement. There is a recording statute in this jurisdiction. The recording statute can best be described as a race-notice

statute. This means that in order to be protected under the statute, the subsequent purchaser must take the property without notice and record their deed first. Because Mary recorded her deed, and Baker never recorded his, the race component of the race-notice statute has been satisfied, as Mary recorded first.

The issue then becomes whether or not Mary satisfies the requirement of being a subsequent good faith purchaser, which I will refer to a[s] BFP for short. A BFP is a purchaser who pays valuable consideration and who takes without notice of the other interest in the property. Mary paid $15,000, so she did pay consideration.

Notice:

The main issue is whether Mary took without notice.

Subsequent purchasers are not good faith BFPs if they have either actual notice, constructive notice, or inquiry notice. Here, there are no facts that suggest that Mary in fact know about the easement, so we cannot simply conclude that she had actual notice. Constructive notice is the type of notice that comes from recording. Because Baker did not record his deed, Mary did not have constructive notice. Inquiry notice comes from physical inspection of the land. Here, the facts indicate that both Baker's house and the dirt road were plainly visible from Whiteacre. This indicates that upon inspection of Whiteacre, Mary could have discovered the easement and inquired about it before purchasing Whiteacre from Able. Thus, it can be said that Mary did indeed have inquiry notice. As such, Mary fails as a BFP, and cannot defeat Baker's interest in Whiteacre. Therefore, it appears that Baker's easement over Whiteacre is valid.

Bank:

Moreover, the race-notice statute also protects mortgagors, such as the Bank. The bank also satisfies the recording first component of the statute, but did not physically inspect the land before taking its security interest in it. Therefore, the Bank also had inquiry notice, and cannot simply defeat Baker's easment.

Bank's interests in Whiteacre

Bank v. Baker

The race-notice statute in this jurisdiction protects beneficiaries under a deed of trust. The bank is a beneficiary under a deed of trust, and therefore the bank is protected by the recording statute. As discussed above, the Bank satisfies the"race" component of the recording statute, as it recorded the deed of trust and Baker never recorded his easement, therefore the Bank recorded first.

Also as discussed above, the Bank did not inspect the land, but if it had it would have discovered the easement. Therefore, the Bank had inquiry notice of the easement and cannot defeat Baker's interest in Whiteacre.

Bank v. Mary

The Bank lent Mary $10,000. In exchange, the Bank received a note secured by a deed of trust in Whiteacre. In a title theory jurisdiction, this would have meant that Bank held title to Whiteacre at equity. In a lien theory jurisdiction, this would have meant that Bank simply had a lien on Whiteacre. In any case, when Mary defaulted on the loan, Bank had a right to foreclosure on the property. Mortgage law requires that a valid foreclosure sale takes place, and the facts state that the Bank lawfully foreclosed.

Following foreclosure, the Bank became the owner of Whiteacre. Thus, the Bank owns whatever interest in Whiteacre Mary owned, which means it owns Whiteacre in fee simple absolute, subject to Baker's easement.

The issue then is whether the Bank has a valid claim against Mary for the $2000 difference between the loan amount and the value the land has been appraised [at] first. Before the Bank can actually bring an action against Mary for the difference, it must sell Whiteacre. Only after it sells Whiteacre on the market can the Bank actually assert a deficiency judgment against Mary. Had the Bank had the property appraised before granting the security interest, the Bank likely would have discovered the easement and would have discovered that the land was not worth $10,000. For this reason, Mary will argue that the Bank assumed the risk of this deficiency.

Mary's claims against Able

Abel conveyed Whiteacre to Mary in fee simple absolute by a valid general warranty deed that contained all the typical covenants, but did not mention Baker's easement. Although land sale contracts contain implied warranty of marketable title, the land sale contract merges into the deed at closing, therefore Mary's only claims against Able must be based on the deed, and Mary must proceed under the principles of real property law. The issue here is what actions Mary has against Able based on the deed.

Deed covenants:

Warranty deeds contain present and future covenants. The present covenants can only be breached at the time of the conveyance, and are therefore not an issue here. However, the future covenants can be breached later. Here, at a time following the conveyance, Mary took a mortgage out on Whiteacre based on the value of the land without Baker's easement. This occurred after conveyance, and therefore Mary can bring an action against Able under the future covenants. The future covenants are for quiet enjoyment, further assurances and warranty.

These covenants represent guarantees made by Able that Mary owns the land outright, free from encumbrances and from challenges to her ownership interests by third parties. Here, the bank is threatening to sue Mary for the $2000 deficiency between what she thought she owned and the value of Whiteacre with Baker's easement on it, as with the easement, the value of Whiteacre is insufficient to pay off the $10,000 mortgage. Mary can sue Able for the $2000 different [sic] under the future covenants, and she should prevail because Able failed to inform Mary about the easement and the easement was not mentioned in her deed. The facts regarding inquiry notice and Baker's failure to record are irrelevant here, as recording statutes do not affect the validity of the deed conveyances.

ESSAY QUESTIONS AND SELECTED ANSWERS

FEBRUARY 2003 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 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.

QUESTION 2

Olga, a widow, owned Blackacre, a lakeside lot and cottage. On her seventieth birthday she had a pleasant reunion with her niece, Nan, and decided to give Blackacre to Nan. Olga had a valid will leaving "to my three children in equal shares all the property I own at my death." She did not want her children to know of the gift to Nan while she was alive, nor did she want to change her will. Olga asked Bruce, a friend, for help in the matter.

Bruce furnished Olga with a deed form that by its terms would effect a present conveyance. Olga completed the form, naming herself as grantor and Nan as grantee, designating Blackacre as the property conveyed, and including an accurate description of Blackacre. Olga signed the deed and Bruce, a notary, acknowledged her signature. Olga then handed the deed to Bruce, and told him, "Hold this deed and record it if Nan survives me." Nan knew nothing of this transaction.

As time passed Olga saw little of Nan and lost interest in her. One day she called Bruce on the telephone and told him to destroy the deed. However, Bruce did not destroy the deed. A week later Olga died.

Nan learned of the transaction when Bruce sent her the deed, which he had by then recorded. Nan was delighted with the gift and is planning to move to Blackacre.

Olga never changed her will and it was in effect on the day of her death.

Who owns Blackacre? Discuss.

Answer A to Question 2

Olga owned Blackacre and had a valid will leaving to her three children "in equal shares all the property I own at death." If the terms of the will were to take effect while Olga owned Blackacre, her three children would share in Blackacre equally. However, she had a reunion with her niece Nan, and had decided to make a present conveyance of Blackacre. She drew up a deed with the help of her friend Bruce, gave the deed to Bruce, and, without Nan's knowledge, instructed Bruce to "record it if Nan survives me." Later, Olga attempted to revoke her alleged gift to Nan by destruction of the deed, however, Bruce did not destroy the deed. When Olga died, Bruce conveyed the deed to Nan. In order to determine who owns Blackacre, the central question to answer is whether Olga made a valid conveyance to Nan. A second question is whether Olga appropriately revoke[d] the conveyance to Nan. If Olga is found to have appropriately conveyed Blackacre [to] Nan, the three children would not take any share of Blackacre under the terms of the will. On the other hand, if Olga did not appropriately convey Blackacre to Nan, the three children would take Blackacre in equal shares, and Nan would not get anything. A final consideration is whether there was any reliance on Nan's part that would allow Nan to take Blackacre.

Did Olga make a valid conveyance of Blackacre to Nan?

In order to find that Olga validly conveyed Blackacre by deed to Nan, three elements must be present. First, there must be an intent by the grantor, Olga, to convey Blackacre to the grantee Nan. Secondly, there must be a valid delivery of the deed to Nan. And thirdly, Nan must validly accept the deed and Olga's conveyance.

Did Olga have an intent to convey Blackacre to Nan?

In order to possess valid intent, Olga must have intended to convey Blackacre to Nan at the moment she made delivery. It is not enough that Olga possess the requisite intent to convey Blackacre to Nan years before delivery is made. The intent must match the moment of delivery.

Here, the facts indicate that Olga intended to "effect a present conveyance." This wording implies that her intent was to convey Blackacre at that precise moment. Olga therefore had Bruce draw up a deed which complied with deed formalities of description of property, names involved, and Olga's signature. Olga then handed the deed to Bruce, stating, "Hold this deed and record it if Nan survives me." When Olga handed the deed to Bruce, the facts state that she intended to transfer Blackacre to Nan at that precise moment. However, her conduct does not match the wording of "present

conveyance." Instead, Olga wanted Bruce to "hold this deed, and record it if Nan survives me." This language is indicative that Olga did not want to make a precisely present conveyance of Blackacre. Instead, Olga wanted Nan to receive Blackacre upon the happening of a condition, that Nan survive Olga. Olga manifested the intent that should Nan not survive Olga, Nan should not get Blackacre. Olga intended that at that moment, Nan was to receive a contingent remainder in Blackacre, and was not intended to be a present conveyance. Instead, Olga intended to remain holder of the deed to Blackacre, and leave open whether her children should take under her will.

This contingent remainder should be distinguished from a fee simple determinable. A fee simple determinable transfers an interest in land; however, should a condition occur, then the land will revert back to the grantor through possibility of reverter. Here, a court will most likely find that Olga did not intend to convey any type of defeasible fee, but instead wanted to convey a contingent remainder.

Nan would disagree with the characterization that Olga intended to convey a contingent remainder. Instead, Nan would argue that Olga intended to make a present possessory conveyance of Blackacre to Nan when she handed the deed to Bruce. However, the language which Olga used, indicating that there was a condition before the deed should be recorded, indicates that there was also a condition before the deed was to become possessory in Nan. This characterization will also depend on whether Bruce is an agent for Nan, or an agent for Olga as shall be discussed later.

Olga's children will argue alternatively that the intent does not match the delivery at all, that Olga's intent was to make a present possessory transfer of Blackacre, that her actions do not match, and therefore, the whole transaction should be invalidated. However, courts are unwilling to invalidate a transaction simply on technicalities. Instead, courts will try to look at the transferor's intent in giving effect to a transaction, use that for guidance, but still rely on legal principles, justice, and fairness in coming to a decision. Therefore, most likely, a court will not invalidate Olga's attempt to convey Blackacre to Nan, solely because her words do not match her actions. Instead, a court will construe her intent reasonably.

Did Olga make a valid delivery of the deed to Nan?

Conveyance of a deed also requires valid delivery of the deed from the grantor to the grantee. Such conveyance does not have to be a precise handing of the deed from the grantor to the grantee. Instead, there can be a constructive conveyance. The grantor could hand the deed to a third party, who could in turn hold the deed for the grantee. A finding of whether there was a valid delivery in such a situation rests upon which party

the third party is an agent for.

In the present case, Olga handed the deed to Bruce, with precise instructions to record the deed should Nan survive Olga. It is clear that there was a valid delivery from Olga to Bruce. But the question is whether Bruce is an agent for Nan, or Olga.
The facts support the conclusion that Bruce is an agent for Olga. The facts describe Bruce as a "friend" of Olga, and a person whom Olga could turn to for help in drafting a deed. Furthermore, Bruce helped Olga draft the deed with a form, and for all purposes, seems to be on Olga's side. The facts also indicate that Bruce was to act on behalf of Olga. Bruce was to convey the deed to Nan, and record the deed, should Nan survive Olga. T[he]se actions on behalf of Olga and other aid to Olga are indicative of an agency relationship. A court will most likely find that Bruce is an agent for Olga.

The facts do not support a finding that Bruce is an agent for Nan. The facts do not show that Nan even knew Bruce, and for all purposes, seems to have first heard from Bruce when Bruce sent her the deed. Because Bruce is not acting on behalf of Nan, but rather on behalf of Olga, a court w[il]l most likely find that Bruce is Olga's agent, and not Nan's.

A finding of this sort is significant. If Bruce is an agent for Olga, then when Olga gave the deed to Bruce, delivery was not yet made. Delivery would happen upon the occurrence of the specified condition, and Bruce would transfer the deed to Nan, using the power which Olga granted to Bruce to act on Olga's behalf. On the other hand, if Bruce is an agent for Nan, then delivery was complete upon Olga's delivery to Bruce. All that would remain is for the deed to be accepted.

Because a court will most likely find that Bruce is an agent for Olga, a court will also most likely not find that there was a valid delivery made to Nan at the moment Olga gave the deed to Bruce. Instead, a court may find that a valid delivery was made when Bruce, acting as agent for Olga, transferred the deed to Nan, because Olga empowered Bruce to act in her interest.

Was there a valid acceptance by Nan?

In addition to an intent to deliver by the grantor and a valid delivery by grantor to grantee, there must also be a valid acceptance by the grantee in order for a valid conveyance of a deed to take place. As indicated above, Bruce will most likely be found to be an agent for Olga. Thus Bruce cannot accept on behalf of Nan. If Bruce had been an agent for Nan, Bruce could accept the deed on behalf of Nan. Instead, the facts indicate that Nan did not even know of anything of the transaction. Nan could not accept until Bruce sent the letter to Nan.

When Bruce did send the letter to Nan, Nan accepted the transfer. This is indicative as Nan "was delighted" and intended to move to Blackacre. Thus, if there was not an effective revocation of Bruce's power to transfer the deed to Nan, then the deed should be effective in favor of Nan.

Significance of Olga's revocation

These findings are significant because of the revocation which Olga made. A revocation is valid anytime up to the moment of acceptance. In the present case, there was not even a valid delivery, let alone a valid acceptance at the moment Olga handed the deed to Bruce. A court MAY find that there was a valid delivery and acceptance when Bruce transferred the deed to Nan, but only if Bruce was st[il]l empowered to transfer the deed to Nan. Nan would argue that Bruce remained empowered to transfer the deed because Bruce did not use substantially the same instrument and means to revoke her gift as she did to make it. Generally, such transfers are terminable by any reasonable means. Olga's children would argue that even if there was not a valid delivery or acceptance, the revocation was effective upon the phone call, that is, was reasonable to revoke her offer by telephone rather than in writing because Olga and Bruce were friends.

A court will probably hold that the revocation was not effective. Although this is a scenario for the transfer of land thus subject to the statute of frauds, a finding that a person can revoke or reinstate a transfer simply on a whimsical phone call would invite the danger of too much fraud. If Olga could effectively terminate her transfer by a phone call, then she could just as easily reinstate her offer. Such ease in a transfer of something as substantial as a transfer of land would invite too much danger of abuse and fraud. Hence, a court will probably hold that Olga's revocation was invalid.

Conclusion

A court will most likely hold that Olga had an intent to deliver land to Nan. Although her intent may not coincide precisely with her actions, a court will construe a reasonable intent to deliver. Olga conveyed the property to Bruce as her agent who in turn was empowered to deliver the deed to Nan. Olga's revocation was ineffective because it did not comply with the statute of frauds. Hence, when Nan accepted the deed, a court will probably find an effective conveyance.

Should the court not find an effective conveyance, Nan could also pursue a theory of reliance. However, the facts do not support too much of a finding of reliance, as Nan did not take any substantial action, and instead, "planned" to move to Blackacre. A plan

is not sufficient to justify a finding of reliance. There must be also a significant manifestation of intent to possess.

Answer B to Question 2

The issue is whether the deed form was sufficient to pass title to Nan and make her the owner of Blackacre, or whether the deed was invalid, which would mean that Olga was owner of Blackacre upon her death and the property would pass through her will to her three children in equal shares.

1. Deed

In order for a deed to be valid there must be: (1) a writing that satisfies the statute of frauds; (2) delivery; and (3) acceptance.

A. Statute of Frauds

When conveying an interest in land, the conveyance must be contained in a writing that satisfies the statute of frauds. A deed is sufficient to satisfy the statute of frauds if it: (1) identifies the parties to the conveyance; (2) sufficiently describes the property to be conveyed; (3) and is signed by the grantor. In this case, Blackacre is a piece of real property that consists of a lakeside lot and cottage, and a sufficient writing must exist in order for the conveyance to be enforceable.

Here, the deed form is a written memorandum which identifies the parties to the conveyance. The deed names herself as grantor and Nan as grantee. The deed also sufficiently identifies the property to be conveyed. The deed designates that Blackacre is the property being conveyed and the deed includes "an accurate description" of Blackacre. Also, Olga, as grantor, signed the deed. In general, the signature of a deed does not have to be notarized; however, in this case the deed was notarized by Bruce after Olga acknowledged her signature. Therefore, it appears that the deed form was a written memorandum that is sufficient to satisfy the statute of frauds requirement for conveying an interest in land.

B. Delivery

To determine whether a grantor has sufficiently delivered a deed so as to affect a conveyance of real property, the focus of the inquiry turns on the grantor's intent. If the grantor intends to pass a present interest in the property, then delivery is complete. Actual physical delivery of the deed is not required, nor is knowledge of the delivery by the grantee, so long as the grantor possessed the requisite intent.

Here, Nan would argue that at the time Olga executed the deed form she had the

present intent to convey Blackacre to her. Olga and Nan were family members and had just had a "pleasant reunion" for Olga's seventieth birthday. In addition, Olga did not want her children to know that she was leaving Nan Blackacre while she was alive. Thus, this shows that Olga has the present intent to pass title to Nan while she was alive. Moreover, the deed form by its terms would effect a present conveyance of the property.
On the other hand, Olga' s children may argue that Bruce merely provided Olga with the deed form, and Olga did not know that it would effect a present conveyance. Even though the terms were sufficient, Olga's children would argue that she lacked the requisite present intent as evidenced by Olga handing the deed to Bruce and telling him to hold the deed and only record it if Nan sur[v]ived her. Olga's children would argue that this demonstrates that Olga did not intend for the deed form to pass to present title and therefore Olga never 'delivered the deed' to Nan. Olga's children would also note that Olga's intent not to pass present title to Nan is shown by Olga's telephone call to Bruce in which she instructed Bruce to "destroy the deed".

On balance, because at the time of the conveyance Olga executed the deed sufficient to convey title and she wanted to make a gift of the property to Nan at that point, even though she didn't want her children to know about it, a court would likely find the deed was sufficient to convey title to Nan at the point it was executed by Olga. Olga did not state that she only intended the deed to be effective upon the occurrence of an event, rather Olga merely stated that she wanted Bruce to record the deed if Nan survived her. A deed does not have to be recorded in order to be valid. Therefore, Olga likely delivered the deed.

C. Acceptance

A grantee must accept the deed of conveyance. In general, acceptance is presumed unless the grantee has specifically indicated an intent not to accept the conveyance. Instead, it is immaterial whether Nan knew about the conveyance or not when Olga "delivered" the deed. Therefore, Nan's lack of knowledge would not prohibit a finding that she "accepted" the deed. In fact, as further evidence of her acceptance, Nan "was delighted" with the gift and planned on moving to Blackacre. Thus, there was sufficient acceptance.

As a result, because there is a sufficient writing to satisfy the statute of frauds, and Olga intended to make a present transfer of the Blackacre when she executed the deed and Nan's acceptance can be presumed, Nan owns Blackacre. Because the property is not part of Olga's estate at the time of her death because she did not own it anymore, her three children would not receive Blackacre in "equal shares" pursuant to Olga's will. A

testator may not devise property which she does not own at her death.

However, if the court found that Olga did not possess the requisite intent to deliver Blackacre to Nan, Nan could still argue that Olga's deed form constituted a valid disposition by will and therefore she would still take the property.

2. WILL - Is the Deed Form a Valid Will?

In general, a will is valid if the testator is at least 18 years old and of sound mind, possesses the requisite testamentary intent, signs the will in the joint conscious presence of 2 witnesses that understand the document is the testator's will and who sign the will. Some jurisdictions recognize the validity of holographic wills. To be valid, a holographic will must be signed by the testator, the testator must possess testamentary intent, and the material provisions of the holographic will must be in the testator's handwriting. Material provisions of the will consist of identifying the beneficiaries and the property to be devised.

In this case, the deed form would not be a valid formal will because Olga executed the document in the presence of only 1 witness, Bruce. Thus, even though Olga was over 18 and appears to be of "sound mind", and she signed the deed, the deed form does not qualify as a valid formal will.

Nan could argue that the deed form constitutes a valid holographic will. The deed form was signed by Olga, and it appears that "Olga completed the form" by naming herself as grantor and Nan as grantee, and by including the property to be conveyed, Blackacre, and accurately described the property. Thus, the [the] "material terms" of the will appear to be in Olga's handwriting. It does not matter that the document was a "form" so long as the material terms were in Olga's handwriting. Therefore, the court may conclude that Olga executed a valid holographic will if it concludes that at the time Olga possessed the necessary testamentary intent.

Nan would argue that Olga's statement to Bruce instructing him to hold the deed and record it if "Nan survives me" evidences a testimony intent that Nan only take the property upon Olga's death. Thus, Nan would not have an interest in the property until Olga dies, which is consistent with disposing of one's property by will. A court would likely conclude that the deed form constitutes a valid holographic will.

3. Revocation of Holographic Will

In general, wills are freely revocable during the testator's lifetime. A will may be revoked by a physical act or by execution of a subsequent instrument.

In order to revoke a will by physical act, the testator must (1) have the intent to revoke, and (2) do some physical act such as crossing out, destroying, obliterating which touches the language of the will. A testator may direct another person to destroy the will, however, the destruction must be at the testator's direction and in the testator's presence.
Here, Olga's children could argue that the deed form, which constitutes a holographic will, was revoked by Olga before her death. Olga intended to revoke the will when she called Bruce and told him to "destroy the deed". Olga's children may argue that even though Bruce did not actually destroy the deed, the court should still find that Olga possessed the intent to revoke. However, because Bruce was not in Olga's presence and did not do anything to the language of the holographic will, it is likely that Olga did not sufficiently revoke the holographic will before her death.

4. Revocation of Earlier Will

If the court found that Olga did not revoke the holographic will, then the issue becomes whether the holographic will is sufficient to revoke the earlier valid will leaving all of Olga's property to her three children equally. A testator may revoke a prior will by executing a subsequent instrument. In general, a subsequent written instrument that qualified as a will must be construed, to the exent possible, as consi[s]tent with the prior instrument. However, to the extent that a subsequent instrument is inconsistent with prior will, the prior will is revoked.

Here, the holographic will leaves Blackacre, which was part of Olga's "property" to Nan. Olga's original will left "all the property that I own at my death" to her three children. If the court finds that the deed form was insufficient to pass title to Nan during life because Olga lacked the necessary intent, she would "own" Blackacre at her death. If the deed form constitutes a valid holographic will, it disposes of Blackacre. Thus, this disposition would work a revocation of the original will to the extent that it is inconsistent. Therefore, Nan would take Blackacre under the holograph will, and Olga's children would take the rest of Olga's property since that would not be inconsistent with the original terms of the will.

Olga's children may argue that Olga never dated the holographic will, and therefore, when a testator is found to have a formal will and a holographic will that is undated, a

presumption exists that the holograph was executed before the holograph [sic]. Thus, the formal will would be inconsistent with the undated holograph, and the formal will would, to the degree of inconsistency, revoke the undated holograph. In that case, Olga's children would own Blackacre equally, and Nan would take nothing.

In sum, Nan likely own[s] Blackacre because the deed form was sufficient to pass present title to her, and therefore Olga did not own Blackacre at her death. As such, her original will would not pass Blackacre to her children since she did not "own" it at her death. In addition, even if the court finds that Olga lacked the requisite intent for a valid delivery, the deed form likely qualifies as a valid holographic will which Olga did not revoke in her lifetime.

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Question 4

Lori owns a small shopping center. In April 1999, Lori leased a store to Tony. Under the lease Tony agreed to pay Lori a monthly fixed rent of $500, plus a percentage of the gross revenue from the store. The lease term was five years. In part the lease provides:

> Landlord and Tenant agree for themselves and their successors and assigns:
>
> * * *
>
> 4. Tenant has the right to renew this lease for an additional term of five years, on the same terms, by giving Landlord written notice during the last year of the lease.
> 5. Tenant will operate a gift and greeting-card store only. Landlord will not allow any other gift or greeting-card store in the center.
>
> * * *

In July 2000, Tony transferred his interest in the lease in writing to Ann. Ann continued to operate the store and pay rent.

In February 2003, a drugstore in the shopping center put in a small rack of greeting cards. Ann promptly complained, but Lori did nothing.

Beginning in March 2003, Ann stopped paying the percentage rent, but continued to pay the fixed rent alone. Lori took no action except to send a letter in April 2003 requesting payment of the percentage rent that was due.

In January 2004, Ann sent a letter to Lori requesting that Lori renew the lease according to its terms. Lori denied that she had any obligation to renew.

1. Is Ann entitled to a renewal of the lease? Discuss.

2. Is Lori entitled to the past-due percentage rent from:

    a. Ann? Discuss.
    b. Tony? Discuss.

Answer A to Question 4

Ann's Right to Renew the Lease

Statute of Frauds

The statute of frauds requires that a lease for possession of property for longer than one year must be evidenced by a writing, signed by the party to be charged. Here, the lease was for a period of 5 years. So to be enforceable it must comply with the statute of frauds. The facts imply that a written lease was drawn and the lease stated the amount of rent[,] the lease term, a right to renew, and a restriction on landlord[']s lease to a competitor and tenant[']s type of use. The Statute of Frauds has been met.

Sublease vs. Assignment

When a lessee purports to transfer less than its entire term, or entire rights and remedies under a lease, the resultant transferee shall be considered a sublesee and the transfer shall be considered a sublease. In this case, the sublessee would not be considered a successor or assignee of the original lessee and would not be in privity of contract with the landlord. Thus, a sublessee may not enforce lessee's rights under the original lease, against the landlord. Conversely, a landlord may not enforce its right to collect rent from a sublesee.

The facts indicate simply that "Tony transferred his interest in the lease in writing to Ann". Because this transfer was in writing, the Statute of Frauds is satisfied. Because it appears that Tony's entire interest in the lease was transferred to Ann, Ann's is an assignee and the transfer shall be considered as assignment.

Does the covenant for tenant's right to renew the lease for an additional five years, on the same terms, by giving landlord written notice during the last year of the lease run with the land?

In order for Ann to be able to enforce her right to renew the lease, she will need to establish that the covenant runs with the land. A covenant is said to run with the land when four criteria are met:

1. The original parties intended that future takers be bound.

Here, the express terms of the lease state "landlord and tenant agree for themselves and their successors and assigns". This language clearly indicates that landlord and tenant intended their successors to be bound.

2. The successor must have knowledge of the covenant.

Ann has actual knowledge of the covenant as it is expressly stated in the original lease and she is seeking to enforce the covenant.

3. There must be horizontal and vertical privity between the parties.

Ann is in horizontal and vertical privity of estate with landlord by virtue of the assignment from Tony, thus, this criterion is met.

4. The covenant must "touch and concern" the land.

A covenant will be held to touch and concern the land if it burdens the land. Here, a 5 year possessory interest in the demised premises, touches and concerns the land.

Because the covenant to renew the lease "runs with the land," unless Ann is in material breach of the lease, she will be entitled to enforce the covenant upon her satisfaction of the "notice during the last year of the lease" requirement. Ann gave written notice to Landlord (Lori), in January of 2004, the last year of the lease. She has met this requirement & is entitled to renew the lease. (She may have waived the non-competition covenant and the renewed lease may not include this covenant - see below.)

[②a.] Did Ann's failure to pay the percentage rent constitute a material breach of the lease, discharging Lori's duties under the lease and permit Lori to collect the percentage rent from Ann?

The facts indicate that begin[n]ing in March 2003, Ann stopped paying the percentage rent. Lori took no action except to send a letter requesting payment of the percentage rent. The covenant to pay percentage rent is enforceable against Ann by Lori since this covenant "runs with the land" (supra). Ann will argue that Lori's breach of the restriction on leasing space to a competitor discharged her duty to pay percentage rent. At common law, the duty to pay rent was held to be an "independent covenant" and was not discharged by a breach of the landlord in regard to improvements on real property. The modern trend is to find that the covenants under a lease for real property are mutually dependant. If Ann can prove that the landlord's (Lori['s]) breach of the covenant "not to rent to a competitor" gave rise to a claim that the amounts of rent she withheld comprised a reasonable "set off" of damages from Lori's breach, her failure to pay the percentage rent may be discharged.

Waiver:

Ann will also argue that Lori's failure to enforce the percentage rent constituted a "waiver" which Ann then reasonably relied upon to continue her tenancy without paying percentage rent. The facts indicate that Lori's only response to Ann's failure to pay

percentage rent was to write one letter requesting rent in April 2003. On these facts, Lori may have waived the covenant to collect percentage rent.

Conversely, Lori may argue that Ann waived the covenant to not to [sic] lease to a competitor greeting card store by merely complaining in February 2003 and then taking no further action under the lease. If Ann would have claimed that Lori's breach of the covenant caused her business to be economically impacted to the point where she had to close shop, she might be able to present an argument for "constructive eviction". Since this did not occur, Ann may have waived her right to enforce the covenant.

Therefore, while the right in Lori to collect percentage rent from Ann may have arisen under the lease, as this covenant "ran with the land", a court might not enforce this covenant against Ann based upon the "mutually dependent" nature of this covenant with Lori's duty not to lease to a competitor, which Lori breached. In the alternative, a court may find that both parties waived their rights to enforce the respective covenants. It should be noted that as Tony's assignee, under the lease, Ann could raise any of Tony's rights and defenses against Lori - provided the covenants run with the land, as they do here.

[②b.] Lori vs. Tony:

Lori's right to collect past due percentage rent.

The assignment of Tony's interest in the lease to Ann did not discharge Tony's duties under the lease. In the facts presented Tony will remain in "privity of contract" with Lori and will therefore be bound by the contractual duties imposed by the lease. The proper method for Tony to have discharged his liability under this contract would have been for Tony & Lori to effect a novation of the contract. A novation occurs when the two parties agree to substitute in a stranger, in this case Ann, and discharge the original party to the contract. No novation occurred in the facts presented. Tony remains liable for the past due percentage rent owed to Lori, subject to the defenses which Ann could have raised, waiver, breach of mutually dependent covenant. For the reasons stated above, Tony will be subject to a claim for unpaid percentage rent based on his contractual liability to Lori, but he will likely be able to successfully defend this claim as set forth above.

Answer B to Question 4

4)

1. Lori's obligation to renew the lease

Validity of the Assignment

The first issue in this case is whether a valid contract exists between Lori and Ann. A lessee may assign his interest in a rental property to a third party unless the lease expressly forbids it. In this case, the lease between Lori and Tony did not forbid an assignment. Therefore, Tony had the right under the contract to assign his interest in the lease to Ann, and a valid contract existed between Lori and Ann. Furthermore, Lori accepted rent from Ann, which further indicates that the assignment was valid.

Terms of the Lease

The second issue is whether Ann has a right under the contract to enforce the provision in the lease that Tenant has the right to renew the lease for an additional term of five years on the same terms by giving the landlord notice. Under the terms of the contract, Ann will argue that Tony agreed for himself and his assigns (Ann) to the term of the lease allowing Ann to renew. Therefore, Ann would have the right to renew the lease, as long as she was not in breach of contract.

Lori would argue that there is no privity of contract between herself and Ann. The contract that Tony made with Ann was not expressly assumed by Lori. Therefore, any covenants that do not run with the land are not binding between Ann and Lori, because there is no privity of contract between them. Lori will further argue that the term of the lease requiring Lori to allow the tenant to renew does not run with the land: there is nothing about the agreement to allow the renewal that touches and concerns the property. Therefore, Lori will argue that her promise to Tony is not binding. However, because the terms of the contract are specifically binding on Tony's successors and assigns, Lori will lose this argument. Under the terms of the original contract, Ann is entitled to renew the lease.

Lori will further argue that Ann breached her covenant to pay rent. The duty to pay rent is an obligation that runs with the land: Ann is in privity of estate with Lori, and her failure to pay rent constitutes a material breach of the contract. Though Lori chose not to evict Ann for her failure to pay rent, she could evict her any time and may refuse to renew the lease at the end of the term.

Ann will will [sic] argue that the duty to pay rent in the form of the percentage check has been excused by Lori's breach of contract. The contract contained a provision that Lori would not allow any other gift or greeting card store in the center. Ann can correctly argue that that [sic] a restriction of this type is a covenant that runs with the land: The restriction

touches and concerns the leased property, because it has the effect of making Ann's gift store more valuable. Furthermore, as mentioned above, the contract expressly states that the covenants in the lease would be binding upon each party's assignees, and Ann as Tony's assignee, can sue under the terms of the contract.

The next issue is whether Lori's decision to allow the drug store to put up a small rack of greeting cards constituted a breach sufficient to allow Ann to stop paying the rent. If Lori's decision constituted a material breach, Ann would be excused from her duty to pay rent. Because Lori would be in breach, Ann could suspend her performance of her rent obligations. Furthermore, as the non-breaching party, she would be entitled to renew the lease under the terms of the agreement between the parties. However, Lori did not breach the terms of the contract. The facts indicate that the contract required Lori not to allow "any other gift or greeting-card store in the center." The facts indicate that the store that sold the cards was a drug store, and that the cards it sold were contained on one small rack. Therefore, under the terms of the contract, Lori will be successfully be [sic] able to show that she was not in breach of the contract. Because Lori did not breach the contract with Ann, Ann was not relieved of her obligation to pay the percentage rent. Ann's material breach of contract, her failure to pay the percentage rent, excused Lori from her obligation under the contract to renew the terms of the lease according to Ann's request.

In the alternative, Lori will argue that even if her decision not to stop the drug store from selling greeting cards did constitute a breach of contract, the breach was minor. A material breach occurs when one party fails to pe[r]form in such a way that the value of the contract is substantially destroyed. Ann may argue that allowing even one card rack in one other store expressly breached the lease and should therefore be considered material. However, Ann will lose this argument: the facts indicate that the drug store primarily sold other things, and that it carried one small rack of card[s]. Allowing the drug store to sell card[s] did not substantially impair the value of the contract for Ann. Therefore, if a breach occurred at all, it was a minor breach. A minor breach does not excuse the other party from performing its obligations under the contract. In this case, Ann had no right to cease paying the percentage rent, because the breach was minor. On the other hand, the failure to pay the full amount of rent owed constituted a material breach, and Lori would have been entitled to evict Ann or sue for damages. Lori's rights concerning the rent itself are more fully discussed below: with regards to the obligation to renew the contract, Lori was excused because of Ann's material breach.

2. The Past Rent

Ann's Obligations

The next issue is whether Lori is entitled to recover for the percentage rent from Ann. As mentioned above, because the covenant to pay rent runs with the land, and because the contract expressly states that the obligations of the lease would be bi[n]ding on assignees such as Ann, Ann was obligated to pay rent. For the reasons discussed above, she will

lose her argument that Lori breached the contract.
Ann's duty to pay rent is a covenant that runs with the land. Since Ann is the tenant in possession of the property, she is in privity of estate with the [sic] Lori. Lori may sue Ann to recover for the value of the rent that she is owed.

Ann may try to argue that Lori is estopped from suing her for the rent. She will argue that, although Lori requested the rent, she allowed Ann to continue occupying the premises for 8 months after requesting the percentage rent. She will argue that Lori's acceptance of the rent constituted a waiver of her right to collect the percentage rent. However, Ann will lose this argument as well. Although Lori had the option of evicting Ann and suing for the rent, she also had the option of letting Ann stay and suing for damages. Ann's obligation to pay rent has therefore not been discharged. Lori clearly did not waive this right, because she sent Ann a letter requesting the percentage rent to be paid.

Tony's Obligation

The next issue is whether Lori may sue Tony to recover the percentage rent that Ann has not paid. The rule is that when two parties sign a contract, and one party assigns its interests in the contract to a third party, the assignor remains liable to the obligee on the or[i]ginal contract. The landlord may collect rent from any party with whom she is in privity of contract or privity of estate.

In this case, Tony and Lori signed the or[i]gnal contract. Tony assigned his interests to Ann. As an assignor, Tony is not relieved of his duty to ensure that the contract is fully performed. Lori may sue Tony for his obligation to pay rent and to pay the percentage of revenues that the story [sic] earned. Tony will have the same defenses available to him that Ann had: he can argue that Lori was in breach and that this breach relieved Ann of her duties to pay. However, for the reasons discussed above, these defenses will not be successful. Because Ann remains liable for the percentage rent, Tony is also liable.

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Question 5

Alice and Bill were cousins, and they bought a house. Their deed of title provided that they were "joint tenants with rights of survivorship." Ten years ago, when Alice moved to a distant state, she and Bill agreed that he would occupy the house. In the intervening years, Bill paid nothing to Alice for doing so, but paid all house-related bills, including costs of repairs and taxes.

Two years ago, without Alice's knowledge or permission, Bill borrowed $10,000 from Lender and gave Lender a mortgage on the house as security for the loan.

There is a small apartment in the basement of the house. Last year, Bill rented the apartment for $500 per month to Tenant for one year under a valid written lease. Tenant paid Bill rent over the next seven months. During that time, Tenant repeatedly complained to Bill about the malfunctioning of the toilet and drain, but Bill did nothing. Tenant finally withheld $500 to cover the cost of plumbers he hired; the plumbers were not able to make the repair. Tenant then moved out.

Bill ceased making payments to Lender. Last month, Alice died and her estate is represented by Executor.

1. What interests do Bill, Executor, and Lender have in the house? Discuss.

2. What claims do Executor and Bill have against each other? Discuss.

3. Is Tenant obligated to pay any or all of the rent for the remaining term of his lease, including the $500 he withheld? Discuss.

Answer A to Question 5

What interests do parties have in the house?

The court must decide between competing claims by Bill (B), Executor (Exec)[,] and Lender (L).

Joint Tenancy

Alice and B originally took title as joint tenants with the right of survivorship. Joint tenancy required the existence of four unities – time, title, interest, and possession. Assuming these unities were present, the distinguishing feature of a joint tenancy, the right of survivorship, will apply.

Under the right of survivorship, on the death of one joint tenant, his/her interest automatically passes to the surviving tenant(s). Thus, if a joint tenancy existed between Alice and B, B would automatically get Alice's interest at her death.

The issue here, though, is whether any actions by the parties changed the joint tenancy before Alice's death.

Severance/L's mortgage

A unilateral act of mortgaging the property may sever a joint tenancy, depending on the type of jurisdiction.

Lien Theory

A lien theory jurisdiction holds that a unilateral mortgage does not automatically sever a joint tenancy. Therefore, if this is a lien theory jurisdiction, normal survivorship rules would apply, and at Alice's death the following would occur:

Alice's interest would pass to B through the right of survivorship. B would thus be left with a fee simple absolute, subject to L's mortgage. Exec gets nothing.

Title theory

However, in a jurisdiction which follows the title theory, a unilateral mortgage by a joint tenant is held to sever the joint tenancy. The result is that joint tenants become tenants in common, with the mortgagee the equitable owner of the undivided portion legally belonging to the mortgagor.

In a title theory jurisdiction, the following would occur:

Immediately upon B's mortgaging the property, the joint tenancy was destroyed. Alice and B were then tenants in common, each with an undivided ½ interest. B's interest was subject to L's mortgage[.]

At Alice's death, her undivided ½ interest passes through her estate. It will thus be held in trust by Exec to be distributed per the provisions in Alice's will. B will continue to hold his undivided ½ interest. L will have an equitable ownership interest in B's undivided share by virtue of its mortgage.

2. Claims of Exec and B against each other

Exec, as the executor of Alice's estate, may be legally able to assert any claim against B that Alice had during her life. B could counter with any claims he had against Alice.

Exec's claims - Rent

A tenant has a duty to account to co-tenants for any rents or profits received from use of the land. Exec will claim interest in ½ of the rents B received from Tenant.

B rented out the basement apartment to Tenant for $500/month. B received rent for seven months, a total of $3,500. Since Alice had a right to ½ of the rents, Exec will lay claim to $1,750.

B's claims against Exec

B will counter for claims for Alice's share of house-related bills, repairs, and taxes.

House-related bills

The house[-]related bills may or may not be subject to partial reimbursement from Alice's estate. Mortgages or loan payments are generally apportioned between the tenants according to their interest. Since Alice and B had equal interests, B may claim compensation for Alice's half of any such payments made by him.

Some bills, however, are the sole responsibility of the tenant in possession, since they are based on his use or enjoyment of the property. Therefore incidental expenses or use charges such as utility bills will not be subject to reimbursement.

Repairs

Tenants in possession may receive contribution from non-posessory tenants for regular repairs (distinguished from improvements). Thus B may receive reimbursement from Alice's estate for ½ of the regular repairs B had done to keep the property in good condition.

Taxes

Tenants out of possession are also liable for their respective share of taxes levied upon the property. B may therefore claim reimbursement for ½ of the taxes he has paid.

3. Tenant's obligation to pay remaining rent?

B and Tenant (T) entered into a one-year lease. After seven months, T refused to pay rent and has moved out. T will try to get out of his duty to pay rent for the remaining term.

Warranty of habitability

Generally at common law, a tenant's duty to pay rent was considered independent of the landlord's duty to provide the premises. Tenants took the premises as they were; "caveat emptor" was the rule of the day.

Because the harshness of application to tenants, courts have modernly considered residential leases (commercial leases are not protected). Thus, if a landlord provides premises that are not inhabitable, tenant's duty to pay rent may be excused.

"Uninhabitability" has been fairly strictly construed by courts. Property is typically considered "uninhabitable" only if it fails to provide the barest essentials - four walls, a roof, and running water/plumbing.

Here, T will claim that the malfunctioning toilet and drain render the premises uninhabitable. A court will probably find for T, because the lack of working plumbing would result in a possible health hazard. T may thus be excused from paying rent until the problem is repaired.

Many courts allow the tenant, in cases where the landlord has failed to repair, to contract himself to have the repairs done and deduct that amount from the rent due.

Here, T did notify B of the need for repairs, and B never responded. T was therefore eligible to engage in "self-help" by contracting for the needed repairs himself. He did so, and withheld the amount from the rent owed to B. He was within his rights to do so.

Constructive eviction

At issue is whether T can avoid the five months remaining on his lease with B.

If the problem with the toilet and drain render the premises completely uninhabitable,

forming a nuisance to T, then upon proper notice to B[,] T can quit the premises. He will be relieved of his obligation to make future rent payments by virtue of the doctrine of constructive eviction.
Here T notified L of the nuisance conditions. T's own plumbers were unable to repair. Because the condition was a nuisance - a health hazard - T could quit the premises. Since he did so, he can claim constructive eviction.

Therefore T is not liable for any rents remaining on his contract with B.

Answer B to Question 5

5)

1.____Interests of Bill, Executor and Lender

Joint Tenancy

Alice and Bill took title as "joint tenants with rights of survivorship." The creation of a joint tenancy requires the presence of the four unities. Joint tenants must take by the same title instrument, at the same time, with identical interests and rights to possession. A and B took title at the same time and by the same deed and apparently had identical interests and rights to possession and thus a valid joint tenancy was created. Joint tenants have rights of survivorship that entitle surviving tenants to automatic ownership of the interests of deceased joint tenants. Thus a joint tenant's interests are not devisable or descendible. As a consequence, as long as B did not sever the joint tenancy by mortgaging his interest, B became sole owner of the house upon A's death.

Title Theory v. Lien Theory of Mortgages

A joint tenancy is severed, i.e., survivorship rights cease and the tenancy becomes that of tenants in common, when, without the permission of the other joint tenant(s) one joint tenant transfers his or her ownership interest in the property. There are two conflicting theories regarding the consequences of one joint tenant mortgaging his or her interest in a joint tenancy without permission. The title theory of mortgages deems the tenancy terminated once the property is unilaterally mortgaged because it treats title as passing from the mortgagor to the mortgagee[,] thus severing the unity of title. The lien theory of mortgages holds that the joint tenancy remains intact despite the mortgage, concluding that the mortgagee only holds a lien on the property so the unity of title is not disrupted. Thus, the effect of B's mortgage to Lender on his joint tenancy with A will depend on which theory the jurisdiction applies. If it applies the title theory, then the tenancy was severed and A's interest became devisible and descendible and is thus now part of her estate. If the lien theory is applied, then the tenancy was not severed and B automatically took title to the house upon A's death.

Equitable Conversion

Lender certainly has an interest in the one-half share of the house that was B's at the time he mortgaged the house. Lender's rights to the other half depends on whether B took title to the entire property upon A's death as discussed above. B only had the power to encumber what he owned – an undivided one-half interest – and thus at the time of the mortgage L only had a security interest in B's half of the house. Whether L will have a security interest in the entire property, assuming the lien theory of mortgages applies, depends on the application of the doctrine of equitable conversion. Under this doctrine

equity deems done that which ought to be done. Thus, if B represented to L that he owned the house alone and thus L thought his security interest was in the entire property, then the doctrine of equitable conversion could apply to L's mortgage and give L an interest in the entire house.

No Adverse Possession

If the title theory of mortgages applies and thus B does not take A's share of the house, he may argue that his uninterrupted possession of the house for the past ten years gives him title by adverse possession. Adverse possession operates to give title to one who occupies property under certain circumstances for a statutorily prescribed period (i.e., the statute of limitations on trespass). To make out a valid claim of adverse possession to possessor mush [sic] show the [sic] his possession was continues [sic] for the prescribed period, that his possession was open and notorious (such that the rightful owner would have notice of the trespass), that possession of the property claimed was actual (no constructive possession) and that the occupation of the property was hostile (i.e., not with permission of the owner). B's possession of the house likely satisfied the first three requirements as he openly lived in the house[;] however, his claim will fail because occupation by a joint tenant is not hostile absent an ouster of the other tenants. A and B agreed that B would occupy the house after she moved away and thus there was no ouster and no hostility.

2. Claims of Executor and Bill

Executor's Claims – Rents

The general rule is that joint tenants are not entitled to rents from other joint tenants even if one tenant has sole possession of the property unless their [sic] has been an ouster (i.e., exclusion of one tenant of another who [h]as a right to possession). Thus, Executor will not be entitled to any rent claimed for B's occupation of the house because B had not ousted A from the house. However, joint tenants are entitled to their pro rata share of any rents collected from non tenants. Thus, Executor has a claim to half of the rents received by Bill from Tenant, i.e., $1750.

Bill's Claims – Repairs and Taxes

Joint tenants are responsible for their pro rata share of taxes and repair costs absent and [sic] agreement to the contrary. Joint tenants are not responsible for expenses related to another's use of the property. Here B paid for taxes and repairs with no contribution from A for the ten years that he was in sole possession of the house and thus under the general rule A's estate could be held liable to B for her half of these expenditures. Executor would argue that B was obligated to give A notice of any necessary repairs prior to making expenditures that she would be responsible for. Executor would also argue that A and B had an implied agreement that B would make

these payments in return for having exclusive use of the house. That B had never requested payment from A during the ten year period indicates that this was indeed the case. Finally, A's estate would not be liable for "house-related bills" that were incident to B's use of the property as joint tenant's obligations extend only to repairs and taxes.

3. Tenant's Obligations

Covenant of Quiet Enjoyment – Constructive Eviction

Every lease includes an implied covenant of quiet enjoyment. This convent [sic] obligates a landlord to do and refrain from doing whatever is reasonably necessary to enable a tenant's quiet enjoyment of the leased premises. This obligations [sic] includes landlord[']s duty to make repairs to the premises if a condition is interfering with the tenant's quiet enjoyment. A continued refusal to comply with this obligation can give rise to a claim of constructive eviction. A constructive eviction will be found when 1) a condition causes a substantial impairment of the tenant's quiet enjoyment, 2) the tenant gave adequate notice to the landlord of the condition and the landlord failed to take appropriate remedial measures[,] and 3) as a result the tenant gave up the lease and moved out. A malfunctioning toilet and drain could certainly cause a substantial impairment of one's enjoyment of an apartment. This is especially true here where the premises consisted of a small basement apartment that likely had only one bathroom and not much ventilation. Tenant gave landlord notice of the problem and even attempted to have the problem fixed himself. Finally, tenant promptly moved out. Thus, tenant has a valid claim for constructive eviction and is thus not liable for the remaining term of the lease. Tenant could also recover damages from B for breach of contract.

Implied Warranty of Habitability – Standard and Remedies

Also implied in every residential lease is the implied warranty of habitability. This warranty requires landlords to provide property that is fit for basic human habitation. The standard can be based on housing code but generally extends to basic amenities such as running water, electricity, heat in cold climates, etc. A malfunctioning toilet that is apparently beyond repair would very likely be found to be a breach of the implied warranty of habitability. Among a tenant's remedies for breach are 1) move out, 2) withhold rent (may be required to keep in escrow), 3) repair and deduct the cost from the rent[,] and 4) remain and sue for damages. Tenant availed himself of the third option by seeking to have the toilet and drain repaired, however the repair was beyond the abilities of the plumbers. As long as tenant's efforts were in good faith he should be entitled to repayment for the $500 he spent to repair the conditions despite the fact that conditions were not capable of being repaired. The continuing breach also gave tenant the right to vacate and terminated his obligations under the lease.

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JULY 2005 CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2005 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.

Question 2

Developer acquired a large tract of undeveloped land, subdivided the tract into ten lots, and advertised the lots for sale as "Secure, Gated Luxury Home Sites." Developer then entered into a ten-year, written contract with Ace Security, Inc. ("ASI") to provide security for the subdivision in return for an annual fee of $6,000.

Developer sold the first lot to Cora and quickly sold the remaining nine. Developer had inserted the following clause in each deed:

> Purchaser(s) hereby covenant and agree on their own behalf and on behalf of their heirs, successors, and assigns to pay an annual fee of $600 for 10 years to Ace Security, Inc. for the maintenance of security within the subdivision.

Developer promptly and properly recorded all ten deeds.

One year later, ASI assigned all its rights and obligations under the security contract with Developer to Modern Protection, Inc. ("MPI"), another security service. About the same time, Cora's next-door neighbor, Seller, sold the property to Buyer. Seller's deed to Buyer did not contain the above-quoted clause. Buyer steadfastly refuses to pay any fee to MPI.

MPI threatens to suspend its security services to the entire subdivision unless it receives assurance that it will be paid the full $6,000 each year for the balance of the contract. Cora wants to ensure that she will not be required to pay more than $600 a year.

On what theories might Cora reasonably sue Buyer for his refusal to pay the annual $600 fee to MPI, what defenses might Buyer reasonably assert, and what is the likely outcome on each of Cora's theories and Buyer's defenses? Discuss.

Answer A to Question 2

2)

Question 2

Cora (C) will assert three different theories: (1) that there was a covenant, the burden of which ran to Buyer (B), and the benefit of which runs to C, (2) that there was an equitable servitude, the burden of which runs to B, and the benefit of which runs to C, and (3) that a negative reciprocal servitude can be implied from a common scheme initiated by Developer (D). C will sue under a covenant theory to obtain damages in the form of the series of $600 payments, or will sue under an equitable servitude theory to require B to pay the $600.

C will assert that he had no notice of either the covenant, equitable servitude or common scheme, and therefore should not have to pay. He will also allege that even if he did have notice, that the assignment of the contractual rights from Ace Security (ASI) to Modern Protection[,] Inc. (MPI) extinguished any obligation he had or notice of an obligation to pay for maintenance of security services.

Cora's Theories of Recovery

1. Covenant

Cora will assert that the original deed between Developer and Seller created a covenant, the burden of which ran to B, and the benefit of which ran to C. A covenant is a non-possessory interest in land, that obligates the holder to either do something or refrain from doing something related to his land. For the burden of the covenant to run, there must be (1) a writing that satisfies the statute of frauds, (2) intent of the original contrac[t]ing parties that the covenant bind successors, (3) Horizontal privity between the original parties, (4) Vertical privity between the succeeding parties, (5) the covenant must touch and concern the burdened land [,] 5 [sic] Notice to the burdened party. For the benefit of the covenant to run, there must be (1) a writing satisfying the statute of frauds, (2) intent of the original parties, (3) the benefit must touch and concern the benefitted land, and (4) there must be vertical privity between the parties.

Running of the burden

Writing

For the burden to run to B, there must be a writing that satisfies the statute of frauds. Here, the original deed was properly written and recorded. Developer inserted the clause covenanting payment in all of the deeds given to the original 10 purchasers. Therefore, there is a writing satisfying the statute of frauds.

Intent

For the burden to run, the original contracting parties must have intended that the benefit run to successor in interest to the land. Here, the deed on its face evidences an intent that the burden run. It specifically says that the "heirs, successors and assigns" of the deed will be bound to pay the security fees. Therefore the[re] is an intent that the successors– such as B – be bound by the covenant.

Horizon[t]al Privity

For the burden of a covenant to run, there must be horizontal privity between the parties. This requires that the parties be successors in interest – typically this is satisfied by a landlord-tenant, grantor-grantee, or devisor-devisee relationship. Here, the relationship is one of seller-buyer. D was the original seller of the land, and S was the purchaser. S was a successor in interest in the land of D. Therefore there was horizontal privity between the original contracting parties.

Vertical Privity

Vertical privity requires that there be a non-hostile nexus between the original covenanting party and a later purchaser. It is not satisfied in cases in which title is acquired by adverse possession or in some other hostile way. Here, however, S sold the property to B. A sale relationship is a non-hostile nexus, and therefore the requirement of vertical privity is met.

Touch and Concern

Defense by C: B may argue that the covenant here does not touch and concern the land. For the burden to run to a party, the covenant must touch and concern the land, that is, it must burden the holder, and benefit another party in the use and enjoyment of their own land. C will argue that this is not the case here.

B will argue that personal safety of house occupants is not necessarily related to the land. Contracts for security services often are used in matters outside of the home. However, this argument will likely fail. C can argue that the safety services are needed to keep the neighborhood safe. In fact, C and others specifically bought homes in the community because of representations that there would be security services available to keep the land safe. The use an[d] enjoyment of the land would be difficult, if not impossible, without the knowledge that the parties will be safe in their homes. Therefore, C can show that the covenant does in fact touch and concern the land.

Notice

Defense by C: B's primary defense will be that he was not given notice of the covenant. The burden of a covenant may not run unless the party to be burdened has notice of the

covenant. Notice may be (1) Actual, (2) by inquiry, or (3) By Record. The latter two types of notice are types of constructive notice.

–Actual Notice

B will argue that he did not have actual notice of the covenant. Actual notice occurs where the substance of the covenant is actually communicated to the party to be burdened, either by words or in writing. Here, there is no indication that B was told of the covenant in the deed. Therefore, he did not have actual notice.

–Inquiry Notice

A party may be held to be on inquiry notice, if it would be apparent from a reasonable inspection of the community that a covenant applies. C will argue that B was on inquiry notice of the covenant. However, this argument will likely fail.

A reasonable inspection of the community would not have revealed the covenant to pay $600. B might have discovered that the community was protected. There were advertisements claiming that the community was gated and secure. There were probably fences or other signage. However, this notice would be inadequate to tell B that the homeowners themselves were obligated to pay for the security service. The payments for security services may have simply been imputed to the home price, or the funds may have come from elsewhere. Either way, a reasonable inquiry would not have informed B of the existence of the covenant.

–Record Notice

C will argue that B was on record notice of the covenant. Record notice applies where a deed is recorded containing covenants. The burdened party is said to have constructive notice of the covenant that is recorded in his chain of title.

B will argue that he is not on record notice because the covenant was not in his specific deed. This argument will probably fail. A party taking an interest in land, or an agent of theirs, will typically perform a title search. Therefore, they will be held to be on constructive notice of any covenants, easements or other obligations. A simple title search by B would have revealed that the deed from P to S contained a covenant binding successors to pay for the security services.

Therefore, B was on record notice of the existence of the easement.

Running of the Benefit

For the benefit of the covenant to run, there must be (1) a writing satisfying the statute of frauds, (2) intent of the original parties, (3) the benefit must touch and concern the benefitted land, and (4) there must be vertical privity between the parties.

The analysis here will be the same as for the running of the burden, except that horizontal privity will not be required (even though it is present). The original agreement was in writing. The original contracting parties intended that the benefit run. The benefit arguably touches and concerns the land. Furthermore, D and C were in a non-hostile nexus, therefore the requirement of vertical privity is satisfied.

Conclusion: Because the requirements for running of the burden and running of the benefit are present, C can enforce the covenant against B, and will be entitled to damages for B's failure to pay for the security services.

2. Equitable Servitude

C may also attempt to enforce the requirement in the deed as an equitable servitude against B. The requirements for an equitable servitude are less stringent than those required for a covenant – for the burden of an equitable servitude to run, there must be (1) a writing satisfying the statute of frauds, (2) intent of the original parties to bind successors, (3) the servitude must touch and concern the land, and (4) notice to the party to whom the covenant is being enforced. If the equitable servitude is enforced, it will allow the party enforcing it to obtain a mandatory injunction. In this case, enforcement of the servitude would require B to make the $600 payments to MPI.

The analysis for an equitable servitude will be the same as that for the running of the burden of a covenant. There was a writing, there was intent by the original parties, the servitude touches and concerns the land, and arguably, there was notice to B. Therefore, given the forgoing [sic] analysis, C will be able to enforce an equitable servitude against B, and obtain a court order compelling him to pay the fees (subject to any defenses: see below).

3. Reciprocal Servitude Implied from Common Scheme

C may also attempt to enforce the payment of the security fees as a reciprocal servitude based on the original common scheme. A reciprocal negative servitude can be implied from a developer's actions where a developer develops a number of plots of land with a common scheme apparent from the development, and where the development party is on notice of the requirement.

C can argue that there was a common scheme to create a secure and gated community. There were advertisements at the time that the land was developed indicating that a major selling point of the development was that the development would be secure. To that end, the developer entered into a contract with ASI. It is apparent from developer's actions that a common scheme, including maintenance of security in the development, was intended.

The analysis for notice of the common scheme is the same as above – it may have been predicated on actual or constructive notice. Here, B was on record notice of the scheme. Therefore, C can successfully hold B to payment of the security fees on an implied

reciprocal servitude theory as well.

Buyer's Defenses

Notice

As noted above, one of B's primary defenses will be that he was not given notice of any covenant or servitude. This argument will fail in most courts, because of the fact that B was on record notice of the covenant, based on a deed in his chain of title.

Touch and Concern

As noted above, B may argue that the covenant at issue does not touch and concern that land. This argument will fail, because the security arrangement will clearly benefit the homeowners in their use and "peace of mind" concerning their homes and personal safety.

Assignment of the Contract from ASI to MPI

B will allege that even if he was obligated to pay ASI based on notice in his deed, he was under no obligation to pay MPI, because of the assignment of the contract. This argument will fail.

Here, ASI has engaged in both an assignment of rights and a delegation of duties. All contract duties are delegable, if they do not change the nature of the services to be received by the benefitted party (here, B). Unless B can show that the security services received from MPI will be materially different from those he would receive from ASI, then he cannot allege that the delegation and assignment excuses his duty to pay. There is no reason to think that MPI is any less capable of performing security services than MPI.

Furthermore, once contract rights are assigned and delegated, a party must pay the new party to the contract once he receives notice of the assignment. B knows that he has to pay MPI, therefore he cannot allege that he is not making payments because he doesn't know who to pay.

Answer B to Question 2

2)

What theories might Cora sue Buyer for his refusal to pay the annual $600 fee to MPI, what defenses could Buyer raise, and what is the likely outcome on each theory?

Cora will argue that the Buyer is bound by a covenant that runs with the land. Cora will further argue that this covenant requires Buyer to pay MCI the $600 per year.

Covenants

A covenant is a promise relating to land that will be enforce[d] at law. Enforcement at law usually gives rise to money damages. Equitable servitudes, which will be discussed later, are enforceable in equity, which often means with an injunction.

Cora will argue that a valid covenant was created when each lot owner signed the deed with Developer that contained the clause that each purchaser, including heirs, successors, and assigns, will have to pay an annual fee of $600 to Ace Security. This covenant was in writing[;] Developer recorded all the deeds.

Will the burden of the covenant run?

Cora will argue that even though Seller was the person who initially signed the deed containing the covenant, the burden of the covenant should run to Buyer. The burden of a covenant will run to a successor in interest if 1) the initial covenant was in writing, 2) there was intent from the initial people creating the covenant that it would run to successors, 3) the covenant touches and concerns land, 4) there exists horizontal and vertical privity, and 5) the successor in interest had notice of the existence of the covenant.

Writing:

The initial covenant was in writing because it was included in the deed that each lot purchaser signed in the contract with Developer. Therefor, this requirement has been met.

Intent:

There also appears to be intent that the covenant bind successors in interest. This is because the deed which Developer and Seller signed contained the phrase “hereby agree on their own behalf and on behalf of their heirs, successors, and assigns.” This is clear evidence that the original parties intended the burden to run.

Touch and Concern:

A covenant will be considered to touch and concern land if it relates to the land and affects each covenant holder as landowners. Here, the covenant was to provide security and maintenance within the subdivision. This probably will be considered to touch and concern land because the safety and maintenance of the subdivision has a clear impact on each landowner's use and enjoyment of his or her lot. The covenant was not to provide personal security to the landowners, but rather to secure the land that was conveyed in the deed. Therefore, the covenant likely will be considered to touch and concern land.

Horizontal and Vertical Privity:

There must also be horizontal and vertical privity in order for a successor in interest to be bound by the burden of a covenant. Horizontal equity deals with the relationship between the original parties. Here, the original parties are Developer and Seller. There must be some connection in this relationship, such as landlord-tenant, grantor-grantee, etc. Here, Developer owned the large tract of undeveloped land that was eventually turned into the ten lots. Then, Developer conveyed one of the lots that it owned to Seller. This will satisfy the requirement of horizontal privity.

Vertical privity relates to the relationship between the original party and the successor who may be bound by the covenant. Vertical privity will usually be satisfied so long as the relationship between the two parties is not hostile, such as when the new owner has acquired ownership by adverse possession. Here, Seller sold the property to Buyer. Therefore, this will satisfy the vertical privity requirement.

Notice:

The final requirement for the burden of a covenant to run to successors is notice to the successor in interest. A successor will be deemed to be on notice of the covenant if there is 1) actual, 2) inquiry, or 3) record notice of the covenant. Actual notice is if the successor was actually aware of the covenant. Inquiry notice is where the successor would have discovered the existence of the covenant had she inspected the land as a reasonable person would have. Record notice occurs when the successor would have discovered the covenant if an inspection of the records had taken place.

Here, there is no evidence that Buyer had actual notice of the covenant at the time that she bought the land from Seller. Also, it is unclear whether Buyer was on inquiry notice. If Buyer had inspected the land prior to purchase, Buyer may have noticed that the land was being maintained and secured by a company. If Buyer had seen this, she should have also probably concluded that each landowner was partially paying for this maintenance and security service. Therefore, Buyer may be deemed to be on inquiry notice.

Even if Buyer did not have actual or inquiry notice, Buyer clearly had record notice of the covenant. This is because the covenant was in writing and was included in the deed of

each of the original purchasers from Developer. Furthermore, Developer promptly recorded all of these deeds. Therefore, if [B]uyer had went [sic] to the record office and looked up the land that she was buying, she would have discovered the covenant.

Therefore, Buyer will be considered to be on notice of the covenant.

Buyer's possible defenses to enforcement of the covenant:

Buyer may argue that [s]he should not be bound by the covenant because the covenant does not touch and concern land, she was not on notice of the covenant, and that she should be excused from performing under the covenant because of Ace Security's assignment to MPI.

Touch and concern:

As discussed earlier, the covenant will likely be considered to touch and concern land. Buyer may argue that the duty to provide security to the landowners is primarily there to protect the landowners personally rather than to protect the actual land. Buyer will further argue that because the covenant relates to personal protection of the landowners, it does not relate to land and therefore should not be deemed to touch and concern land. If the covenant is deemed not to touch and concern land, the covenant will not bind successors in interest.

However, because the contract with Ace Security was for the security and maintenance of the subdivision, Buyer's claim will likely be rejected. Even if Buyer can convince the court that the Ace Security had promised to protect the individual landowners rather than the land, Ace Security's promise to maintain the property clearly related to land. It would not make sense for Buyer to argue that Ace Security's duty to maintain relates to maintenance of the landowners rather than maintenance of the land.

Therefore, Buyer's argument that the covenant does not touch and concern land will be rejected.

No Notice:

As discussed earlier, Buyer may argue that she did not have notice of the covenant and, therefore, should not be bound by the covenant. Buyer will point to the fact that the deed between Seller and Buyer did not mention the covenant to pay for security services. However, this argument will fail because Devel[o]per properly recorded each of the deeds which contained the covenants. As a result, if Buyer would have checked the records she would have discovered the covenant.

Thus, this argument by Buyer will also fail.

Contract Defenses:

Buyer may also make some contract arguments.

What law governs?

The contract between Developer and Ace Security will be governed by the common law because it is a contract for services, not goods. Even though the contract cannot be performed within 1 year (because the contract is for 10 years) the statue of frauds has been satisfied because the contract was in writing between Developer and Ace Security.

Third Party Beneficiary

Cora can claim that he [sic] is a third party beneficiary of the original contract between Devel[o]per and Ace Security. Cora will point out that in the initial contract between Devel[o]per and Ace Security, it was clearly Developer's intent that performance of the security services go to the purchasers of the land rather than to Developer. He will also claim that his rights under the contract has [sic] vested because he has sued to enforce the contract. Because Cora can show that all of the landowners are third party beneficiaries, Cora will have the ability to use under the contract.

Invalid Assignment to MPI:

Buyer may also argue that even if the original covenant runs to her, she should no longer be bound by the covenant because of Ace Security's assignment of the contract to MPI.

An assignment can include all of the rights and obligations of the original contracting party. In general, an assignment and/or delegation will be valid unless 1) the original contract specifically says that all attempted assignments or delegations will be void, or 2) the assignment or delegation materially changes the risks or benefits associated with the original contract.

Here, there is nothing in the original contract between Developer and Ace Security that states that assignments will be void. Furthermore, there is nothing in the covenant that Seller signed with Developer that limits the covenant only to performance by Ace Security. Therefore, this will not be a valid reason for invalidating the assignment and excusing Buyer's need for performance.

Also, it does not appear that Ace Security's assignment to MPI will in any way impact that obligations [sic] to Buyer or the benefits that Buyer will receive. Ace Security was originally required to provide security and maintenance for the subdivision. This is not a personal service that only Ace Security can effectively provide. Rather, security service is a task that any competent security company can handle. Therefore, the fact that performance will now be coming from MPI rather than Ace Security will not negatively impact Buyer's benefits from the contract.

Moreover, the assignment will not effect [sic] Buyer's obligations under the contract either. Under the initial contract with Ace Security, Buyer was required to pay $600 per year. After the assignment to MPI, Buyer is still required to pay only $600 per year. Therefore, Buyer's obligations after the assignment will not be changed in any way. Therefore, the assignment from Ace to MPI will be considered valid and Buyer will not be excused from performing as a result of this assignment.

MPI's threat to suspect [sic] service unless it receives assurances that it will be paid the full $6,000 each year for the balance of the contract

Buyer may also argue that even if they are bound by the covenant, MPI is not entitled to assurances that it will be paid the entire value of the contract for the remainder of the contract term. As common law, a suit for breach of contract could not be brought until the date for performance has passed. Cora will argue, on behalf of MPI, that they are entitled to assurances of future performance because of Buyer's anticipatory repudiation.

Anticipatory Repudiation

Generally, a suit for breach of contract can only be brought when the date for performance has passed. However, is [sic] a party to a contract unambiguously states that he cannot or will not perform under the contract, a suit may be brought immediately for breach of contract.

Here, Buyer has steadfastly refused to pay any fee to MPI. It is unclear whether the time has passed in which Buyer was required to pay MPI. Regardless, Buyer's clear statement that it will not pay MPI will be considered an anticipatory repudiation. Thus, Buyer will be able to immediately bring suit.

Also, because of the anticipatory repudiation, Cora or MPI would be entitled to immediately bring suit. Because they could immediately sue Buyer if they so chose, it only makes sense to allow MPI to seek assurances that Buyer and the other landowners will continue to perform under the contract.

Equitable servitude

An equitable servitude is much like a covenant except that an equitable servitude is enforceable in equity, rather than at law. Here, Cora may prefer to have the court declare an equitable servitude, so that the court will enjoin Buyer to pay the $600 each year for the 10 year length of the contract. This will ensure that Cora will not have to pay more than $600 in any year.

In order for the burden of an equitable servitude to run with the land, there must be 1) a writing, 2) intent, 3) touch and convern[sic], and 4) notice to the successor in interest. All of these have been discussed earlier and have been satisfied. Therefore, this could be

considered to be an equitable servitude.

Cora may wish to get an injunction requiring Buyer to pay $600 per year for the 10 year length of the contract. Cora will first need to show that Buyer has breached his obligations under the contract.

Under an equitable servitude, the court may require Buyer to pay $600 per year for the remainder of the contract.

Buyer's defenses

Buyer could make the same defenses as in the covenant situation. As stated earlier, all of these defenses will likely be rejected.

Common Scheme Doctrine

Even if Cora's other attempts to enforce a covenant or equitable servitude fail, Cora may be able to show that Buyer should be bound by the common scheme doctrine. Cora would need to show that the original developer had a common scheme for the entire subdivision and that this scheme was clear to anyone who inspected the area and the records. Cora's argument may succeed because of the fact that Developer recorded the covenant between all of the original purchases from Developer.

Conclusion/Likely Outcome:

Cora will likely succeed in showing that there was a covenant between all of the original landowners. Cora will also be able to show that the burden of this covenant should run to Buyer. Cora will also be likely able to show the existence of an equitable servitude.

ESSAY QUESTIONS AND SELECTED ANSWERS

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Question 3

Mike had a 30-year master lease on a downtown office building and had sublet to others the individual office suites for five-year terms. At the conclusion of the 30-year term, Olive, the building's owner, did not renew Mike's master lease.

When Olive resumed control of the building, she learned that Mike had failed to comply with the terms in the 30-year lease that required him to renew an easement for weekday parking on a lot between the building and a theatre. The theatre, which, in the past, had always renewed the easement, used the lot for its own customers on evenings and weekends.

Olive also learned that a week before the end of the 30-year lease Mike had renewed for another five years the sublease of one tenant, Toby, at a rate much below market. Toby ran an art gallery, which Mike thought was "classy." Upon signing the renewal, Toby purchased and installed expensive custom lighting and wall treatments to enhance the showing of the art in his gallery.

Because of Mike's failure to renew the parking easement, the theatre granted it to another landowner. As a result, Olive had to request a variance from the town ordinance requiring off-street parking. The Board of Zoning Appeals (BZA) denied the request because a nearby parking-lot operator objected. The off-street parking requirement, combined with the loss of the parking easement, meant that several offices in Olive's building would have to be left vacant. The BZA had recently granted a parking variance for a nearby building under very similar circumstances.

Olive commences the following actions:

1. A suit against Mike to recover damages for waste resulting from Mike's failing to renew the parking easement.

2. An action for ejectment against Toby and to require him to leave the lighting and wall treatments when he vacates the premises.

3. An appeal of BZA's denial of Olive's variance request.

What is the likelihood that Olive will prevail in each action? Discuss.

Answer A to Question 3

3)

A lease or "leasehold estate" is an interest in land whereby the landholder ("landlord") grants another person (the "tenant") the exclusive use of the land for a limited period of time, subject to certain terms and conditions, if any, set forth in the lease. The lease between Mike and Olive was a lease "for years," which means that it was for a specific period of time, after which the lease would automatically terminate. Therefore, here, Mike's lease terminated automatically at the conclusion of 30 years, in favor of Olive.

1. Olive v. Mike

Waste is an action initiated by a person with an interest in land (usually a holder in fee or a remainderman), against the occupier of the land, for harm to the land caused by the occupier's actions. Here, Olive is arguing that Mike's failure to renew the parking easement harmed the downtown office building [and] constituted waste, since this action set off a chain of events leading to Olive's inability to rent out all of the office spaces, thus decreasing the value of the office building.

Typically, an action for waste lies when the occupier's action is physically damaging the land - such as where the occupier removes trees or minerals for commercial use. Therefore, Olive's claim for waste based on Mike's failing to renew the easement is unusual. However, the existence of an easement appurtenant, as exists here, is in fact an interest in land that is "attached to" the office building itself. Thus, a court could find that loss of the easement is tantamount to harm to the land, and allow Olive to proceed with the waste action. It seems, however, that this would be highly unusual and therefore it is most probable that, since Mike's failing to renew the easement did no physical harm to any land, Olive is not likely to prevail on this theory. (She should try a breach of lease theory, since the facts state that the renewal requirement was a term of the lease.)

2. Olive v. Toby

Ejectment is an action at law whereby one claiming a superior interest in a parcel of land seeks to have the present occupier removed. (Modern courts, including California, use the unlawful detainer action to accomplish substantially this remedy.) Olive's ejectment action against Toby can only succeed of [sic] Toby is not entitled to occupy his office.

Sublease

Absent any provision in the lease to the contrary, a lease is freely alienable, meaning that it may be freely assigned and subletted. A sublease is an interest in land created when a tenant transfers part of his leasehold interest to another party. Here, Mike subletted Toby's office for 5-year renewing terms. However, the last time that Mike renewed Toby's sublease, there were less than five years remaining in Mike's term. An estate can never last longer than the estate on which it depends, which is why an assignment or sublease can never be for a longer period of time than the sublessor has remaining in his term. Therefore, while earlier subleases to Toby may have been proper, the last sublease, made

only a week before Mike's lease terminated, was improper. Accordingly, Tony's sublease automatically extinguished upon the termination of Mike's lease. At that point, Olive was entitled to possession of Toby's office.

Therefore, Olive is likely to succeed in her action to eject Toby.

Fixtures and Merger
Under the doctrine of fixtures and merger, when an occupier of land affixes any object to the land, or to any structures built upon the land, those items merge into the land. The general rule is that an occupier is not entitled to remove fixtures from the occupied property when the estate terminates. Therefore, under this general rule, Toby should not be permitted to remove the expensive custom lighting and wall treatments he added to his office space. However, some courts will permit a tenant to remove trade fixtures (equipment used in carrying out a specific business or occupation) if the circumstances suggest that the tenant intended to be able to keep them and if they can be removed without significantly harming the property. Here, since: (1) the lighting and wall treatments that Toby installed were custom-made for him; (2) the items were expensive; and (3) Toby had installed them very recently (which means that he probably has not received the benefit of buying them), a court will probably allow Toby to remove these items, if this can be done without significantly harming the building.

3. Olive v. BZA
Zoning ordinances are laws restricting the use of land, and are a valid exercise of the police power inherent in the states and their political subdivisions.

It is important to note here that Olive is requesting a variance to a zoning ordinance requiring off-street parking, and not simply a permit to which she has an entitlement if certain requirements are met (as may be defined by statute with respect to some kinds of permits). Therefore, the BZA was free to deny her permit, and that denial will be deemed lawful unless it was: (1) arbitrary or capricious in violation of the Fourteenth Amendment to the United States Constitution; (2) an unlawful taking of her property for public use without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution; or (3) otherwise illegal (e.g., unlawfully discriminatory or otherwise violative of state or federal law).

Arbitrary and capricious. Olive will argue that the denial of the permit based solely on the fact that the nearby parking lot owner objected was arbitrary and capricious, especially in light of the fact that the BZA had recently granted a parking variance for a nearby building under very similar circumstances. While these are factors that the court will consider in determining whether the denial of the permit was improper, Olive will have the burden of proof here, and if the court can find rational basis for upholding the denial of the permit, it will do so. It is likely that the court will be able to find such a rational basis for the denial of the application - as just about any valid reason will do.

Taking. Olive may argue that the denial of the variance requests is causing her so much harm that it amounts to a taking of her property without just compensation, in violation of the Fifth Amendment to the United States Constitution as incorporated against the states and their political subdivisions through the Fourteenth Amendment. It is true that if the BZA's exercise of its police power in executing the zoning ordinances created such a severe economic harm to Olive, that is not justified by the denial of the permit, this could constitute a taking, which would be invalid unless the city paid Olive just compensation. However, even though it appears that Olive did incur economic harm because she was not able to obtain the permit, this "taking" argument will still be a stretch given the fact that Olive was never entitled to the permit in the first place, and thus never had a property interest in it.

Otherwise unlawful. The facts do not indicate that BZA's denial of the permit to Olive was in violation of any other laws or the federal Constitution.

Based on the above, Olive is not likely to prevail in her appeal of the BZA's denial of her variance request.

CONCLUSION

Based on the foregoing, Olive should not prevail in her action against Mike for waste. She should be successful in her action to evict Toby, but the court will probably allow him to remove the lighting equipment and wall coverings if he can do so without harming the property. Finally, Olive is unlikely to succeed in her appeal of the BZA's denial of her variance request.

Answer B to Question 3

3)

Olive v. Mike

A landlord can sue a tenant for "waste" where the unreasonable acts of the tenants cause a diminution in value of the leased property. Normally the issue of waste involves physical property damage, but it can involve a loss of a right such as an easement. Certainly the loss of the occupancy permit greatly diminished the value of the property. It was also arguably "unreasonable" for Mike to fail to renew the lease, particularly in light of the fact that the Theatre was apparently willing to grant such a renewal.

A cause of action for "waste" would require Olive to prove that Mike caused a diminution of the value of the office building. Here, she could most probably prove the loss of the easement diminished the value of the office building. The easement was an "easement appurtenant" that benefited the office building (the dominant estate), as opposed to the easement in gross, which would only benefit an individual person. An easement appurtenant can increase the value of land and is a real interest.

As a defense, Mike can argue that there was no guarantee that the lease would be renewed and that, since Olive had no real interest in the easement past its original term, the loss of the easement was not "waste" because it did not diminish the value of the leased property. The value of the property was that of an office building with an easement that was set to expire. An anticipated right (such as the optional renewal of an easement) is not part of the "value" of the property, since there was no guarantee that the easement would be renewed at all.

Olive would most probably be better off suing Mike under a contract theory for a breach of his lease agreement.

Olive v. Toby

Toby's Sublease

Modern law generally favors the assignability of leases. An assignment of an entire leasehold is called "an assignment," whereas the partial assignment of a leasehold is considered a sublease. An assignment novates the lease wher[e]as a sublease does not absolve the original lessor of liability.

Even though assignability is favored, a tenant can never assign or sublease any more than his or her interest under the master lease. In this case it appears that, at a point when he only had a week left on his master lease, Mike attempted to grant Toby a 5 year sublease. This sublease would be invalid because Mike only had one-week's worth of interest left under his master lease. Because Mike cannot sublease out an interest greater

than he possesses, the sublease to Toby is invalid (at least insofar as it extended past a week).

Ejectment

The owner of real property has the right to eject any person on the property without a legal right to be there. Toby has no valid lease or sublease, because Mike couldn't grant him a lease that extended beyond the ma[s]ter lease's 30-year term. Accordingly, Olive can bring an action for Toby's ejectment.

Retention of Improvements

Absent a contrary provision in a valid lease, the owner of real property is not entitled to retain possession of fixtures installed by a tenant or a third-party (in this case a third party with an invalid sublease). The landlord is only entitled to retain the improvements if they are "permanently affixed" to the real estate.

It would be a question of fact as to whether Toby's improvements are "permanently affixed." The custom lighting, if it is track lighting that can be removed without damaging the structure, is probably not a "permanently affixed" item that the landlord has a right to retain. A "wall treatment" might be something that is permanently affixed, depending on its size and how it was attached to the structure. This would be a matter for the finder of fact to determine.

Of course, if Olive is owed any unpaid sums due to Toby's use of her real property, she would probably be entitled to a lien on any of Toby's property within the office building, including the fixtures and wall treatment.

Olive v. BZA

A local government has the authority to pass zoning ordinances under general police power to legislate for the well-being of citizens. This power, however, cannot be employed in a way that violates a citizen's right to due process or equal protection, or that amounts to an "unauthorized taking" of private property.

BZA is a government entity and, therefore, any actions by BZA constitute "government activity" implicating the U.S. Constitution.

It appears that Olive was given the opportunity to be heard and notice of any proceedings, therefore her procedural due process rights were most probably not violated. No fundamental rights are implicated by the BZA's decision to deny a variance for lack of parking, so it appears unlikely that any substantive due process rights were violated. Olive can argue that the failure to provide her with a variance when a similar variance had been recently granted to a similarly situated applicant violated her substantive due process rights because the action was not "rationally related to a legitimate state purpose." The BZA,

however, will res[p]ond that requiring parking for office space rationally related to the legitimate state purpose of a unified zoning scheme, and that granting variances to all applicants would diminish the uniformity and purpose of that scheme. Olive will argue that the zoning ordinance gives the board unfettered authority to grant or deny variances, which might be a problem for the BZA if they can't establish that the[y] follow guidelines or standards in determining what variances to grant. Olive will most likely fail in her attempt to argue that the refusal to grant her a variance was so "irrational" as to constitute a due process claim.

In this case, Olive's best argument would be that the denial of the variance was a violation of equal protection. Unless a fundamental right or a suspect classification is implicated, a zoning regulation or determination by a zoning board will be evaluated under the rational basis test and will be upheld if the regulation is reasonably related to a legitimate state purpose. In this case Olive can argue that the government created a classification by treating her differently from the other applicant who was granted the variance, and that the disparate treatment was irrational. The burden would be on Olive to demonstrate that the BZA's action in treating her differently was not reasonably related to a legitimate state purpose. In this case, Olive will argue that the different treatment could not possibly be rational because the applicants were so sim[i]lar. The BZA will most likely respond that it can only grant a limited number of variances, and therefore classifying among applicants in[h]erently requires some degree of discretion and they often grant variances on a "first come first served" basis.

Because the "rational basis" test is so deferential to the government, Olive is unlikely to succeed in her due process or equal protection claims.

Citizens are also protected from any "takings" of property without just compensation. Olive can argue that the refusal to allow her to use her property for offices if she does not secure parking amounts to a "taking." She is also unlikely to prevail on this claim. A property owner can sue for "reverse condemnation" if a government agency enacts regulations that preclude virtually any reasonable use of the real estate, but here the BZA has not denied Olive any use. She can still rent out some of the offices, and she is free to continue to seek commercial parking elsewhere so she can regain the use of the offices that she currently can't use. Accordingly, Olive's claim of an "unjust taking" will most likely fail.

THURSDAY MORNING
FEBRUARY 23,2006

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

FEBRUARY 2007 CALIFORNIA BAR EXAMINATION

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

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

Question 1

Builder sold a shopping mall to Owner. The recorded deed from Builder to Owner conveyed the mall and parking lot where the parking spaces were numbered 1 to 100. The deed reserved to Builder the exclusive right to use parking spaces 15 through 20 as a place to set up a stand to sell sports memorabilia and sandwiches on Sundays. The shopping mall was located adjacent to an existing residential neighborhood.

Owner entered into a written 30-year lease with Lois leasing to her a store in the mall and parking spaces 1 through 20. Under the lease, Lois agreed to pay rent monthly and not to assign the lease without Owner's prior written approval. After occupying the leased premises for five years, Lois subleased the store and parking spaces to Fast Food for a term of ten years without first having obtained Owner's written approval.

Fast Food occupied the premises and paid rent to Owner. Fast Food, which operated a take-out restaurant on the premises seven days a week, used state-of-the-art equipment and operated in compliance with all local health ordinances. Notwithstanding this, on warm days when Fast Food was particularly busy, unpleasant cooking odors were emitted from Fast Food's kitchen. The unpleasant odors caused discomfort to many of the homeowners living in the adjacent neighborhood.

On the first Sunday after Fast Food opened its take-out restaurant, Builder set up his memorabilia and sandwich stand in parking spaces 15 through 20. Fast Food, not aware of the provision in the deed, complained to Builder about the competition of Builder's sandwich sales and the occupancy of parking spaces allocated to Fast Food. Builder ignored Fast Food's complaints. Fast Food then informed Owner that it would cease paying rent until Owner took steps to prevent Builder from using the parking spaces. Owner explained to Fast Food that there was nothing he could do about it, but Fast Food insisted that it would not pay further rent until Owner stopped Builder from setting up his stand. Thereupon, Owner hired a locksmith, who changed the locks on the space occupied by Fast Food, thus denying Fast Food access to the premises.

1. Did Lois violate the "no-assignment" provision in her lease with Owner? Discuss.

2. If Fast Food brings an action in trespass against Builder for his use of parking spaces 15 through 20, is Fast Food likely to prevail? Discuss.

3. Did Owner have the right to change the locks on Fast Food's premises? Discuss.

4. Can the homeowners establish a claim for nuisance against Fast Food? Discuss.

Answer A to Question 1

1)

1) No Assignment Provision

"No assignment" provisions in leases are enforceable; however, they are strictly construed as restraints on alienability. An assignment is the transfer by a tenant of all their remaining interest in a leasehold, whereas a sublease is a transfer of something less than the full interest remaining. In this case, Lois and Owner entered into a 30-year term of years lease, which, at the time of sublease, had 25 years remaining. Lois's sublease to Fast Food was therefore not an assignment, but a sublease, because Lois only subleased to FF for 10 years, and Lois and Owner remained in privity of estate and privity of contract. Owner would therefore be entitled to seek damages against Lois (who could then look to Fast Food for indemnification), but since the clause at issue was a "non-assignment" clause, the sublease of the premises to Fast Food did not violate the clause.

Owner will argue that the power to prevent an assignment includes the power to prevent a lesser transfer of interest, in this case the sublease. Although Owner is correct that an assignment confers a greater interest than an assignment, this argument is unlikely to be persuasive because of the fact that the court will strictly construe the non-assignment clause as prohibiting only assignments and not subleases.

Lois will be able to advance another argument in defense of her assignment to Fast Food: she will claim that Owner is estopped from arguing that an actionable violation occurred. Generally, a party who could otherwise assert a claim for violation of an agreement will be estopped from bringing the claim where he or she acquiesced in the violation. Here, even if Owner had a right to bring an action for damages or eviction based on violation of the non-assignment clause, he likely forfeited that right by accepting rent from Fast Food. Acceptance of Fast Food's rent indicates acquiescence and waiver of the right to enforce the clause, and since Fast Food (and, by extension, Lois) likely reasonably relied on Owner's acquiescence, Owner should be estopped from bringing an action for breach of the non-assignment.

2) Fast Food v. Builder

Fast Food's rights against Builder depend on whether the covenant in the original deed created an express easement in favor of Builder.

An easement is an interest in land that allows the holder to use the land for some designated purpose. Easements can arise from proscription, by express writing, or by implication. In this case, the deed form Builder to Owner expressly reserved the right of Builder to use spaces 15 through 20 for his commercial activities on Sundays. Since this easement benefits Builder alone, separate from his interest in land, it is an easement in gross rather than an easement appurtenant. Easements in gross generally do not run with

the land, except when the easement relates to economic or commercial activity. In this case, the use of the parking spaces for selling merchandise and food on Sundays relates to economic activity, and will therefore be valid even as against subsequent owners or interest-holders.

FF can bring an action against Builder for trespass, which is the physical invasion of one's land by another without consent or privilege to do so, but Builder will assert that he has been expressly granted the right to do so in the deed to Owner. Although FF was not a party to this deed, he will be bound by the easement so long as the easement has not been extinguished. Extinguishment of an easement can occur by several different means, including condemnation, proscription, express agreement, estoppel, end of necessity out of which the easement was created, merger of two parcels of land where an easement appurtenant is involved, and abandonment combined with physical actions indicating intent to never use again. None of these circumstances seem present here, and thus FF will be bound by the easement. Binding FF to this easement will not be unjust, as he had notice of Builder's reservation of his rights in the original deed. The deed was recorded, and even if FF did not have actual notice of the easement, he will nonetheless be bound because easements run with the land and FF had record notice of the easement.

3) Owner's Changing the Locks

_____Owner's rights against FF are determined by landlord-tenant law. The issue is whether a landlord may engage in self-help and evict a tenant who has breached a duty.

A tenant has a duty to pay rent. If FF actually refused to pay rent (rather than simply stating that it would not pay), FF is in breach of his duty. However, the remedies for a landlord with respect to a tenant in possession that has breached a duty are limited to a) initiating eviction proceedings, and b) allowing the tenant to remain while suing for damages. Self-help is strictly prohibited. By changing the locks, landlord has evicted FF without engaging in the required formalities of eviction proceedings, and therefore did not have the right to change the locks.

Whether Owner had a right to evict or sue FF for damages isn't clear from the facts of the question. If FF merely stated that he would not pay rent (but was otherwise current with his rental payments and had breached no other duty), Owner's rights as against FF would not have ripened. Owner would be required to wait until an actual breach occurred prior to initiating eviction proceedings or suing for damages. On the other hand, if FF was in actual present breach of his duty to pay rent, Owner would be permitted to seek relief in one of the two ways mentioned above, but never by engaging in self-help by causing the actual eviction of FF.

4) Homeowners v. FF

_____A public nuisance is defined as activity by the defendant in the use of his land that

causes interference with the health, safety, or well-being of the public at large. A private individual may only bring action based on a theory of public nuisance if he has suffered some particular injury to his property as a result of defendant's conduct. Since the facts indicate discomfort, but not threats to health or safety, public nuisance doctrine is not likely applicable to the claims of homeowners.

Private nuisance claims can be brought where defendant's activity in connection with the use of his land create a substantial and unreasonable interference with plaintiff's use and enjoyment of his land. Unpleasant odors might create a close factual case as to whether the interference with the use of homeowners' land was "substantial" enough, especially because they only emanated from FF on warm days when FF was particularly busy; that question would be for the trier of fact. While it seems pretty questionable that the interference was substantial enough, assuming for the purposes of this question that it is, homeowners would also be required to show that the interference with their land was unreasonable.

That inquiry involves weighing the utility of FF's conduct, as well as considering the general neighborhood conditions. Another factor the court would consider is FF's compliance with the local health ordinances, although that evidence would not be conclusive. A final factor the court would consider is FF's investment in the property, which in this case seems substantial. In total, this presents a close case. The utility of a restaurant located close to a residential neighborhood is high. FF's conduct has been approved by local health codes, and only occasionally interferes with homeowners' use of their land. FF has invested in the restaurant by obtaining state of the art equipment, a factor that also indicates that this cooking cannot be performed in any less annoying or interfering manner. However, if the court were to determine that the hardships balanced in favor of the homeowners, they could obtain (under the strict minority view) an injunction against FF's cooking conduct that created the odor, and would further be entitled to damages for the interference with their use and enjoyment of their land. But given that this is a close call, and the high utility of FF's conduct to the residential community, homeowners would likely be required to compensate FF for the expense of relocating their operations.

Answer B to Question 1

1)

Assignment

Lease is valid. Under the Statue of Frauds, a contract such as a lease, that conveys an interest in land for a period longer than a year must be in writing and signed by the person to be charged. Therefore, in order for O to enforce the lease provisions against L, the lease between O and L must have been in writing and signed by L. We know that L and O entered into a 30-year lease. Therefore the SOF applies. Further, we know that the lease was in writing. However, it is unclear if the written lease was signed by L. If the lease is signed by L then the written terms of the lease are enforceable against L.

Assignment is valid. As a general matter, a lease is assignable unless the lease agreement specifically states that the lease cannot be assigned. Courts do not favor complete limitations on assignments so these provisions are interpreted narrowly. In this case, the term is not a complete limitation on assignment. The lease term permits assignment with the prior written consent of the owner. In this case, the limitation is in the written lease and allows for some flexibility. Therefore, upon reviewing the lease in an action between L and O, the limitation is [sic] in the written lease will be enforced by the court.

Sublease v. Assignment - An assignment occurs where a tenant assigns his rights and obligations to a subtenant for the entire term of the lease. A sublease occurs where the tenant transfers his rights and obligations to a subtenant for a portion of the term of the lease. The important difference between the two types of agreement is that the T has remaining rights to the property when an [sic] sublease occurs and does not have remaining rights when an assignment occurs. In this case, T entered into a lease agreement with FF for a period of 10 years. T had only occupied the property for 5 of the 30 years of the lease term. Therefore after the 10 years given to FF is [sic] completed, T will still have the rights under the lease for 15 more years. Therefore, T entered into a sublease with FF.

The lease agreement specifically stated that an assignment of the lease is prohibited without the consent of the landlord. However, the lease was silent as to subleases. The lease agreement in this matter involved commercial vendors likely with business experience. In such cases, the court would be unlikely to imply that the prohibition against assignments prohibited subletting. Therefore, because the agreement between L and FF is a sublease (as discussed above) the prohibition does not apply and L is not in breach of the lease agreement.

Estoppel - However, an L can be found to have approved an assignment/sublease where the owner accepts rent from the subtenant without objection. This is true even where the lease requires that the lease is in writing. In this case, the L accepted rent from

FF. Therefore, L is estopped froom alleging breach of the assignment provision by L. Essentially, by taking the rent, L approved the sublease.

Trespass

In order to bring an action for trespass, the landowner of the person with exclusive right to the land brings an action against a person who without permission physically invades the land. In this case, FF will assert that B is invading the land by erecting the Sunday business on the property. However, a landholder cannot bring an action for trespass where the alleged trespasser has a right to use the land under an easement. Therefore, in this case, if B has a right to use the land, FF cannot bring an action for trespass.

Express Easement - In this case, B and O entered into an express easement as part of the deed when B sold the property to O. An express easement occurs where the owners of the benefited land and the owners of the burdened land expressly agree in writing giving a property interest in the other. In this case, the deed expressly conveyed the right to use parking spaces 15-20 for a once a week shop. This is an express easement because it was recorded in the deed.

Easement in Gross/Easement Appurtenant - An easement in gross occurs where a person grants an easement to another landowner that is specific to the person and not specific to the land of that person. An easement appurtenant is an easement that is granted by the owner of one parcel of land to another land owner that specifically relates to the land. In this case, the property right owned by B and held by deed is an easement in gross. Generally, an easement in gross is not transferable by the holder. However, the easement burden will transfer.

Notice - An express easement is enforceable against future owners when it is properly recorded. In this case, O leased the land to L. L's lease included the right to spaces 1-20. L occupied the property for 5 years. Presumably, B operated his shop on 15-20 during this time period. Therefore, L had notice of the operation. L then sublet the property to FF. Apparently, FF took the lease without notice of the easement. However, because the easement is recorded, FF cannot sue for trespass.

Change the Locks

Duty to pay rent - When a sublease occurs, the original T remains obligated to pay the rent unless there is a written agreement with L stating otherwise. In this case, L remained obligated to pay rent to O even though there was a valid sublease. As a result of the sublease, FF was also liable to pay rent to O. In this case, FF refused to pay rent to O.

Constructive Eviction - Constructive eviction occurs where a (a) the tenant notifies the landlord of a condition on the property that constitutes a substantial interference with

tenants' use and enjoyment of the property, (b) the landlord does not fix the problem after notice, and (c) the tenant leaves the premises. A constructive eviction eliminates a tenant's obligation to pay rent. In this case, FF was not subject to a constructive eviction. FF did notified [sic] B of the problem; there was no indication that he notified either O or L. Second, FF did not leave the premises. Therefore, constructive eviction did not release FF from its obligation to pay rent.

Self-Help Eviction - A L cannot evict a T through self-help eviction. Self-help eviction occurs where the L takes action to limit the T's ability to access or use the property without going through the judicial process. In this case, FF was subject to eviction for failure to pay rent. O changed the locks and evicted the tenant without going through the legal process. O did not have the right to change the locks without going though the judicial process.

Nuisance

A nuisance occurs where a person/entity ("offender") uses their land in such a manner that unreasonably interferes with another landowner's ("injured") quiet enjoyment of their land. A nuisance is different from a trespass. A trespass involves the physical invasion of the property: a nuisance involves no invasion. There are two types of nuisance: Private and Public. A private nuisance is where the activities of the offender's use interferes with one or a small number of injured's specific use of their land. A public nuisance occurs where the offender's activities unreasonably interferes with the property rights of the general public. In order for a person to recover damages for a public nuisance, the injured must show actual damages. In this case, the homeowner's [sic] are complaining of a private nuisance because they are complaining about an injury that is occurring to a [sic] identifiable group of individuals. While the alleged conduct effects [sic] "many of the homeowners" the result is a private nuisance because it does not effect [sic] the public at large.

In order to state a claim for nuisance the injured must make two showings: (a) that the conduct of the offender interferes with some property right, and (b) that the conduct is unreasonable. An interference occurs where the offender uses their property in a manner that is an annoyance and would be considered offensive or burdensome to a reasonable person. In this case, the nuisance complained of is that on warm days offensive cooking odors are emitted from the FF business and those odors cause discomfort to many of the homeowners in the adjacent neighborhood. A nuisance will not be found if the injured is hypersensitive. In this case, we know that many of the homeowners are effected [sic]. Because there is a large group that find the conduct offensive, the injured in this case is not hypersensitive. Further, in order to determine whether or not this conduct constitutes an interference, it would be important to know how many "warm" days there are in a given year. If there are only a few, then this is not likely to be a nuisance. However, if there are more than a few days in which the homeowners are subjected to the offensive smell, it is likely that a court would find that a reasonable person would be offended by the smell of unpleasant odors involved in this case.

However, even where the offender's conduct is found to interfere with the property right of the injured, the court must determine if the interference is unreasonable. Unreasonableness is determined by balancing the hardships - balancing the interests and needs of the homeowners against the interests in having the business continue operating. During this process, the court will look at many factors including: whether the homeowners purchased their land at a discount because of its near location to the shopping center (coming to the nuisance), the offender's right to use his property as he wishes, the value of the business to the community including the number of employees, whether the nuisance can be abated by modifications of the offender's business, the length of time the offender has been in business, the possibility of using the property for some other purpose, the offender's investment in the business, etc.

In this case, certain factors indicate that the use by FF will be considered unreasonable. The offender has only been in business for a short period of time. It is unclear from the facts whether HO purchased at a discount based on nearness to the shopping center, but because the business is new the court is unlikely to find that HO came to the nuisance.

However, other factors indicate that the use by FF will not be considered unreasonable: FF has a right to use his property as he sees fit; FF has a right to use the shopping center property for a restaurant. Further, FF has put considerable investment into the operation as a FF establishment by purchasing top of the line equipment. This is not an unusual use for such a property. Further, it does not appear that the business could be abated. We know that FF is complying with all health ordinances and that the business is operated using the best equipment.

While the facts of this case will present a close call, the court is unlikely to find that there is a nuisance that should be abated. This is particularly true if there are a few number of warm days. The interest in allow [sic] FF to operate its business outweighs the interest of the homeowners for the reasons discussed above. As such, the court will not grant an injunction. However, if the court finds that there is some level of nuisance, the court may require FF to pay some measure of damages to HO to compensate them for their injuries arising from their nuisance.

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.

Question 1

Larry leased in writing to Tanya a four-room office suite at a rent of $500 payable monthly in advance. The lease commenced on July 1, 2006. The lease required Larry to provide essential services to Tanya's suite. The suite was located on the 12th floor of a new 20-story office building.

In November Larry failed to provide essential services to Tanya's suite on several occasions. Elevator service and running water were interrupted once; heating was interrupted twice; and electrical service was interrupted on three occasions. These services were interrupted for periods of time lasting from one day to one week. On December 5, the heat, electrical and running water services were interrupted and not restored until December 12. In each instance Tanya immediately complained to Larry, who told Tanya that he was aware of the problems and was doing all he could to repair them.

On December 12, Tanya orally told Larry that she was terminating her lease on February 28, 2007 because the constant interruptions of services made it impossible for her to conduct her business. She picked the February 28 termination date to give herself ample opportunity to locate alternative office space.

Tanya vacated the suite on February 28 even though between December 12 and February 28 there were no longer any problems with the leased premises.

Larry did not attempt to relet Tanya's vacant suite until April 15. He found a tenant to lease the suite commencing on May 1 at a rent of $500 payable monthly in advance. On May 1, Larry brought suit against Tanya to recover rent for the months of March and April.

On what theory could Larry reasonably assert a claim to recover rent from Tanya for March and April and what defenses could Tanya reasonably assert against Larry's claim for rent? Discuss

Answer A to Question 1

Larry v. Tanya

In the lawsuit between Larry and Tanya regarding their lease of the office building that commenced on July 1, 2006, the following are the salient points that Larry will assert and Tanya will defend.

First, the lease was a tenancy for years. Second, there were no Breach of Covenants to give rise to a right of termination. Third, the termination was ineffective because it was not in writing.

Each of these points and defenses are addressed in detail.

I. The Tenancy

The first issue is to determine the tenancy created.

Tenancy by Years

Under this type of tenancy there is a fixed date of termination with no notice required to end the arrangement. It expires at a specified time.

In this case, the lease between Larry and Tanya simply stated that a rent was to be paid monthly in advance. There is no mention of a fixed date of termination.

Therefore, a tenancy by years was not created.

Periodic Tenancy

A periodic tenancy is one that continues for a specific period – week/week; month/month – until it is effectively terminated.

Termination requires written notice of at least one month prior in case of a month-month lease and the lease must end at a natural lease period.

In this case, a periodic tenancy was created since the lease called for payment of a monthly rent of $500 in advance and did not have a fixed termination date.

Therefore, the lease is a periodic tenancy.

II. Termination

The next issue is to determine whether the termination of the lease by Tanya was effective on February 28. If it was then she will not be liable for rent for March and April.

Tanya can assert termination based on 1.) Valid notice, 2.) Breach of Covenants, 3.) Constructive education.

Valid Notice

To terminate a month-month lease valid notice of at least one month is required in writing. The lease must also end at a natural lease period.

In this case, Tanya orally told Larry she was terminating her lease on February 28. She did this on December 12. While the length of the notice was sufficient because it was given at least a month prior to the termination, Larry will argue that it was effective since it was not given in writing.

As such, Larry will argue that since the notice was ineffective to terminate the lease Tanya could not have moved out on February 28 and remains liable for the rent of March and April.

In conclusion, there was no valid notice.

Surrender

Surrender occurs when a tenant abandons the tenancy and the landlord takes possession and control of the premises.

However, a landlord may move in and attempt to relet the premises on behalf of the tenant, which will not result in a surrender.

In this case, Tanya will argue that Larry accepted surrender due to his delayed attempt in finding a substitute tenant. Larry did not move in and try to relet the premises immediately, but let six weeks elapse, after which he decided to relet.

However, Larry will argue that he did nothing to accept surrender since he did not exercise control enough and was simply reletting on Tanya's behalf.

In conclusion, surrender will not likely work.

Constructive Eviction

Constructive eviction occurs when:

1. there is a condition on the premise that makes it uninhabitable.
2. the landlord knows or should have known about the condition.
3. the landlord fails to remedy the condition.
4. the tenant moves out within a reasonable time.

Conditions

In this case, Tanya will point out to the following conditions that made habiting the premises unreasonable.

First, interruption of water. This is an essential service that Larry agreed to provide that was interrupted frequently. This happened once in November and during the week between December 5 and December 12 the interruption lasted for one entire week.

Second, interruption of elevator service. Tanya is on the 12th floor of a 20 story office building which makes the elevator service essential to the lease since trekking twelve floors is an unreasonable condition in a commercial building.

Third, interruption of heat and electricity. These services were interrupted frequently and once for as long as one whole week.

These constant interruptions of services made it impossible for Tanya to conduct her business.

Larry's Knowledge

Additionally, Tanya informed Larry immediately about the conditions and he admitted he was aware about them and doing everything he could to repair.

Larry Remedied the Situation?

However, Larry will argue that he fixed the problems and therefore Tanya no longer had a claim to constructive eviction. Ever since December 12 up to February 28, for an entire six weeks there were no longer any problems in the leased premises.

Did Tanya move out in a reasonable amount of time?

Furthermore, Larry will point out that Tanya did not move out within a reasonable time since she waited six weeks.

She gave herself this amount of time to give herself ample opportunity to locate alternative office space.

This behavior is contrary to the contention that the premises were in such bad condition and that Tanya moved out within a reasonable time.

Implied Warranty of Habitability

This doctrine only applies to residential leases. Under this doctrine a landlord warrants that the premises are suitable for human habitation.

However, the lease between Tanya and Larry is for an office suite, which is commercial in nature, and as such this doctrine is inapplicable.

Breach of Covenants – Right to Termination of Lease

Tanya could also possibly terminate the lease if the breach of any covenants gives her the right to do so under the terms of the lease.

Usually, the covenants between the landlord and tenant are independent, making the breach by one giving rise simply to damages, and not a right to terminate.

However, in this case, Larry breached his covenant to provide essential services, by failing to supply running water, heat, electricity for a period as long as one week. Therefore, under the terms of the lease Tanya may have a right to terminate.

III. Damages

Finally, if Tanya is unsuccessful in arguing that she had a right to terminate the lease she will try and lessen her damages by pointing that Larry did not mitigate his damages.

A landlord has a duty to mitigate damages by promptly reletting the premises.

In this case, Larry knew that Tanya was going to be gone by February 28. However, he did nothing to relet the premises until April 15, which is a duration of six weeks.

It only took Larry two weeks to find a new tenant when he decided to relet.

If he had done so earlier he could have relet the premises for April.

Therefore, Tanya should not be liable for rent for April.

Answer B to Question 1

1. Larry's claim against Tanya for March and April rent

Rental Agreement

Larry and Tanya entered into a written lease agreement. A periodic tenancy is a lease agreement in which the tenancy is for periods of time as determined by the cycle of payments. A periodic tenancy can be created expressly, by written agreement, or by implication. Moreover, a periodic tenancy can be terminated by providing the landlord with notice of intent to terminate the lease, in which the notice is given to the landlord at least one period in advance.

Here, Larry and Tanya entered into a lease agreement for a month-to-month lease, with rent payable at $500 monthly. Moreover, although the landlord need not assume general repairs for the tenancy space, here Larry agreed to provide essential services to Tanya's suite. This lease agreement is valid.

Tanya's proper termination?

To terminate a periodic tenancy, the tenant must provide a reasonable period of notice, at least one period in advance. The termination notice must be in writing. Larry argues that Tanya's attempt to terminate the lease was improper because she orally terminated the lease, rather than provided written notice of her intent to terminate the lease. As a result, if the termination notice should have been in writing, Tanya's termination was improper.

Failure to pay rent – Abandonment

Larry will argue that he is entitled to the rent. A tenant has a duty to pay rent. Where a tenant fails to pay rent and abandons the premises, a landlord my treat the abandonment as a subrent, relet and sue the tenant for damages, and in some minority jurisdictions can ignore the abandonment and sue for damages without attempting to relet the apartment. Here, Tanya failed to pay the rent for the months of March and April. Therefore, Larry will claim that Tanya breached the lease agreement.

2. Tanya's Defenses

Implied warranty of habitability

Tanya may first attempt to argue that the landlord has breached the implied warranty of habitability. The implied warranty of habitability warrants that the premises are suitable for human habitation and basic needs. Where this warranty has been breached, the tenant can choose to move out, repair and deduct the rent from future payments, remain on the premises and sue for damages, or reduce the rent payments. However, the implied warranty of habitability has been held to apply only to residential leaseholds. Here, Tanya is renting a four-room office suite on a 20-story office building. As a result,

because this is clearly not a residential lease but instead a commercial lease, this defense will not resonate with the courts.

Implied warranty of quiet enjoyment

Constructive Eviction

Tanya will argue that Larry breached the implied warranty of quiet enjoyment. The implied warranty of quiet enjoyment is an implied warranty that the landlord will not interfere unreasonably with the tenant's use and possession of the premises. This warranty can be breached by both an actual and a constructive eviction. To make a claim for a constructive eviction, and for this warranty to be breached, there must be substantial interference caused by the landlord (or of which the landlord had noticed but failed to act), the tenant must provide notice of the interference and problems, and then the tenant must move out immediately. Where this warranty is breached and a constructive eviction has occurred, the tenant may leave immediately and terminate all future payments of rent.

Here, Larry's failure likely reached to the level of substantial interference with Tanya's use. Tanya for many days did not have running water, clearly an essential service. In fact, this occurred at least more than once and occurred for periods of up to one week. Moreover, Tanya was deprived of heat during the winter months of November and December, making it difficult to use the premises without Tanya making substantial sacrifices for warmth. The electrical services were interrupted on three occasions, sometimes lasting for a week: in a commercial office building, failure to have electrical services clearly makes running an office or other commercial space difficult. She would likely have been unable to run the computers, printers, and other important office equipment necessary for the functioning of a viable office environment. As a result, it is likely that there was substantial interference with Tanya's use and possession. Larry may attempt to point out that Tanya did not leave the apartment until months after these problems, suggesting that Tanya was okay with the interference and that it did not disrupt her business substantially. Nevertheless, on this prong, it is clear that weeks without heat and services are clearly substantial interference.

Here also Tanya made complaints to Larry. They were timely: she made them immediately. And she made them in each instance after each particular problem. Larry was clearly on notice. Although Larry will attempt to claim that he "was doing all he could to repair them," and that he was therefore not responsible for the failures, the facts nevertheless suggest (as in the paragraph before) that Larry's failure to take action or improve the situation resulted in a substantial interference.

As mentioned above, the tenant must move out immediately. Here, Larry may attempt to claim that Tanya did not move out within a fast enough period of time. Tanya was apparently fed up with the failures to provide essential services on December 12, yet she failed to leave her office suite until February 28, 2007. This suggests that perhaps the interference was not that substantial. Moreover, it also suggests that there was not indeed a constructive eviction. However, Tanya will point to the need to find alternative office

space. She will argue that, although there was substantial interference with her ability to use her commercial space, still having some space was better than not having any at all. Nevertheless, Larry may have a good claim that this was not indeed a constructive eviction because this element was not met. Tanya did not leave her apartment immediately, and therefore cannot claim a constructive eviction.

As a result, given Tanya's failure to move out immediately, a court may find that Tanya cannot defend that she was constructively evicted.

Breach of Contract

Tanya will claim that by failing to provide essential services, Larry breached his lease agreement, which is a breach of contract. A landlord and his tenant are in contractual privity. Although a landlord at common law did not have duty to repair the leased office space, a landlord can specifically contract to provide such repairs. Where the landlord provides such repairs, he will be liable for any unreasonable failures to do so. Where the express promise to repair does not occur, the failure will be deemed a breach, especially where the tenant to receive her benefit of the bargain.

Here, Larry contractually agreed in the lease agreement to provide essential services to Tanya's suite. Larry failed to provide essential services as required. Given that Tanya was on the 12th floor of the office building, clearly elevator service would be essential to running an office in a commercial space. Moreover, heat (especially in the winter months of December and November) and running water are essential services, as they are necessary for mere basic human habitation. These failures occurred regularly and for extensive periods of time. As a result, Tanya will be able to claim a breach of the contract.

Independent Conditions?

However, promises in the lease agreement are deemed to be independent. As a result, a breach of one condition generally does not relieve the tenant or landlord of the other obligations in the rental agreement. Here, Larry will argue that although he may have failed to provide some of the essential services, this does not in and of itself relieve Tanya of her obligation to pay rent. Instead, Larry will argue, Tanya had a responsibility to continue to pay rent and sue for any damages she may have suffered.
If Larry is successful on this argument, and indeed Tanya should have continued to pay rent, then Tanya will claim that Larry failed to mitigate his damages.

Failure to Mitigate

Tanya will claim that, even if she had a duty to continue to pay rent, Larry failed to mitigate his damages. Damages for failure to pay rent will be awarded where the damages are foreseeable, causal, unavoidable, and certain. Unavoidable requires that the non-breaching party take reasonable steps to mitigate any losses he may have suffered. Where a person has abandoned the premises and fails to pay rent, the landlord must

attempt to relet the apartment. Then, it will be appropriate for the landlord to sue for the difference between the initial lease payments and the payments made by the reletter, as well as any incidental damages.

Here, Tanya will claim that Larry failed to take reasonable steps to mitigate. Although Larry was aware on December 12 that he would need to find a new tenant on February 28 – more than a month and a half away – Larry still failed to attempt to relet Tanya's vacant suite until mid-April. Therefore, although Larry had substantial lead-time, he waited more than a month after Tanya vacated to even attempt to find someone else. Moreover, the second he attempted to find someone else, he was able to, as evidenced by the fact that between April 15 and May 1, he had already found a new occupant. Given the immediacy with which he was able to find a new tenant, and given the fact that he also had a month and a half of lead time before Tanya moved out, Tanya will win on her claim that Larry failed to mitigate his damages.

As a result, even if Tanya is liable for some of the rent on the arguments above, Tanya will not be required to pay the full rental price.

ESSAY QUESTIONS AND SELECTED ANSWERS
JULY 2008
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2008 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.

Question 5

Ann, Betty, and Celia purchased a 3-bedroom condominium unit in which they resided. Each paid one-third of the purchase price. They took title as "joint tenants, with right of survivorship."

After a dispute, Betty moved out. Ann and Celia then each executed a separate deed by which each conveyed her respective interest in the condominium unit to Ed. Each deed recited that the conveyance was "in fee, reserving a life estate to the grantor." Ann recorded her deed and delivered the original deed to Ed. Celia also recorded her deed and left the original deed with Ann in a sealed envelope with written instructions: "This envelope contains papers that are to be delivered to me on demand or in the event of my death then to be delivered to Ed." Celia recorded the deed solely to protect her life estate interest. Ann, without Celia's knowledge or authorization, mailed a copy of Celia's deed to Ed.

Subsequently, Ann and Celia were killed in a car accident. Betty then moved back into the condominium unit. She rented out one bedroom to a tenant and used the other bedroom to run a computer business. Betty paid all costs of necessary repairs to maintain the unit.

Ed commenced an action against Betty, demanding a share of the rent she has collected. He also demanded that she pay rent for her use of the premises.

Betty cross-complained against Ed, demanding that he contribute for his share of the costs of necessary repairs to maintain the unit.

1. What are the property interests of Betty and Ed, if any, in the condominium unit? Discuss.

2. What relief, if any, may Ed obtain on his claims against Betty for past due rent for her use of the condominium unit and for a share of the rent paid by the tenant? Discuss.

3. What relief, if any, may Betty obtain on her claim against Ed for contribution for the costs of maintaining the condominium unit? Discuss.

Answer A to Question 5

Betty and Ed's Interests

Ann, Betty, and Celia originally took title to the condo as "joint tenants with right of survivorship." A joint tenancy is characterized by the four unities of time, title, possession, and interest, and expressly stating the right of survivorship. The title that they all took when purchasing the unit together satisfies the four unities (they all took by the same instrument, as joint tenants, paid 1/3 of the purchase price, and have the right to possess) and expressly states that a joint tenancy with a right to survivorship is created. Hence, A, B, and C all owned an undivided interest in the property, were entitled to possess it, and if any of them died, the survivors were entitled to succeed to the decedent's interest, unless they severed the joint tenancy.

B's Interest

Joint tenants all have an equal right to possess the whole property, but they may choose not to exercise that right. B moved out after a dispute. Hence, although B is out of possession, that does not alter her interest or sever the joint tenancy as to her.

E's Interest Taken from A

A conveyed her interest to E by a deed that conveyed to A a life estate followed by a remainder to E in fee simple. A recorded this deed and delivered to E. An inter vivos conveyance will sever a joint tenancy because it destroys the unities of time and title, resulting in the grantee holding as a tenant in common with the others. Hence, if A's conveyance was valid, A severed her 1/3 interest and gave it to E as a tenant in common. A deed is valid if it describes the interest conveyed and is validly delivered and accepted. Delivery is a matter of the grantor's intent. Recordation gives rise to presumption of intent to presently transfer an interest, and acceptance is generally presumed absent some action by the grantee to reject delivery. Here, by conveying her interest in the condominium unit to E in a deed that she recorded, A had the intent to transfer, and E received the deed and did not reject it. Hence, there was a valid delivery and acceptance and A's transfer of the remainder after her life estate to E was valid. When A died, Ed's remainder vested and he now has possession of his 1/3 interest as a tenant in common.

E's or B's Interest Taken from C

C executed a deed like A did to give herself a life estate and the remainder to E. If this effectuated a valid inter vivos conveyance, then C's interest is also severed from the joint tenancy and C's 1/3 is held by C for life, remainder to E as a tenant in common with A's life estate, remainder to E, and B. If the inter vivos conveyance was invalid, however, then C's interest was not severed and C remained holding in joint tenancy with B up until C's death. In that case, B takes the entire 2/3 held by B and C in joint tenancy. The issue, then, is whether there was an inter vivos conveyance by C. If there was no effective conveyance, B takes as the survivorship of B and C, but if there was an effective inter vivos conveyance that severed the joint tenancy, E takes C's 1/3 upon C's death because C's death extinguishes C's life estate and the remainder vests.

A conveyance is valid if the deed accurately describes the property, is delivered and accepted.

The deed describes that E is to take the remainder in the condo (the condo is known and provides a good lead), presumably, so the deed itself describes enough to be effective if validly delivered. Delivery is a matter of grantor's intent. Here, it is unclear what C intended. When a party records a deed, intent to deliver is presumed, but here, C recorded solely to protect her life estate interest rather than to convey. However, C would have no need to protect her life estate interest if she did not intend to transfer the remainder to E, so a court might well infer that she intended the delivery to be immediately effective without conditions. Acceptance is presumed absent some action indicating rejection. When C received the deed from A, he did not reject it, so C would be deemed to have accepted, making the conveyance effective and severing the joint tenancy as between C and B. Hence, C will argue there was intent to deliver and so delivery and acceptance, making the inter vivos conveyance good. On the other hand, B will argue there was no intent because C merely recorded to keep her life estate and that A's act of sending the papers without C's consent could not create present intent to transfer, making the conveyance only meant to be a testamentary transfer which would fail because C has no interest to pass by will (joint tenancy interests are not devisable or descendible).

Further, C gave the deed to Ann with instructions that the papers were to be delivered to Ed on the event of her death, or returned to her on demand. This action evidences a different intent than a present transfer. A transfer of a deed to a third party for a donative transfer without instruction is generally deemed to be an effective delivery and present intent to transfer. But when the grantor gives to a third party rather than the grantee, written instructions not on the face of the deed itself are valid to create a conditional delivery. Further, if the grantor expressly reserves for herself the right to revoke, such a reservation of interest indicates lack of intent to presently transfer. Additionally, if there are instructions only to deliver upon death, that does not evidence present intent to transfer and instead evidences a will substitute. Here, C reserved a right to revoke. B will argue this evidences a lack of present intent to deliver. Further, C gave the deed to a third party (A) with instructions not to deliver until C's death. On these facts, B will argue that there was no present intent to deliver and only an intent to make a testamentary transfer because of the condition of delivery upon death (which is valid because, although not in the face of the deed, it was contained in instructions to a third party who was to deliver the deed upon happening of the condition). On the other hand, C will argue that once a donative transfer is made and delivered to a third party to deliver upon death, many jurisdictions consider this irrevocable (even if grantor tries to revoke) and therefore, effectuates a present transfer.

Ultimately, several actions indicate C's lack of intent to presently transfer an interest, such as her instructing A not to give the deed to E until her death. However, C did record the deed to preserve her life estate, indicating a present intent to at least have the remainder transferred to E, and E did receive the deed and accept it without instructions or conditions. Although it is close, a court will probably find that C intended

to make a present, inter vivos transfer; the recordation of the deed was sufficient evidence of intent, and that therefore E succeeds to C's 1/3 as the remainderman.

Hence, E owns A and C's 1/3, giving his 2/3 held as a tenant in common with B (if the court doesn't find intent to make an inter vivos transfer, however, then B will take as the survivor and will have 2/3 with C's 1/3 as tenants in common).

Ed's relief against Betty

Cotenants have a right to possession of the premises, and are not responsible to each other for rent. However, when a cotenant rents out the property to a third person, she must account for the rents to the other cotenants. Additionally, when a cotenant allows the property to earn profits from a third person, the cotenant must account.

Here, B was using one room for her own computer business, and rented out the other room to a tenant. B, as a 1/3 (or 2/3) owner of the condo as a tenant in common with E is entitled to use the property to run her own business, and is not responsible to E for rents. E might argue that use of the business creates profits, and a tenant is responsible to her cotenants for accounting for profits earned from third parties, but here, because any profits come to B as a result of her running her own business rather than allowing another third party to run a business out of the unit, she is not responsible to E for rents or profits for use of the room as an office.

On the other hand, B rented out one room to a tenant. Because that constitutes renting to a third party, B is liable to E to account for his share of the rents paid (either 1/3 or 2/3, depending on whether C's deed was delivered).

Betty's relief against Ed

An in possession cotenant has an obligation to keep the premises in good repair. The cotenant may not commit voluntary, permissive, or ameliorative waste. The cotenant is only entitled to contribution for repairs that are necessary if she notifies the other cotenants of the need for the repairs, and she is entitled to contribution for improvements only upon sale (and if the improvements decreased rather than increased the value of the property, she bears 100% of the loss).

Here, Betty is responsible for ensuring that necessary repairs were made so she was not liable for permissive waste, and she is entitled to contribution from E if the repairs were necessary and she notified him of the need for repairs in advance. Here, the repairs Betty made apparently were necessary, but it is unclear whether she notified E of the need to make them in advance. If she did, then E must contribute his share (either 1/3, or 2/3, as described above).

Answer B to Question 5

1. **Property Interests of Betty and Ed**

Betty has 2/3 interest in the condominium as a tenant in common, and Ed has a 1/3 interest.

Joint Tenancy

Ann ("A"), Betty ("B"), and Celia ("C") originally purchased the condominium as "joint tenants" because they took title at the same time and by the same instrument as "joint tenants with rights of survivorship." The "four unities" appear to be present. A joint tenancy gives each tenant an undivided interest in the property with a right of survivorship, which means that if one of the other joint tenants dies, that tenant's interest automatically becomes part of the surviving tenants' interests.

The joint tenancy, however, may be severed when one of the tenants conveys her interest to another party. That other party then takes an interest in the property as a tenant in common.

Tenants in Common

While A and C were originally joint tenants, A and C severed the joint tenancy by conveying their interests in the condominium to Ed ("E"). Generally, when a joint tenant conveys her interest in a joint tenancy to another party, that other party takes the property as a tenant in common. In this case, however, E took the property as a remainderman.

Life Estates and Remainders

Both A and C reserved for themselves life estates in the condominium. They did this by deeding the property interest to E "in fee, reserving a life estate for the grantor." E now has a vested remainder in fee simple, and A and C have life estates. Therefore, while E has a property interest in the condominium, his interest does not become possessory until the death of A or C -- i.e., at the termination of their life estates.

Effect of Deaths of A and C

As noted above, when a joint tenant dies, the surviving joint tenants automatically take her interest. A joint tenancy interest may not be devised by will. E will argue that when A and C died, their life estates were terminated, and that E as the remainderman now has an undivided 2/3 interest in the condominium, while B has the other 1/3 interest.

However, because the attempted [conveyance] from C to E was ineffective (as discussed below), C did not sever the joint tenancy vis-à-vis B. As a result, when C died, her 1/3 interest automatically passed to B, the surviving joint. Thus, B has a 2/3 interest, and E only has a 1/3 interest.

Deed Formalities and Delivery

To be valid, a deed must be both (1) executed, and (2) delivered. If either requirement is not met, the property interest is not conveyed from the grantor to the grantee.

Delivery is generally regarded as solely a question of the grantor's intent. Courts have held that the delivery of a deed in which the grantor reserves a life estate is effective, even though the grantee's interest does not immediately become possessory.

In this case, A executed the deed, and both recorded and delivered the deed to E. Thus, the deed and conveyance from A to E is valid. C executed and recorded the deed. However, C did not physically deliver the deed to E. Instead, she left the original deed in an envelope with A.

Recording a deed creates a presumption of delivery. Thus, E may argue that by recording the deed, the delivery requirement is met. However, B will argue that the presumption in this case may be rebutted. While it is true C recorded the deed, she did this to protect her life estate interest, not to satisfy the delivery requirement. Furthermore, the deed was in a sealed envelope with written instructions, providing that the papers in the envelope be delivered to A on her request. These instructions suggest that C did not intend to deliver the deed to E. Instead, she wanted to have the power to take the deed back at any point during her life.

E will argue that the instructions also provided that in the event of C's death, the deed was to be delivered to E. The problem with this argument is that delivery is only effective if there is a present intent to deliver. An intent to deliver a deed in the future is not effective. Alternatively, E may argue that the written instructions are a last will and testament, devising C's property interest to E. However, there is no indication that the Statute of Wills has been complied with. Therefore, there was no delivery to E, and C retained her interest in the condominium at her death.

2. **Relief Ed May Obtain for Past Rent Due and Rent by Tenant**

As a general rule, one cotenant does not have to share profits earned from the property with other cotenants, unless there is an agreement to the contrary. However, cotenants are obligated to share profits that they receive by renting the property to third parties.

In this case, B rented one bedroom to a third party, and used another bedroom to run a computer business. Because B rented the bedroom to a third party, E has a right to demand an accounting for his share of the profits earned from the third-party rent.

On the other hand, while B is using one of the bedrooms to run a computer business. E has no right to demand a share of the rent for the use of the bedroom as a business office. This is true even though B is clearly saving money by not having to lease commercial space from someone else. B is also not obligated to pay rent to E for her personal use of the condominium.

3**. Relief Betty May Obtain for Contribution of Maintenance Costs**

Cotenants are required to make contributions for necessary repairs, taxes, and mortgage payments (if the cotenant signed the note). Cotenants are not required to make contributions for non-necessary repair or improvements, although there may be a right of reimbursement upon partition. In this case, B made necessary repairs to

maintain the unit. As a result, B is entitled to contribution from E for his share of the cost of repair.

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ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2010
CALIFORNIA BAR EXAMINATION

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Question 5

Paula has owned and farmed a parcel consisting of 100 acres for many years. Last year, in compliance with County regulations, she expended a substantial amount of money in determining the economic feasibility of developing 10 acres of the parcel that border the shore of a small lake. She recently submitted a development application to County seeking to construct 30 homes on those 10 acres. County then determined that the 10 acres constitute protected wetlands that, under a state law enacted recently, had to be left undeveloped to protect certain endangered species. On that basis, County denied the development application.

Paula brought an action claiming that County's denial of the development application constituted a regulatory taking in violation of the U.S. Constitution. It was stipulated that the 10 acres are worth $4,000,000 if development is permitted and $200,000 if it is not.

The trial court ruled that County's denial of Paula's development application did not constitute either (1) a total or (2) a partial taking.

Did the trial court correctly rule that County's denial of Paula's development application did not constitute:

1. A total taking? Discuss.

2. A partial taking? Discuss.

Answer A to Question 5

1. Did the trial court correctly rule that County's denial of Paula's development application did not constitute a total taking?

The Fifth Amendment of the Constitution prohibits the government from taking private property for public use without just compensation.

Taking

There are two types of takings: permanent physical occupation and regulatory takings. The former is not at issue because Paula's complaint contends the County is liable for a regulatory taking.

A regulatory taking is considered a "per se" taking if it deprives the owner of 100% of all economic viable use of the owner's property. Here, Paula owned 100 acres and 10 of those acres bordered a small lake in which she [was] seeking to develop to construct 30 homes thereon. However, the County denied Paula's application to develop the 10 acres on the basis that the 10 acres constituted protected wetlands. Thus, Paula owned 100 acres but only 10 of it was denied development. Because the County did not deny development of the entire 100 acres owned by Paula (rather, the County only denied development of 10 acres), Paula was not deprived 100% of all economically viable use of her property.

Denominator Problem

The US Supreme Court has recognized an inherent denominator problem regarding takings. As applied to this case, if Paula only owned 10 acres and was denied development of that entire 10 acres, she would prevail against the County in a per se taking claim. However, because Paula owns (and has owned "for many years") 100 acres, she is unable to prevail in a per se taking claim since the County did not deprive her of 100% economically viable use of all her property.

However, even if Paula only owned 10 acres in the context of the state law depriving her development of that 10 acres, Paula would still not be deprived of 100% of all economically viable use of her property because the parties have stipulated that her land is worth $200,000 notwithstanding the prohibition on development. Thus, no total taking has occurred.

Private Property

The 5th Amendment is implicated here because Paula's property is private property.

Public Use

The 5th Amendment is implicated here because regulatory takings are generally considered to be public use. The US Supreme Court in Kelo defined public use to include any government action taken to serve any public purpose. Here, the state law required 10 acres of Paula's land to be undeveloped to protect certain endangered species. Because protecting certain endangered species serves a public purpose, the government may lawfully take private property so long as it meets other requirements under the 5th Amendment.

Just Compensation

If the court determines that a total taking has occurred, the government is liable to compensate Paula justly. "Just compensation" is generally measured by the fair market value of a piece of property or the value as stipulated by the parties. The value of the property specific to Paula is irrelevant.

The parties here have stipulated that Paula's land is worth $200,000 if development is not permitted. Thus, Paula would be awarded $200,000 in the event that a total taking has occurred. Paula may argue she should be entitled to $4,000,000 since that's what her land would be worth had she been able to develop her property. However, "just compensation" will likely not be determined by the court to be $4,000,000 because Paul lacks a vested right to develop.

Vested Rights

A private property owner has a vested right to develop when a government body has specifically approved, by individualized action, the development of a particular piece of property.

Here, although Paula has expended a substantial amount of expenditures in determining the feasibility for developing the 10 acres, she nonetheless has no "vested" right to develop because she lacks the requisite government approval. There are no facts indicating the government issued Paula any type of building permit or other individualized action specific to her property that would vest her rights to develop. Thus, because she has no vested right to develop the 10 acres, the value of the 10 acres is tantamount to its value as undeveloped wetlands, i.e., $200,000.

Conclusion

Although Paula's property is private property and the state law is pursuant to public use, the trial court's decision that a total taking has not occurred is correct because Paula was not deprived of 100% of all economic viable use of the owner's property.

2. Did the trial court correctly rule that County's denial of Paula's development application did not constitute a partial taking?

Taking

A regulatory taking does not have to be a "per se" taking to implicate the 5th Amendment. A regulatory taking is also considered a "taking" under the 5th Amendment if it does not pass the Penn Central Balancing Test. In the Penn Central case, the U.S. Supreme Court analyzed three factors in determining whether a "taking" has occurred: (1) the nature of the government action, (2) the private property owner's reasonable investment-backed expectations, and (3) the level of diminution in the owner's private property value.

1. Nature of Government Action

Here, a state law was enacted to protect wetlands to protect certain endangered species. It was not enacted to punish Paula. And it's probably safe to presume the state law is also applicable [to] other properties alongside the lake and that it was not similar in form to that of "spot zoning" – where the government singles out a piece of property and changes its use in a way that's distinct from other adjacent properties. Because the nature of the state law was to protect endangered species and not to single out Paula's property, this factor weighs in favor of the trial court's decision that a partial taking has not occurred.

2. Private Property Owner's Reasonable Investment-backed Expectations

Last year, Paula expended a "substantial amount" of money in determining the economic feasibility of developing 10 acres of the parcel. Thus, she invested a considerable amount in her expectation to develop eth property. The County may argue, however, that Paula's level of investment was not reasonable under the circumstances because she had no "vested right" (see heading Vested Rights under question 1 above) to develop her 10 acres. The County would argue she should not have spent a substantial amount at a point in time when the probability of her being able to develop her property was so speculative.

However, the facts state Paula did the economic feasibility study "in compliance" with County regulations. Thus, Paula has a strong argument that her investment was reasonable because the County required her to do an economic feasibility study. On balance, Paula's expenditure of a "substantial amount" was probably reasonable under the circumstances.

3. Level of Diminution in Value

Here, the parties stipulated that the 10 acres are worth $4,000,000 if development is permitted and $200,000 if it is not. Thus, Paula would likely argue that the level of diminution in the value of her property is great because of the difference in what her

property would be worth if the state did not prohibit her from developing her property. However, the $4,000,000 figure is a "would be" value and not an "as is" value. The court may weigh this factor differently if it was the case that Paula owned property worth $4,000,000 and, due to a state law, it is now worth $200,000. However, that is not the case. Here, Paula's property is worth $200,000 as it sits right now, undeveloped. Because Paula's property has not diminished in value, this factor weighs heavily in favor of the trial court's decision that a partial taking has not occurred.

Denominator Problem

A court's review of the trial court's decision that a partial taking has not occurred would have to grapple with the same denominator issue (as analyzed above and repeated below) as they would regarding the trial court's decision that a total taking has occurred.

The US Supreme Court has recognized an inherent denominator problem regarding takings. As applied to this case, if Paula only owned 10 acres and was denied development of that entire 10 acres, she would prevail against the County in a per se taking claim. However, because Paula owns (and has owned "for many years") 100 acres, she is unable to prevail in a per se taking claim since the County did not deprive her of 100% economically viable use of all her property.

However, even if Paula only owned 10 acres in the context of the state law depriving her development of that 10 acres, Paula would still not be deprived of 100% of all economically viable use of her property because the parties have stipulated that her land is worth $200,000 notwithstanding the prohibition on development. Thus, no total taking has occurred.

Private Property

The 5th Amendment is implicated here because Paula's property is private property.

Public Use

The 5th Amendment is implicated here because regulatory takings are generally considered to be public use. The US Supreme Court in Kelo defined public use to include any government action taken to serve any public purpose. Here, the state law required 10 acres of Paula's land to be undeveloped to protect certain endangered species. Because protecting certain endangered species serves a public purpose, the government may lawfully take private property so long as it meets other requirements under the 5th Amendment.

Just Compensation

If the court determines that a total taking has occurred, the government is liable to compensate Paula justly. "Just compensation" is generally measured by the fair market value of a piece of property or the value as stipulated by the parties. The value of the property specific to Paula is irrelevant.

The parties here have stipulated that Paula's land is worth $200,000 if development is not permitted. Thus, Paula would be awarded $200,000 in the event that a total taking has occurred. Paula may argue she should be entitled to $4,000,000 since that's what her land would be worth had she been able to develop her property. However, "just compensation" will likely not be determined by the court to be $4,000,000 because Paula lacks a vested right to develop.

Conclusion

Although Paula's property is private property and the state law is pursuant to public use, the trial court's decision that a partial taking has not occurred is correct because the factors under the Penn Central balancing test weigh in favor of the trial court's decision.

Answer B to Question 5

1. DID THE TRIAL COURT CORRECTLY RULE THAT COUNTY'S DENIAL OF PAULA'S DEVELOPMENT APPLICATION DID NOT CONSTITUTE:

A. A TOTAL TAKING?

TAKINGS CLAUSE

The 5th Amendment of the US Constitution states that the government may not take private land for public use without paying just compensation. Through the Doctrine of Selective Incorporation, this is made applicable to the states via the Due Process Clause of the 14th Amendment. In this case since the County is a state municipality Paula will challenge under the 14th Amendment clause.

A taking can either be physical, where the government physically occupies the land, or a taking can be regulatory, where a government regulation renders the land economically unviable. In either case, if there is indeed a "taking" and the taking is for public use the government will be required to pay just compensation.

PHYSICAL TAKING

As mentioned above, a physical taking occurs when the government physically occupies the land either in part or in total. If there is actually any "physical" occupation in any way, it will constitute an official taking. If the taking is for public use the government will be required to pay just compensation.

In this case the only governmental action is a regulatory statute preventing Paula from developing the 10 acres. There is no actual physical occupation, but rather a regulation affecting Paula's use.

Therefore, there is no physical taking.

REGULATORY TAKING-TOTAL

A regulatory taking occurs when a government regulation renders property economically unviable. For there to be a taking under the takings clause through, and unlike a physical taking, the regulatory taking must leave no economically viable use of the property.

Here the court concluded that there was no total regulatory taking of Paula's property when they rejected her application. Let's explore this further to see if indeed there was a total taking.

Paula owns 100 acres of land and had done so for many years. Paula has farmed the land, but the facts don't state how much of the land she actually farms. Presumably Paul also lives on the farm as well.

In this particular case, Paula is seeking to build 30 homes on 10 acres of her land sitting next to a small lake. The government is claiming that due to a state law the 10 acres is protected land and Paula is not able to build. It should be immediately noted that only 10 of Paula's 100 acres is being negatively affected by the government's regulation. Paula is still free to use the remaining 90 acres as she sees fit. She can continue to farm it, or even build the 30 homes on any of those remaining 90 acres. It's presumed that Paula's intentions in building the homes is for business purposes. Moreover, since the 10 acres abuts a small lake, Paula will likely be able to make a bigger profit on selling the homes as she'll be able to advertise that they are "waterfront property". The facts don't specifically state what type of condition the remaining 90 acres is. 90 acres is a lot of land and perhaps there is another equally viable place for her to build the 30 homes.

However, the government regulation is not a total taking here since there appears to be a lot of economically viable use of the land remaining. First, Paula has possession and can make use of 90 of the 100 acres presumably as she sees fit. The government regulation only affects 10% of Paula's land. Paula still has a lot of remaining of which [it] has tremendous economical use. Paula can continue farming the 90 acres of land,

and even perhaps the 10 acres in question. Additionally, she may even be able to move her development plans to those 90 acres as well. In this case the government regulation may not even affect her that much at all.

Since the regulation only affects 10% of the land, and there is still considerable economical use of the remaining 90 acres of land, the government regulation is not a total taking.

B. A PARTIAL TAKING

PARTIAL REGULATORY TAKING

A partial regulatory taking occurs where the government regulation affects some economic use of the land, but there still remains a sufficient amount of economic use.

Here, Paula will argue that by preventing her from building the 30 homes on the 10 acres the government regulation is rendering those 10 acres economically unviable. She will further argue that while in relation to the total 100 acres 10 acres is only 10%, but in relation to the 10 acres in question, the government regulation is preventing her from making any economic use of the land. By not allowing Paula to build the 30 homes on the 10 acres the government is preventing her from making a profit from her use of the land. The state law in question requires the 10 acres to be undeveloped, meaning Paula cannot build any structures on the land, or make any profitable use of it.

INVESTMENT BACKED OPPORTUNITIES

Paula will argue that the government regulation destroys her investment backed opportunity since she's invested a substantial amount of money in determining the economic feasibility of developing the 10 acres. While the facts don't say, Paula has perhaps entered into contracts with prospective buyers of the homes and/or even contractors to build the land. Further, Paula will argue that she complied with County regulations the entire step of the way in her pursuit of this endeavor.

The government will argue that she should not have invested that much money before researching if her prospective use was legal. In doing so she created her own detriment and will suffer the burdens of it.

BALANCE OF INTEREST

Finally, the court will likely balance the interest of both parties to determine if there is a substantial partial regulatory taking of which compensation should be paid.

Here, Paula's interests are obvious. She wants to be able to build 30 homes on the 10 acres of land so she can make a profit on them. Also Paula can argue that by building the homes she's providing adequate housing for the public. Alternatively, the government wants to protect endangered species from becoming extinct. Weighing the two factors, given the fact the Paula's interests are purely pecuniary, the government will likely prevail in this battle. Their interest protects more of the public at large while Paula's merely protects a few, if any.

In conclusion there appears to be [not] any total or partial taking. However, in the event the court finds that there was, the taking must be for public use.

PUBLIC USE

The government may only take land if is for public use. Here, the government regulation is to preserve endangered species. This is a benefit for the public at large since it preserves the wildlife for all to enjoy.

JUST COMPENSATION

Finally, in the event that there is a taking for public use, the government must pay just compensation. This is the market value of the land to the owner at the time of the taking.

In this case, if there is a taking the government will have to pay Paula $4,000,000 since the taking prevents her from developing her land as she wants to.

STATE LAW INVALID

Paula may try to argue that the state law guiding the government's decision is invalid.

10th AMENDMENT & PREEMPTION

Under the 10th Amendment, powers not reserved to the federal government are reserved to the states.

Here the state law protects certain wetland and endangered species. Paula will argue that the state law is preempted by federal law since under the federal property power, the federal government is in control of preserving the land.

In conclusion, the court did not err in ruling that the County's denial of Paula's development application did not constitute a total or partial taking.

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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.

Question 3

Leo owned three consecutive lots on Main Street. At one end, Lot 1 contained an office building, The Towers, leased to various tenants; in the middle, Lot 2 was a lot posted for use solely by the tenants and guests of the other two lots for parking; at the other end, Lot 3 contained a restaurant, The Grill, operated by Leo.

In 2008, Leo leased The Grill to Thelma for 15 years at rent of $1,000 per month under a written lease providing in relevant part: "Tenant shall operate only a restaurant on the premises. Landlord shall not operate a restaurant within 5 miles of the premises during the term of the lease. Tenant and his or her guests shall have the right to use Lot 2 for parking."

In March 2009, Thelma assigned the lease to The Grill to Andrew after he had reviewed it. The lease did not contain any provision restricting assignment. Although Leo did not express consent to the assignment, he nevertheless accepted monthly rental payments from Andrew.

In April 2010, Leo sold Lot 1 and Lot 2 to Barbara after she had inspected both lots. Barbara immediately recorded the deeds. Leo retained ownership of Lot 3.

In June 2010, Leo informed Andrew that, within a month, he intended to open a restaurant across the street from The Grill.

Also in June 2010, Barbara announced plans to close the parking lot on Lot 2 and to construct an office building there. There is no other lot available for parking within three blocks of The Grill.

1. Andrew has filed a lawsuit against Leo, claiming that he breached the provision of the lease stating, "Landlord shall not operate a restaurant within 5 miles of the premises during the term of the lease." How is the court likely to rule on Andrew's claim? Discuss.

2. Andrew has filed a lawsuit against Barbara, claiming that she breached the provision of the lease stating, "Tenant and his or her guests shall have the right to use Lot 2 for parking." How is the court likely to rule on Andrew's claim? Discuss.

Answer A to Question 3

1. ANDREW (A) V. LEO (L)

Applicable Law

Service contracts, including leases, are governed by the common law. These contracts involve a lease of land, which is a service. As such, the common law will govern these transactions.

Validity of Lease from L to T - Statute of Frauds

The Statute of Frauds prevents the introduction of a contracts for services that takes more than one year to complete, unless the statute of frauds has been satisfied by a writing, performance, or a judicial assention. In this case, the lease between L and T [was] for a sum of 15 years, but it was in writing and presumably signed by both parties. Therefore, the Statue of Frauds has been satisfied. Therefore, there was a valid lease from L to A.

Assignment from T to A

An assignment occurs when a person who is in rightful possession of property transfers all of her rights to another person. An assignment will be presumed valid, unless there is a no-assignment provision in the lease which is valid and has not been waived. Once rights have been assigned, the original assigning party, the assignor, remains in privity of contract with the lessor and the new assignee is not in privity of estate. As such, both the assignor and the assignee may assert their rights against the landlord, and the landlord may similarly assert his rights against both assignor and assignee.

In this case, A will easily be able to show that T assigned the lease to him since she transferred all of her rights in The Grill to him. Additionally, the original lease between L and A did not contain a 'no assignment' provision. T transferred all of her rights in Lot 3 to A for the balance of 14 years on her lease, which falls within the statute of frauds. Accordingly, A and T's assignment needs to be in writing. Because A and L both

“reviewed” the assignment, it is likely that the assignment was indeed in writing and is therefore valid under the Statute of Frauds.

Therefore, the assignment will be deemed valid.

Equitable Servitude

An equitable servitude (ES) is a promise in relation to land that does not necessarily burden one party's land, but it will concern the land of the other party. The benefit of an ES will be deemed to run with the benefitted land if the following are found: (i) generally, a writing; (ii) intent of the parties that the benefit run; (iii) touch and concern of the land; and (iv) notice. The recovery of an equitable servitude is equitable relief, rather than damages.

In the present action, the lease between T and L contained a promise by L not to open a restaurant within 5 miles of Lot 3, which contained The Grill that T leased. That lease was then validly assigned to A. In order for A to enforce the contract provision against L, he will need to show that the promise was an equitable servitude that was intended to “run with the benefitted estate”, in this case Lot 3.

Writing

Generally, a writing is required for an ES to run with the benefitted land. In this case, there was a writing between L and T, which included the covenant. Additionally, the assignment from T to A was also in writing, as discussed above. Therefore, this requirement is met.

Intent

However, L will argue that he did not intend for the ES to run with the land, since it is not evidenced "to successors or assigns" in the lease. However, because there was a valid assignment and because it is very likely that a 15-year lease will be assigned at some point, A will argue that the fact that a non-assignment provision did not appear in the lease is sufficient to show intent to run. Additionally, A will argue that because L

accepted monthly rental payments from him, that he was well aware that the lease had been assigned and had made no efforts to refuse the assignment or show his intent not to let the ES run with Lot 3.

Touch and Concern

The ES must also directly affect the benefitted party's use of the land. Here, A will argue that the ES concerns his ability to use Lot 3 as a restaurant, which was the purpose of his taking over the lease. L will argue that the provision only refers to restaurants and only inhibits A's ability to run the restaurant, which may be located on land, but does not directly affect the land. However, because A took the land as a restaurant and it is likely that he took it as a restaurant, the fact that the provision goes to preventing L from opening a restaurant within 5 miles directly affects his use of Lot 3. Therefore, the ES does touch and concern the land.

Notice

Finally, the parties must have had notice. L will argue that the assignment between T and A did not contain the provision restricting assignment, and therefore the benefited land did not have notice. However, notice can be gotten by looking to the record and inspecting the previous documents in the chain of leases. As such, A did have valid notice by looking to the lease between L and T. Additionally, L will be deemed to have notice because he was a party to the first lease between him and T. Therefore, this element is met.

Conclusion

It is most likely that A will want to seek equitable relief in the form of an injunction, to enforce the provision preventing L from opening a restaurant within 5 miles of Lot 3. For the reasons stated above, A will likely be able to show that the ES was validly formed and runs with Lot 3. Accordingly, the court will likely order an injunction against L to enforce the ES and prevent him from opening a restaurant within 5 miles.

Covenants to Run with Burdened Land

A may also argue that the provision is a covenant. A covenant is a contractual provision in a writing whereby one promises not to do something in relation to land. It is very similar to an ES, described above. However, money damages can be awarded, which A won't want.

2. ANDREW V. BARBARA (B)

Easements

An easement is a non-possessory interest in the use of someone else's land. An easement appurtenant involves the two properties, a dominant (the benefitted land) and a survient (the burdened land) tenement. An easement is created a number of ways, including by grant (which is a writing), prescription, implication, and necessity. It can be terminated, generally by release or abandonment, which takes a physical act. An easement will pass to a burdened estate so long as the new owner has notice of the easement, which is found by record (looking to previous conveyances), inquiry (looking to the land), and actual notice (being informed of the easement).

In this case, there was a provision in the original lease between L and T that allowed T and her clients to use the parking lot that was located in Lot 2, next door [to] T's leased premises. Because there were two lots, one burdened (lot 2), and the other benefitted (Lot 3), this is an easement appurtenant. Additionally, because the easement was granted in the writing between L and T, this was a valid easement by "grant". L then sold his property to B, who took the property and recorded the deeds. B will argue that because she was not informed of the easement by L and because her deeds did not include the provisions from L to A, since that was simply a lease and B's deeds were actually recorded conveyance documents, that she did not have notice. However, she did inspect both lots, Lot 1 and Lot 2, before purchasing them. In this regard, she most likely noticed that there were many people walking from Lot 2, where they parked their cars, to Lot 3 where they dined at The Grill. Additionally, she would have noticed that there were most likely more cars present in Lot 2 than would normally be for Lot 1

alone. This should have led her to inquire as to whether an easement or agreement existed to allow Lot 3 to use the Lot 2 parking lot. As such, the Court will likely find that B had inquiry notice of the easement and the easement will pass with the burdened Lot 2.

Therefore, B had inquiry notice of the easement and A will most likely be successful in enforcing the easement against her.

Answer B to Question 3

Thelma=T

Leo=L

Andrew=A

Barbara=B

1) Restrictive Covenant/Equitable Servitude

A covenant is a promise to do or not do something on or near one's land. Here L promised in his lease to T that "landlord shall not open a restaurant with 5 miles of the premises during the terms of the lease." Since it is a promise not to do something near his land, it is a covenant.

Equitable Servitude

Whether a covenant is a restrictive covenant or an equitable servitude depends on the types of damage that the plaintiff seeks. If A is seeking money damages, then it is a restrictive covenant. If he is seeking injunctive relief, then it is an equitable servitude. Here, A is suing to prevent L from opening a restaurant, which he said he would do in one month. Since he is seeking injunctive relief, it is an equitable servitude.

Here, the issue is whether the benefit and burdens of the equitable servitude run to A, who is a successor to the original tenant, T. For the benefit to run, the original agreement 1) must have been in writing, 2) parties intended the benefit to run to future successors, 3) the agreement touches and concerns the land, and 4) the parties had notice.

Here, the original equitable servitude was from a written lease signed by L and T in 2009. Therefore, the writing requirement is satisfied.

Here, L could argue that there was no intent by the original parties that the benefit would run to future successors because there is nothing said in the lease about the

benefit running to future successors. However, A could argue that because it said that the agreement would last "for the term of the lease" and the term was 15 years, it was intended that the benefit would be valid for the entire period of the 15 years. There was no clause restricting assignment and under the common law a tenant is free to assign her rights under the lease unless the lease or the landlord objects. Because the benefit was to last 15 years and T was free to assign her rights to another, it can be said that the parties intended that the benefit would run to future successors of the lease.

Touches and concerns the land means that whether the agreement affects the parties as landowners, not just community members. Here the agreement affects the tenant because the Grill is a restaurant and the previous owner of the restaurant opening up a new restaurant within five miles of the old restaurant brings along competition and hurts the tenant. It affects the landlord as a landowner because it prohibits him [from] doing something on his land.

Here A had notice of the agreement because it was in the lease and he reviewed it. L could argue that he did not have notice that the agreement was going to be able to [be] used to T's assignee, L. A could argue that L did have notice because he accepted rental payments from A, which presumably were checks written by A and should have then alerted L that A has taken over for T.

Restrictive Covenant

If L brought a claim for money damages, then it would have to be analyzed as a restrictive covenant. All the elements are the same except the original parties must have had horizontal privity and the assignor-assignee would have had to have vertical privity. Vertical privity is any nonhostile nexus. Here T (assignor) and A (assignee) have an assignment relationship which qualifies as nonhostile vertical privity. Horizontal privity means that the original parties must have had a relationship apart from the covenant. Here, T and L were landlord-tenant apart from the covenant. Therefore, horizontal privity is established. A would also prevail under a restrictive covenant theory.

2) Easement

An easement is the nonpossesory property interest to use another's land for one's benefit. Using another's land for the use and enjoyment of one's land is an easement appurtenant.

Here, the agreement that tenants should have the right to use lot 2 for parking is an easement because it gives the tenants a nonpossesory property interest to use lot two for their benefit. It is an easement appurtenant because it is for the using [of] another's land for the use and enjoyment of one's land. Lot 3 is the dominant tenement and lot 2 is the servient tenement.

Here, an express easement was created because it is written in a lease between T who was the tenant for lot 3, dominant tenement, and L who was the owner of lot 2, the servient tenement.

The benefit to an easement appurtenant runs with the land passes automatically with the transfer of the dominant tenement. Here, T, the original leasee of lot 3, assigned her rights under the lease to A. When an assignment of a lease happens, the new assignee and the landlord are in privity of estate and can enforce covenants that run with the estate/estate. Here, A, the assignee, would be able to enforce the easement because it runs with the land.

The burden of an easement appurtenant also passes automatically with the transfer of the servient tenement. Here, the servient tenement, lot 2, was sold by L to B. Therefore, the burden of the easement passes to B. However, the burden would not pass if B was a bona fide purchaser without notice (BFP). A BFP is someone who pays valuable consideration for the land and takes the land without notice of the burden. Here, B did pay valuable consideration for the land by buying it. However, she is not a BFP if she had notice of the easement.

One form of notice is record notice. A buyer is on record notice of what a record search of the grantor-grantee index would reveal. However, in this case L did not sell the land to T but instead leased it. Therefore, the lease containing the easement would not be found through a record search.

Another form of notice is inquiry notice. A buyer has a duty to inspect the land she buys and is on inquiry notice of reasonable inquiries that she should have made. Here, lot 2 was a parking lot of tenants of lot 3 before B bought it and it would have been obvious if she went there and saw that there were cars parked there. She should have asked L why there were cars there. Therefore, she is on inquiry notice of what L would have told her, which is that there is an easement on lot 2.

Easement by implication

Even if the easement from the lease is not enforced, it could be argued that when L sold the land to B he created an easement by implication. This requires a prior use that was reasonable [and] necessary to the owners of the dominant tenement and that this was reasonable [and] apparent when the land was bought. Here, when B bought the land it was apparent that lot 2 was being used as a parking lot. Also, it is reasonable [and] necessary for owners of the dominant tenement because other than lot 2 there is no parking available within three blocks of lot 3.

FEBRUARY 2011
ESSAY QUESTIONS 4, 5, AND 6

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 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 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 2011
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the July 2011 California Bar Examination and two answers to each question that were written by actual applicants who passed the examination after one read.

The selected answers were assigned good grades and were transcribed for publication 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.

Question 5

Prior to 1975, Andy owned Blackacre in fee simple absolute. In 1975, Andy by written deed conveyed Blackacre to Beth and Chris "jointly with right of survivorship." The deed provides: "If Blackacre, or any portion of Blackacre, is transferred to a third party, either individually or jointly, by Beth or Chris, Andy shall have the right to immediately re-enter and repossess Blackacre."

In 1976, without the knowledge of Chris, Beth conveyed her interest in Blackacre to Frank.

In 1977, Beth and Frank died in a car accident. Frank did not leave a will and his only living relative at the time of his death was his cousin Mona.

In 1978, Chris and Andy learned that Beth had conveyed her interest in Blackacre to Frank. When Mona approached Chris a day later to discuss her interest in Blackacre, Chris told her that he was the sole owner of Blackacre and she had no interest in Blackacre. Chris posted "No Trespassing" signs on Blackacre. He also paid all of the expenses, insurance, and taxes on Blackacre. Andy and Mona have never taken any action against Chris' possession of Blackacre.

1. What right, title, or interest in Blackacre, if any, did Andy initially convey to Beth, Chris, and himself? Discuss.

2. What right, title, or interest in Blackacre, if any, are held by Andy, Chris, and Mona? Discuss.

Answer A to Question 5

1. WHAT RIGHT, TITLE OR INTEREST IN BLACKACRE DID ANDY INITIALLY CONVEY TO BETH, CHRIS, AND HIMSELF?

Andy owned Blackacre in fee simple absolute, which indicates absolute ownership and means he had the full right to convey Blackacre.

Joint tenancy

In 1975, Andy by written deed conveyed Blackacre to Beth and Chris "jointly with right of survivorship."

A conveyance of land requires that the deed be lawfully executed and delivered. A conveyance to multiple parties can create a tenancy situation. A conveyance creates a joint tenancy when the four unities are present: possession, interest, time and title. The unity of possession means the joint tenants have the equal right to possession; interest means they have an equal ownership interest in the land; time means they received their ownership interest at the same time; and title means they received their ownership interest via the same instrument (such as a deed).

When a joint tenancy is created, it carries a right of survivorship (ROS), which usually must be expressed in the conveyance itself. The ROS means that when one joint tenant dies, the other succeeds to her entire interest in the land. In a situation involving two joint tenants, this means the surviving joint tenant would succeed to the entire ownership interest in the property. However, a joint tenancy can be severed by a sale, partition, or mortgage (in title theory jurisdictions). The severance of a joint tenancy typically results in a tenancy in common.

Here, Andy created a joint tenancy between Beth and Chris. This is because the deed expressly contained the words "jointly with a right of survivorship," and the four unities were present: Beth and Chris each have a 1/2 interest in Blackacre, right to possess the whole, and received their interest at the same time (1975) and by the same instrument (the deed from Andy).

Thus, there was a joint tenancy between Beth and Chris.

Fee Simple Subject to Condition Subsequent

However, the deed also contained another provision which potentially affects the parties' rights in Blackacre: the deed provided "If Blackacre, or any portion of Blackacre is transferred to a third party, either individually or jointly by Beth or Chris, Andy shall have the right to immediately re-enter and repossess Blackacre."

Through this language, Andy purported to create a fee simple subject to a condition subsequent (FSCS). A FSCS is an ownership interest in land whereby the present possessor owns the land until a specified condition occurs, whereby the grantor then has the option of exercising his right of reentry and re-taking possession of the land. To create a FSCS, the grantor must use express conditional language in the conveyance and reserves a right of reentry, using words such as "but if" and "the grantor shall have the right to re-enter." In other words, the express conditional language must indicate that the interest conveyed is subject to the grantor's right of reentry if the specified condition occurs subsequent to the conveyance.

Here, the specified condition is the transfer of Blackacre or any portion thereof, either individually or jointly by Beth and Chris. Andy carved out the right of reentry by stating "Andy shall have the right to immediately re-enter and repossess Blackacre." Thus, Andy purported to create an arrangement where he could cut off Beth and Chris' rights in Blackacre, reenter the land and possess it, if any portion of the land was transferred. This constitutes a FSCS.

Thus, under Andy's purported conveyance, Beth and Chris would be joint tenants with respect to their interest in Blackacre: a fee simple subject to a condition subsequent.

Restraint on Alienation

However, Andy's purported conveyance is problematic because it is a restraint on alienation. A restraint on alienation occurs when the grantor attempts to restrict the alienability (e.g. transferability) of the land. A grantor may impose certain conditions in connection with his conveyance of the land, such as restrictions on what purpose the land may be used for. However, when the grantor attempts to impede the grantee's

ability to transfer the land to others, the courts will classify that as a restraint on alienation.

The law will uphold reasonable restraints on alienation, but not unreasonable restraints on alienation because of the public policy favoring the free transferability of land. When there is an unreasonable restraint on alienation, the court will simply strike the restraint from the conveyance and declare that the grantee holds the property without the restraint. A restraint is generally reasonable if the restriction lasts only for a specified period of time, such as a restriction during the grantor's life. It is generally unreasonable if the restriction continues indefinitely and applies even to the grantee's heirs and assigns.

Here, there is a restraint on alienation: the conveyance completely restricts Beth and Chris' rights to transfer the property because it provides that Blackacre or any portion thereof may not be transferred. This is probably an unreasonable restraint on alienation because there is no time limit to this restriction - Beth and Chris are indefinitely prohibited from transferring Blackacre; presumably, even their heirs/devisees could not transfer the land. Moreover, the prohibition is not for a reasonable time, such as for a set period of years.

Andy may argue the restraint is reasonable because it does not expressly apply to Beth and Chris' "heirs and assigns" -- he may argue that this restriction does not apply indefinitely, but rather only during the period of Beth and Chris' lifetime. He may argue their heirs and assigns are free to transfer the land. He may also argue that the creation of a joint tenancy restricts their ability to transfer anyway because doing so will sever the joint tenancy. However, these are weak arguments. The restraint is still probably unreasonable because it is a total restriction during the tenants' lifetimes, which is a significant amount of time. Beth and Chris may not even transfer a portion of Blackacre. While they would lose joint tenant status by a transfer, they still have the option of doing so in the absence of the restraint. Thus, the restraint is unreasonable.

Accordingly, the court would likely strike the condition Andy included in the deed. This would mean that Beth and Chris hold Blackacre in fee simple as joint tenants.

Conclusion: initial conveyance

Thus, the initial conveyance means Beth and Chris held Blackacre in fee simple as joint tenants.

2. WHAT RIGHT, TITLE OR INTEREST IN BLACKACRE ARE HELD BY ANDY, CHRIS, AND MONA?

1976: Beth's conveyance - severance of joint tenancy

In 1976, Beth conveyed her interest to Frank.

A joint tenant may sell her interest, but as indicated above, the sale of her interest severs the joint tenancy because it destroys the unity of time/title. When a joint tenancy is severed, the new tenants hold as tenants in common (TIC) with each other. TIC have no right of survivorship, which means that upon death, their interests in the property pass to their devisees/heirs through a will/intestate succession.

Here, Beth's sale to Frank severed the joint tenancy because it destroyed the unities: Frank and Chris do not have their interests conveyed by the same instrument and at the same time. So Frank became a TIC with Chris, and Beth no longer had any ownership interest. As of 1976, Frank and Chris both had a 1/2 interest in Blackacre. This is the case even though Chris did not know about the sale to Frank--the sale severed the joint tenancy nonetheless.

1977: Beth and Frank's death

In 1977, Beth and Frank died. Beth no longer had any interest in Blackacre. Frank's 1/2 interest as a TIC with Chris would pass via will or intestacy. Because Frank did not have a will, his interest would have to pass through intestate succession. Frank's only living relative was his cousin Mona, so she would be his heir under the principles of intestate succession. Thus, Mona would get Frank's 1/2 interest in Blackacre via intestate succession, and continue to hold Blackacre as a TIC with Chris.

Thus, as of 1977, Mona and Chris each had a 1/2 interest in Blackacre as TIC; Andy had no interest in Blackacre.

1978: Chris' ouster

In 1978, Chris learned about Mona. The issue is whether he deprived her of her ownership interest in Blackacre through his actions.

Chris and Mona were co-tenants (and specifically TIC) which means each had certain rights and duties. Each tenant has a right to possess the entire premises, so one tenant in exclusive possession has no duty to pay rent to the other. Moreover, the tenants are jointly responsible for paying ordinary expenses associated with the property, such as property taxes and maintenance expenses.

Moreover, because each tenant has the right to exclusive possession of the property, a tenant in exclusive possession cannot claim ownership of the entire property through adverse possession unless he commits an ouster. An ouster is when one tenant expressly excludes the other from possession of the premises, by preventing the tenant from possessing the premises and/or through words/conduct indicating they have no right to possess the premises.

Here, Chris probably committed ouster of Mona. As a co-tenant, she was entitled to possession of the premises, but Chris would not let her have possession. Chris told her he was the sole owner of Blackacre and she had no interest in Blackacre, which constitutes an expression that she had no right to possess Blackacre. Moreover, Chris put "no trespassing signs" on Blackacre, and also paid all of the expenses, insurance and taxes on Blackacre (he never sought compensation from Mona). Thus, his exclusive possession of Blackacre was notwith Mona's consent--even though she did not take any action against Chris' possession of Blackacre, that does not indicate that Chris and she consented to this arrangement whereby he would have exclusive possession. Rather, he clearly indicated that she could not possess the premises, thus committing an ouster and entitling him to claim adverse possession if he meets the elements discussed below.

Adverse possession

A person in possession of land may have the possession ripen into title through the application of adverse possession (AP). A tenant must meet several elements to show they have acquired title through AP: continuous possession of the land for the statutory period, open and notorious possession, exclusive possession, actual possession, and hostile possession.

Continuous:

The possession must be continuous throughout the statutory period. It is unclear what is the statutory period in this jurisdiction, but Chris has possessed the property for such a long time that it is likely he has met the statutory period. Since his ouster occurred in 1978, it has been 32 years that he has possessed the property. The statute of limitations usually ranges from 10-20 years, so he likely has met the element of continuous possession.

Open and notorious:

The possessor must possess the property as the true owner would--in other words, his possession must be open and notorious such that a reasonable inspection of the property would reveal the possession. Here, Chris took ample actions to make his possession open and notorious; not only did he live on Blackacre, but he also posted no trespassing signs, paid the upkeep, and informed Mona that she had no interest in Blackacre. Thus, his possession would put a true owner on notice.

Exclusive:

Chris' possession was exclusive because he alone lived on Blackacre.

Actual:

Chris actually possessed the whole of Blackacre because he presumably lived on it.

Hostile:

Finally, the possession was hostile (i.e. without the true owner's consent) because Chris committed ouster, as described above.

Thus, Chris can probably meet the elements of adverse possession and claim title to Blackacre entirely (he already had 1/2 interest in Blackacre, and acquired the other 1/2 of Mona's interest through AP). Andy and Mona have never taken action against Chris' possession of Blackacre, so they did not defeat his claims and he likely owns it all via adverse possession. Note that he would have to file an action to quiet title before he could convey Blackacre to a third party.

Conclusion:

Thus, the final rights, title and interest in Blackacre are as follows: Chris owns all of Blackacre; Andy and Mona own nothing.

[Alternative analysis re restraint on alienation]

If the restraint on alienation analyzed above in Andy's original deed was valid, and Andy did in fact have a right to re-enter and repossess Blackacre, the final outcome would be the same because Andy never exercised that right of re-entry, and Chris succeeded to ownership of the whole property by adverse possession. (Of course this might be problematic because Andy could argue that the "hostility" element of AP was met because he allowed Chris to possess the property because he did not try to exercise his right of reentry). Nonetheless, the better analysis is that the restraint on alienation was invalid.

Answer B to Question 5

1. **Andy's Initial Conveyance of Blackacre / What interest was Conveyed?**

Joint Tenancy Discussion

Andy (A) conveyed Blackacre by written deed, thereby satisfying the Statute of Frauds, to Beth (B) and Chris (C). The language of the deed was to B and C "jointly with right of survivorship." On this language alone, B and C have a joint tenancy.

Joint tenancies are created when two or more people receive land under circumstances such that the four unities, possession, interest, time, and title, are met. Here, both B and C took possession at the same time (from A's grant), they have the same interest (they both own an undivided one-half interest in Blackacre), they have the same right to possess the whole, and the title they have in Blackacre will be the same (although exactly what title they own will be discussed further here).

Additionally, to create a valid joint tenancy, express language concerning the right of survivorship should be used. The right of survivorship means that when one joint tenant dies, he or she may not pass their share via will or intestacy; it passes automatically to the remaining joint tenant or tenants. Express language is required, because this automatic passing on an interest bypassing the probate system, which is generally "frowned up." Thus, courts will infer a tenancy in common (to be discussed further below) if express language is not used. Here, express language was used, as A conveyed to B and C "jointly with right of survivorship." As such, the requirement for a valid joint tenancy were met.

Attempt at Fee Simple Subject to Condition Subsequent

A's deed to B and C also contained language that "if Blackacre, or any portion of Blackacre, is transferred to a 3rd party, either individually or jointly, by Beth or Chris, Andy shall have the right to immediately re-enter and repossess Blackacre."

Here, A was attempting to create a fee simple subject to a condition subsequent. Unlike a fee simple absolute, where the recipient has full ownership and control of the land indefinitely, and which is alienable, descendably, and devisable, a fee simple

subject to a condition subsequent means that the takers ownership is conditioned upon a certain occurrence either being met or avoided. A fee simple subject to a condition subsequent is similar to a fee simple determinable in that both reserve an interest in the grantor, here A. However, a fee simple determinable uses express durational language (To A, for so long as....) where as a fee simple subject to a condition subsequent conveys the interest in full, but then conditions it upon a certain occurrence or non-occurrence. Another important distinction is that a fee simple determinable creates a possibility of reverter in the grantor, which means that the grantor's right vests automatically as soon as the occurrence takes place (without any action needed on the part of the grantor) while a fee simple subject to a condition subsequent creates a right of re-entry, which does not occur automatically and requires that the grantor affirmatively exercise his or her right to retake the land if the condition is met. Here, A attempted to create a fee simple subject to a condition subsequent, retaining a right of re-entry in himself. He did not use durational language, but instead conveyed to B and C as joint tenants, but then he added a condition. He also used the words "right to immediately re-enter" which indicate a right of re-entry rather than a possibility of reverter.

Restraint on Alienability

Though A attempted to reserve for himself a right of re-entry, the condition on the land amounts to a total restraint on alienation. A restrain on alienation is when a grantor attempts to make it so that the grantee cannot sell the land. The right to sell land, however, is one of the rights inherent in property ownership, such that restraints on alienation are not viewed favorably. Reasonable restraints of alienation may be tolerated. For example, a condition that the grantee cannot sell the land for 15 years, until a cloud on the title will be resolved, may be tolerated. Similarly, other restraints are possible, such as those that affect the appearance of the land, or the purpose for which the land is used. Total restraints on alienation, on the other land, will be stricken as void. Here, the condition that A attempted to include will amount to a total restraint on alienation, as it stated that B and C could not transfer Blackacre or any portion of it, and it was an indefinite condition. Therefore, the condition will be considered to be void, and it will be stricken from the deed.

Conclusion

Because this was a fee simple subject to a condition subsequent, the effect of the stricken clause will be that B and C have a fee simple absolute (discussed above). A's future interest will be eliminated. Thus, A initially conveyed to B and C a joint tenancy with right of survivorship in fee simple absolute.

2. **Rights, Titles, and Interests in Blackacre of Andy, Chris, and Mona**

Andy's Interest

As discussed above, Andy's interest in Blackacre terminated when he included a total restraint on alienation in his deed to B and C. Because the condition will be stricken, there is no stated occurrence that can cause A to be able to validly exercise his "right to immediately re-enter and repossess Blackacre" though that was his intent and desire. Because his right to re-entry is impossible, it too will be stricken and A has no remaining interest in Blackacre.

Mona's Interest

In order to discuss what interest Mona has in Blackacre, it is necessary to first discuss Beth's conveyance to Frank and Frank's subsequent death.

Beth's conveyance to Frank

B conveyed her interest in Blackacre to Frank without the knowledge of C. When one joint tenant conveys his or her interest in the joint tenancy, the result is that the joint tenancy is severed. The reasoning is that the grantee who receives the conveyance will not share the four unities with the remaining tenant, thus they cannot be joint tenants with respect to one another. However, this does not mean that B cannot convey her interest in Blackacre - she can - it simply means that the person she conveys to will be a tenant in common with her former joint tenant.

A tenancy in common is when two or more people each own an undivided interest in land. An undivided interest means that each has the right to possess the

whole. The four unities are not required, so that one tenant in common may own a larger interest in the land, but each will still have the right to possess the whole.

Here, when B conveyed to Frank, the joint tenancy was severed as between B and C, and C and Frank became tenants in common, each with an undivided one half share in Blackacre. There will be no remaining right to survivorship, as tenants in common do not have this right. The fact that B did not give notice to C of her conveyance is irrelevant - joint tenants do not need the consent of one another to convey their individual interests in the land.

Frank's Death

Frank died in a car accident after he received his interest in Blackacre. He did not leave a will, meaning that he died intestate. The facts indicate that his only living relative was his cousin Mona, which means that Mona will receive all of Frank's real and personal property via intestacy.

Mona's Interest

Mona thus received Frank's undivided one-half interest in Blackacre via intestacy, and became a tenant in common with C. This means that at the time of Frank's death, Mona HAD the right to possess Blackacre with C. However, as will be discussed further below, Mona may have lost this interest via adverse possession. More facts are needed as to the passage of time since Chris told Mona that she had no interest in Blackacre and posted "no trespassing" signs, thereby ousting Mona and initiating a hostile possession of Blackacre. If the statutory length of time has passed, Mona will have lost her interest in Blackacre, because (as discussed below) the other requirement for adverse possession will have been met. If, however, the requisite amount of time has not passed, Mona can exercise her undivided one half interest in Blackacre and remain a tenant in common with Chris. She would be advised to bring an action to quiet title in order to do this.

Chris's Interest

As discussed above, C was initially a joint tenant with B, and then became a tenant in common with Frank when B conveyed to him. Subsequently, he became a tenant in common with Mona when she inherited Frank's interest via intestacy.

C, though, may now possess all of Blackacre in fee simple absolute via adverse possession. When C told Mona that she had no interest in Blackacre, he effectively ousted her, basically meaning affirmatively kicked her off the property, thereby starting the adverse possession clock running. The requirement of adverse possession are a continuous, adverse, open, and hostile possession for the required statutory period of time. Here, C's possession was continuous for however long it's been since he ousted Mona - the facts do not indicate that C ever stopped possession Blackacre. His possession is open - he lives there and posted a No Trespassing sign for all to see. It is hostile and adverse, because it is not with Mona's consent. For this prong, it doesn't matter if C thinks that he is entitled to full ownership or not as subjective good or bad faith is irrelevant. The fact that C paid the insurance and taxes is not required by a majority of jurisdictions, but it certainly does not pose a problem for C that he did pay them, as indicated in the facts. Therefore, as long as the statutory time period is met, C will possess all of Blackacre via adverse possession.

Finally, it should be noted that although C may have acquired title via adverse possession, it will not be marketable. In order to convey the land in fee simple to someone else, and not just convey his one half interest, C will have to bring an action to quiet title against Mona.

ESSAY QUESTIONS AND SELECTED ANSWERS
FEBRUARY 2012
CALIFORNIA BAR EXAMINATION

This publication contains the six essay questions from the February 2012 California Bar Examination and two answers to each question that were written by actual applicants who passed the examination after one read.

The selected answers were assigned good grades and were transcribed for publication 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.

Question 6

Donna was looking for a place to live. Perry owned a two-story home, with the second story available to lease.

Donna and Perry signed a two-year lease that provided, in part: "Lessee may assign the leased premises only with the prior written consent of Lessor."

Upon moving in, Donna discovered that the water in her shower became very hot if Perry ran water downstairs. When Donna complained to Perry about the shower and asked him to make repairs, Perry refused, saying, "I'll just make sure not to run the water when you are in the shower."

Perry soon adopted a new diet featuring strong-smelling cheese. Donna told Perry that the smell of the cheese annoyed and nauseated her. Perry replied: "Too bad; that's my diet now."

After constantly smelling the cheese for three weeks, Donna decided to move out and to assign the lease to a friend who was a wealthy historian.

Donna sought Perry's consent to assign the lease to her friend. Perry refused to consent, saying, "I've had bad experiences with historians, especially wealthy ones." Thereafter, every time Donna took a shower, Perry deliberately ran the water downstairs.

After two weeks of worrying about taking a shower for fear of being scalded and with the odor of cheese still pervasive, Donna stopped paying rent, returned the key, and moved out. At that time, there were twenty-two months remaining on the lease.

Perry has sued Donna for breach of the lease, seeking damages for past due rent and for prospective rent through the end of the lease term.

What defenses may Donna reasonably raise and how are they likely to fare? Discuss.

QUESTION 6
Answer A

As set forth below, Donna can raise the following defenses (1) material breach of lease, (2) constructive eviction, (3) breach of the warranty of habitability, and (4) failure to mitigate damages. Donna is likely to succeed on all four defenses.

1. Material Breach of Lease.

Tenancy for Fixed Term.
A fixed term tenancy is a pre-agreed term by the landlord and tenant.

Here, Donna and Perry signed a "two-year lease." As such, the term of the lease is fixed at two years.

Therefore, Donna is obligated to pay rent for the full two years of the lease, unless otherwise excused.

Duty to Repair.

Generally, a tenant has a duty to keep the premises in good order and repair, unless otherwise agreed to by the parties. The landlord, however, has a duty to repair common areas of use.

Here, there was something wrong with the plumbing in Perry's home. Each time Donna took a shower, she was scalded if Perry was taking a shower at the same time. She notified Perry of the problem, but her [sic] refused to fix it — stating only that he would not take a shower while she did. The leased premises is [sic] part of Perry's home. It is not a separate apartment, did not have separate plumbing or other utilities. Even if Donna wanted to fix the problem herself, she would have not have the ability to do so since she did not lease or control the areas of the home that were the source of the

problem. Perry controlled these items. The plumbing was, in essence, a common area under Perry's control.

Therefore, Perry, as landlord, had the duty to repair the plumbing issue and breached his duty to Donna by failing to repair it.

Duty re Nuisance.

A landlord owes a duty of quiet enjoyment to his tenant, including the abatement of nuisances to the extent within his control. A nuisance is something that would be offensive to a person of ordinary sensibilities.

Here, Donna was "annoyed" and became "nauseated" at the smell of Perry's new diet of strong-smelling cheese. However, this appears to be something unique to Donna. She was perfectly willing to assign the lease to her friend the wealthy historian - who would have been subjected to the same smell. A friend would not do this to a friend, unless she knew that the problem with the smell was due to her being ultra-sensitive to that particular cheese. As such, this ultra sensitivity does not arise to the level of being a nuisance.

Therefore, Perry did not breach his duty to Donna by failing to stop eating the cheese.

On the other hand, however, Perry began intentionally annoying Donna. After their dispute regarding the cheese and the possible lease assignment, he began to deliberately turn on the water whenever Donna tried to take a shower. This meant that Donna was not able to take a shower for nearly two weeks. Most anyone of normal sensibilities would be annoyed by this behavior.

Therefore, Perry did breach his duty to Donna by deliberately running the water while she took a shower.

Duty to Pay Rent Despite Material Breach.

At common law, a tenant's duty to pay rent is not relieved by the landlord's material breach of lease. Modernly, a material breach of lease that goes to habitability relieves the tenant's obligation to pay rent.

Here, Perry breached the lease by failing to repair the plumbing. He further breached it by deliberately running the water each time she took a shower. Nevertheless, Donna still owed a duty to pay rent to Perry, despite the breach. Under modern statutes, however, Donna will likely be relieved of the obligation to pay rent because the breach went to her use, enjoyment, and habitability of the leased premises.

Conclusion re #1 Breach of Lease.

As such, Perry breached the lease by failing to repair the plumbing. Therefore, Donna can reasonably raise this as a defense and is likely to succeed.

2. Constructive Eviction.

A landlord owes a duty of quiet enjoyment to his tenant. In the event of (a) a substantial interference with the use and enjoyment of the premises, the tenant may (b) give notice to the landlord, and (c) leave the premises, thereby being excused from any further obligations under the lease.

Here, re (a) there was something wrong with the plumbing in Perry's home. Each time Donna took a shower, she was scalded if Perry was taking a shower at the same time. She notified Perry of the problem, but her [sic] refused to fix it — stating only that he would not take a shower while she did. What's more, Perry began intentionally annoying Donna. After their dispute regarding the cheese and the possible lease assignment, he began to deliberately turn on the water whenever Donna tried to take a shower. This meant that Donna was not able to take a shower for nearly two weeks. Most anyone of normal sensibilities would be annoyed by this behavior. Not being able

to take a shower in your own apartment is a substantial interference with the use and enjoyment of the apartment.

Therefore, element (a) is met.

Here, re (b) Donna had notified Perry about the problem. At first he said he would simply not run water while she took a shower. However, in the end, he did so deliberately. As such, Perry had notice of the plumbing problem.

Therefore, element (b) is met.

Here, re (c) after two weeks with no shower, she turned stopped paying rent, returned the key and moved out.

Therefore, element (c) is met.

As such, elements (a), (b), and (c) are met. Therefore, Donna is relieved of her obligations under the lease through Perry's constructive eviction.

Conclusion re #2 Constructive Eviction.

Therefore, Donna can reasonably raise a defense of constructive eviction and is likely to succeed with this defense.

3. Breach of Warranty of Habitability.

A landlord of residential property, which includes commercial in California, owes a duty to his tenant to keep the premises fit for normal habitation. This duty is breached when the landlord fails to fix a condition that impacts the habitability of the premises or violates building codes.

Here, Donna was being scalded each time she took a shower. This started out being an unintentional problem, but grew into an intentional problem when Perry used the defect to intentionally annoy Donna. In the end, Donna was unable to take a shower at all for fear of being burned or scalded. The plumbing issue is likely a building code violation as well. Building codes typically set standards for the temperature of water coming from hot water heaters to avoid burning and scalding, as was happening here. Nevertheless, Perry refused to fix it.

Here, regarding the cheese, Donna was "annoyed" and became "nauseated" at the smell of Perry's new diet of strong-smelling cheese. However, this appears to be something unique to Donna. It does not go to the building code or other habitability issues.

Therefore, Perry breached his warranty of habitability to Donna by failing to fix the plumbing.

Remedies for breach of warranty of habitability.

When a breach of the warranty of habitability occurs, a tenant has several option;, the tenant can (a) stay in the premises, deduct rent and repair the issue, (b) stay in the premises and abate rent until the issue is repaired, or (c) stop paying rent and move out.

Here, Donna chose option (c). She stopped paying rent, returned the keys and moved out. Therefore, she is relieved from any further obligation under the lease.

Conclusion re #3 Breach of Warranty of Habitability.

Therefore, Donna can reasonably raise a defense of breach of warranty of habitability and is likely to succeed with this defense.

4. Failure to Mitigate damages.

A landlord has a duty to mitigate his damages in the event of a breach by the tenant.

Here, Donna tried to find another solution for Perry. She wanted to move out and assign the lease to her wealthy historian friend. The lease required consent for this assignment, and Donna was seeking such consent. However, Perry decided he really did not want to live with a wealthy historian because of his prior bad experiences with them. Due to the nature of this [sic] leased premises, that it was a part of Perry's actual home that required the sharing of space, it is not necessarily unreasonable for Perry to be a little picky about this. Nevertheless, Perry did not even agree to meet with the wealthy historian. Being wealthy and [a] historian does not automatically place someone in an annoying class. Perry's prior experience was probably on a personal level with an individual and had nothing to do with him being a wealthy historian. Perry should have, at a minimum, met with the person, interviewed him, sought references, and otherwise done his due diligence before turning down the opportunity. By failing to do this, he failed to mitigate his damages.

Mitigation as limitation on damages.

A landlord has a duty to use reasonable efforts to re-let the premises. Damages will be reduced by an amount found [that] could have been reasonably avoided.

Here, no, after Donna has left the premises, Perry is under a continuing duty to mitigate his damages by using reasonable efforts to re-let the premises. He must advertise it and seek a reasonable replacement for Donna. Perry is not automatically entitled to full rent for the remaining 22 months without first trying to re let the premises. He already knows at least on [sic] prospective tenant — the wealthy historian — who would take Donna's place.

Therefore, Perry's award for damages, if any, will be reduced by the amount that is shown could have been avoided by mitigating his damages.

Conclusion re #4 Failure to Mitigate.

Therefore, Donna can reasonably raise a defense for failure to mitigate damages and is likely to succeed — at least in part — on this defense.

Overall Conclusion.

In conclusion, Donna can raise the following defenses: (1) material breach of lease, (2) constructive eviction, (3) breach of the warranty of habitability, and (4) failure to mitigate damages. Donna is likely to succeed on all four defenses.

QUESTION 6
Answer B

Statute of Frauds

A contract which cannot, by its terms, be completed or fully performed within one year must be in writing in order to be enforceable. Furthermore, a contract conveying an interest in land must be in writing in order to be enforceable. In order to satisfy the statute of frauds, a contract that comes within its purview must be signed by the party to be bound. Here, Donna and Perry have entered into an agreement to lease the second story of Perry's home for two years. Donna has "signed" the lease, meaning it must have been in writing, and she is the party to be bound. Therefore, the statute of frauds will not be an effective defense to enforcement of the contract against Donna.

Valid Assignment

If Donna validly assigned the lease to her friend, then she would only be secondarily liable based on privity of contract with the original leasor, Perry. The original lessor must seek payment from a valid assignee before seeking payment from the assignor.

Lack of Privity of Estate

If the assignment from Donna to her friend is valid, then privity of estate is destroyed between Perry and Donna. However, privity of estate is not required if there is privity of contract between the landlord and previous tenant. Therefore, the lack of privity of estate will not protect Donna from a lawsuit following a valid assignment because, as the original lessee, she still has privity of contract with Perry.

Restriction on Alienation/Assignment

Restrictions on alienation of property are disfavored. As a consequence, lease clauses restricting a tenant's right to assign or sublease will be strictly construed. For example, a prohibition on assignment absent consent will not prohibit sublease without consent and vice versa. Here, the lease prohibits assignment without consent and would not bar sublease. However, Donna sought to assign her interest to her friend. The language is not controlling. The difference between assignment and sublease is whether the whole remainder of the term is conveyed to the new tenant. If the whole remainder of the lease term is conveyed, then the transfer is an assignment. If only part of the remaining term is conveyed, then the transfer is a sublease. Here, Donna sought an assignment.

Landlord's Unreasonable Refusal to Consent to Assignment

Under the terms of the lease, an assignment requires the landlord's prior written consent. Donna sought Perry's consent and he refused because he had "bad experiences with historians, especially wealthy ones." Donna may argue that Perry's refusal was unreasonable and that the assignment should be valid.

In residential leases of a single family dwelling, a landlord's refusal of consent need not be reasonable so long as it is not based on an unlawful form of discrimination--such as race. In commercial leases or residential leases for large apartment complexes, most jurisdictions require the landlord's refusal to be objectively reasonable, but not so with small residential leases such as the second story of Perry's home. Perry discriminated on the basis of Donna's friend's occupation and wealth which are not unlawful bases. Therefore, Perry's refusal is permissible and Donna will not be permitted to avoid liability by assigning her lease to her friend.

Implied Warranty of Habitability

Every residential lease contains an implied warranty of habitability which requires the leased premises to be fit for basic human dwelling. Housing code violations and serious problems such as lack of heat in a cold winter, lack of running water, flooding, etc. would constitute violations of the implied warranty of habitability. A tenant has several

options when the implied warranty of habitability has been violated. After giving the landlord reasonable notice, the tenant may repair the problem and deduct the cost from rent payments, may repair the problem and sue for the cost in damages, may remain in possession and sue for damages, or may move out and avoid liability for the remaining rent. Here, Donna wishes to move out which she may do if the alleged violation is sufficiently serious.

Stinky Cheese

The smell of Perry's cheese, though annoying and nauseating, is problably not enough to make the leased premises unfit for basic human dwelling. If Donna's nausea is so severe that the smell constitutes a health risk to her, then her claim would be significantly strong, but that does not appear to be the case here.

Hot Shower

The hot shower water definitely constitutes a safety hazard, but may not, by itself, be enough to make the premises unfit for basic human dwelling. This is a close call. In conclusion, Donna will probably not be successful on a claim for violation of the implied warranty of habitability. She has a strong claim for constructive eviction anyway.

Constructive Eviction

If, by a landlord's act or omission, a tenant is constructively evicted from premises, then the tenant is relieved of any obligation to pay rent. In order to satisfy the requirements for a constructive eviction, there must be (1) substantial interference with the tenant's use and enjoyment of the leased premises, (2) reasonable notice and time to fix or repair, and (3) tenant must vacate within a reasonable amount of time.

(1) Substantial Interference

Meanness--"Too bad; that's my diet now"

As a landlord, Perry is very mean and refuses to express any concern for Donna's comfort. Just because a landlord is mean does not constitute substantial interference with a tenant's use or enjoyment of her property. Therefore, Perry's meanness will not be sufficient to satisfy the substantial interference requirement.

Landlord's Duty to Repair--Hot Shower

A landlord generally does not have a duty to repair defects in leased premises with several exceptions such as a duty to keep common areas reasonably safe and a duty to make safe furnished, short-term leased premises. If there is a risk of serious harm from a latent defect inside leased premises on a long-term lease, however, a landlord has a duty to repair the problem. The tenant must give the landlord notice of the problem. If the tenant gives notice and the landlord refuses or fails to repair the defect, then the landlord has violated his duty. Here, Donna faces a serious latent defect by virtue of the shower being so hot that it could seriously burn her. She notified Perry and Perry refused to repair. He took steps to avoid injury (at first) by "mak[ing] sure not to run the water when [Donna was] in the shower," but he did not repair the defect. This omission, in the presence of a duty to repair, may constitute a substantial interference provided that the risk of injury is sufficiently high.

Retaliation--Hot Shower

A landlord must not retaliate against tenant for complaints or requests made under the lease. Here, Donna merely sought Perry's consent to assign the lease to her friend. Perry refused and, thereafter, deliberately ran the water downstairs to make Donna's shower dangerously hot. This intentional, bad-faith retaliation for requesting to assign her lease to another constitutes substantial interference with Donna's use and enjoyment of the premises because it created a significant risk of injury to her.

Nuisance--Stinky Cheese

A private nuisance is any substantial interference with another person's use and enjoyment of property to which they have a right to possession. Whether an alleged nuisance constitutes substantial interference is an objective question. If the plaintiff is deemed ultra-sensitive, she will not recover because the interference is not objectively substantial even if it is substantial subjectively. Whether the stinky cheese is a substantial interference is a question of fact for the trier of fact at trial. Depending on the severity of the odor, a reasonable person may find that stinky cheese odor constitutes substantial interference. Therefore, Donna may satisfy the substantial interference requirement based on the stinky cheese as well as the retaliation.

(2) Notice

Donna gave Perry notice of the problems with the shower and the stinky cheese as evidenced by Perry's recognition of her complaints. Donna gave Perry a total of five weeks to resolve the problems about which she complained. Perry refused to resolve the issues. Therefore, the notice and time to repair requirements are satisfied.

(3) Vacate

Donna moved out of the premises and returned the keys in a timely manner.

Conclusion--Constructive Eviction Satisfied

Based on the foregoing, Donna has satisfied the requirements for constructive eviction and will not be liable for past due or future due rent for the remainder of the lease. She is not liable for past due rent because she stopped paying at or after the time the constructive eviction arose--namely, when Perry started retaliating after already refusing to repair the hot shower. She is not liable for future rent because she has been constructively evicted and moved out by that time.

Absence of Equitable Defenses

Perry may claim equitable defenses such as laches or unclean hands, but Donna moved out timely and did not have unclean hands. Rather she demonstrated good faith by giving notice and returning the keys and moving out in a peaceable fashion.

Duty to Mitigate/Avoidable Consequences

Even assuming that Donna moved out wrongfully, when a tenant wrongfully vacates premises, the landlord has three options (1) treat the tenant's vacation as a voluntary surrender and accept without demanding further rent, (2) re-let the premises [to] someone else as an act of mitigation and sue the tenant for the unpaid rent, (3) only in a minority of jurisdictions, ignore the tenant's act and sue for damages for past and future due rent. As a general/majority rule, and the rule reflected in the second option, a landlord must attempt to re-let premises in order to obtain damages that would otherwise be considered avoidable. Any damages that could reasonably have been avoided by mitigation will not be awarded to the landlord.

Here, Perry attempted to hold Donna liable for the entire twenty-two months remaining on the lease. None of those money damages are recoverable because Perry could reasonably have avoided those damages by leasing the premises to Donna's friend.

Conclusion

Donna has successful defenses based on constructive eviction and failure to mitigate damages.

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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.

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

Question 4

Jane owned a machine shop. It had one slightly buckled wall. It had been built years prior to Town's adoption of a zoning ordinance that permits office buildings and retail stores, but not manufacturing facilities.

Ira purchased the machine shop from Jane for $500,000. He gave her $50,000 in cash and a promissory note for an additional $50,000 secured by a deed of trust. He borrowed the other $400,000 from Acme Bank (Acme), which recorded a mortgage. Acme was aware of Jane's promissory note and deed of trust prior to the close of escrow.

Donna owns a parcel adjoining Ira's machine shop. She recently began excavation for construction of an office building. Ira complained to Donna that the excavation was causing the shop's wall to buckle further, but she did nothing in response.

Shortly thereafter, Ira's machine shop collapsed. Ira applied to Town for a building permit to rebuild the shop, but Town refused. He then defaulted on his obligations to Jane and Acme.

Ira has sued Donna seeking damages, and he has sued Town seeking issuance of a building permit. Acme has filed a foreclosure suit against Ira, and Jane has demanded a proportionate share of the proceeds from any foreclosure sale.

1. How is the court likely to rule on Ira's claim for damages against Donna? Discuss.

2. How is the court likely to rule on Ira's request that Town issue a building permit? Discuss.

3. How is the court likely to rule on Jane's claim for a proportionate share of the proceeds from any foreclosure sale? Discuss.

QUESTION 4: SELECTED ANSWER A

1. Ira's Claim for Damages against Donna

Ira owned the machine shop that adjoined Donna's parcel of land. When Donna excavated her parcel it caused Ira's machine shop to collapse. Ira has many multiple causes of action that he may pursue against Donna in attempt to recover from the collapse of his machine shop. They include a strict liability claim based on lateral support principles, or based on negligence.

Strict Liability and Lateral Support:

Landowners have a right to the support of the surface of their property. When an adjoining landowner engages in action that causes the adjoining property to subside, the owner who caused the subsidence may be strictly liable for the damage caused. In order for strict liability to apply, the injured party whose property has subsided must show that the actions of the adjoining landowner caused the subsidence, and that the subsidence would have occurred even if no structures were built on the injured party's land. If the subsidence would not have occurred but for the weight of the structure built on the land, then strict liability will not attach and the injured party will have to pursue another cause of action to recover.

Here, Donna began excavation for construction of an office building on her parcel that was adjacent to Ira's machine shop. Despite complaints from Ira, Donna continued her planned excavation. Based on Ira's statements that the excavation was causing the wall of his machine shop to "buckle further," which eventually led to the collapse of the machine shop, it seems clear that the excavation is what actually caused the structure to fall. Ira can recover for strict liability as long as the subsidence would have occurred even if the machine shop were not built on the land. This is likely where Ira's cause of action will fail. Facts stipulate that the wall of the machine shop was slightly buckled, and the excavation caused the wall to "further buckle." Facts do not indicate that the

land on which Ira's shop actually subsided, only that the action caused the machine shop to collapse. It does not appear that the land would have been damaged or lost lateral support if the machine shop was not built on the land.

In conclusion, Ira cannot recover based on his right to lateral support in strict liability because the collapse of the structure and the land likely would not have occurred if the structure was not built. No facts indicate the land would have subsided despite the shop. Ira must look to another cause of action.

Negligence:

Ira may attempt to assert a negligence claim against Donna. Negligence occurs when a party breaches a duty owed to another and the breach is the actual and proximate cause of damages suffered by another party.

Duty:

Donna has a duty to act as a reasonably prudent landowner who adjoins other parcels with structure on them. Ira is an owner of an adjoining parcel, she had a duty to act as a reasonably prudent landowner to the adjacent owners.

Foreseeable plaintiff:

Under the majority view of Cardozo, a party only owes a duty to foreseeable plaintiffs. Foreseeable plaintiffs are those that reside within the zone of danger of the defendant's actions. Here, Ira was the adjacent landowner to Donna. When Donna began excavation all adjacent landowners were foreseeable plaintiffs because it is foreseeable that construction could cause injury to the adjacent land or landowners. Ira was a foreseeable plaintiff.

Breach:

Donna possibly breached her duty to act as a reasonably prudent landowner when she continued excavation despite the fact that she was informed it was causing a wall of Ira's to buckle and was likely going to cause damage. Facts do not indicate whether or not the excavation was executed with reasonable care or not, but the fact that Donna continued after being informed that her actions were causing damage may mean that she breached her duty of care to Ira.

Actual Cause:

Actual cause is also termed the "but for" cause. The issue is whether but for Donna's actions the building would have collapsed. Ira informed Donna that the construction was causing the wall to buckle further, and the continued excavation led to the collapse of the building. Donna's actions were the but for cause of the collapse.

Proximate Cause:

Proximate cause is called the legal cause and the issue is foreseeability. Here, it is foreseeable that a person doing excavation may end up causing damage to the structures of adjoining parcels. Ira will argue that Donna's actions were completely foreseeable. Donna on the other hand will argue that the proximate cause was not her excavation, but rather the fact that the machine shop already had a "slightly buckled wall." Donna will argue that it is not foreseeable that adjacent landowners have improperly supported structures that will collapse during excavation of adjoining parcels. Donna's argument that the buckled wall makes the collapse unforeseeable probably will not work, but it may be effective as a defense (discussed below.) Moreover, Donna knew that her actions were causing the wall to buckle more after Ira told her, so ultimately her actions were foreseeable because she was informed of them.

Damages: Damages must be causal, foreseeable, certain, and unavoidable.

Here, Donna's actions caused the entire shop to collapse, and it is very possible that a court will find that she breached her duty to Ira and that her actions were the actual and proximate cause of Ira's damages. Absent any defenses, Donna will be required to pay Ira for either the cost of repair of the building (which is substantial), or the reduced value of Ira's property now that the shop has collapsed.

Defenses: Comparative Negligence

Donna has a good argument that Ira was himself negligent and she should be absolved of liability or that her liability should be substantially reduced. Ira knew that the machine shop had a slightly buckled wall that would likely reduce its structural soundness. Ira had a duty to investigate the structural integrity of the building, and insure that it was not at risk for collapsing easily. This is a very strong argument and Donna will likely have her damages reduced by the amount of Ira's negligence, which is significant.

In conclusion, Ira may recover from Donna under a negligence theory but Donna's damages will be offset by the amount of Ira's own negligence.

2. Ira's Request to have Town Issue a Building Permit.

Here, Ira's machine shop has been destroyed, and he wishes to rebuild it. Because of the current zoning ordinance, Ira's machine shop is not permitted in the area where he wants to build it. The issue is whether Ira should be granted a permit to operate the machine shop.

Zoning Ordinances:

Zoning ordinances are an effective way for states and localities to regulate the land use of their jurisdiction. However, a person who seeks to violate a zoning ordinance may

seek a variance that will be granted or denied in the form of a permit.

Variance:

A variance is an individual exception to a zoning ordinance. There are two types, area variances and use variances. Area variances are more likely to be granted because it is simply an exception given to allow a building to exist in dimensions that slightly violate the zoning ordinance. Use ordinances are less likely to be granted — a use variance is a permit allowing a person to operate a structure for a purpose that is not permitted by the zoning ordinance. Here, Ira wishes to get a permit to allow him to use his property for manufacturing, which is a use that is not permitted. In order to get a use permit, Ira must show that he will (1) suffer a hardship without the ordinance, (2) that the variance would not damage or harm the neighborhood, and (3) that he is not at fault or a bad actor in his request.

(1) Suffer a hardship

Here, Ira has paid a substantial amount of money in order to purchase the machine shop and operate it at the location where it currently resides. But for the fact that the machine shop collapsed, Ira would still be able to operate it most likely as a nonconforming use (discussed below). Preventing Ira from being able to rebuild and operate the shop as he had previously would cause him significant injury and he will surely suffer an economic hardship if not allowed to resume his business.

(2) Won't Harm the Neighborhood

Here, the neighborhood permits office buildings and retail stores, just not manufacturing. If the neighborhood were zoned only for residential use by families, it is likely that granting such a variance would cause harm to the neighborhood because families would have to deal with the constant manufacturing noise. But, because the area allows offices and retail stores, it is unlikely that the manufacturing would likely

cause significant harm to the neighborhood, unless the manufacturing involved toxic materials or chemicals. This factor weighs in favor of Ira.

(3) Ira is not at Fault

Here, Ira was operating the machine shop until Donna's excavation caused the shop to collapse. Ira did not buy the property knowing about the ordinance and now seeks a variance to benefit knowing all along such action would be in violation. And, but for the collapse of the structure, Ira likely would have been able to continue to run the business as a nonconforming use. Ira is not at fault in seeking the variance.

Conclusion:

In conclusion, the court should rule that the Town should issue a building permit because all of the elements required for a proper use variance are satisfied, and Ira is not a bad actor.

Nonconforming Use:

The other argument that Ira may present is that his operation of the machine shop is a nonconforming use because it was in existence prior to the change of the ordinance. Nonconforming uses that are in effect prior to an ordinance change are allowed to continue unless they cause harm to residents or adjoining property. Even then, an amortization period is generally allowed to allow the owner to find a new location for the activity. Here, Ira was properly operating the manufacturing business prior to the ordinance, and the fact that the building collapsed should not deprive him of being able to rebuild a similar structure and continue with the nonconforming operation he had prior to the collapse. There is no evidence the manufacturing is causing harm to other residents.

In conclusion, the court also should have the Town issue a building permit because Ira's prior nonconforming use should still be considered in effect.

3. Jane's Claim for Proportionate Share of the Proceeds from Foreclosure.

Deed of Trust and Mortgage:

When Ira purchased the property from Jane, he gave her a 50K promissory note secured by a deed of trust. He borrowed the other 400K from Acme which recorded a mortgage. Mortgages and Deeds of Trust operate similarly.

A Deed of Trust is an arrangement where a third party holds a deed in a trust to stand as collateral for a debt owed. With a deed a trust, if the debtor (Ira) fails to make payments and ends up in default on the loan, the party that made the loan, Jane, can initiate foreclosure and execute a private sale of the property.

A Mortgage is an arrangement where a party who has or is buying property gets a loan and has the property itself stand as security for the debt. If a debtor fails to make the loan payments and ends up in default, then the holder of the mortgage, the mortgagee, may initiate public foreclosure proceedings against the property.

Here, Ira failed to make payments on the loan and was thus in default. Acme was within its right to initiate foreclosing proceedings against the property to recover for the debt owed. The order of payment from a foreclosure sale is determined by a number of factors, including whether the loan was a purchase money security interest.

Priority:

Upon a foreclosure sale, how proceeds from the sale are distributed is determined by the priority of the creditor's interest. Priority is determined by (1) whether or not the loan was a purchase money security interest and (2) when the interest or mortgage was

recorded. All purchase money security interests have priority over other creditor interests executed at the same time.

Here, Jane executed a valid deed of trust, and Acme executed a valid mortgage. The mortgage was recorded and had notice of the deed of trust secured by Jane. Because both loans were provided in order for Ira to obtain the purchase of the property, both interests should be considered purchase money security interests. If Acme had recorded the mortgage on the property without notice of the deed of trust secured by Jane, Acme would have had priority over all other creditors. However, because Acme had notice of the deed of trust, and because both loans will be considered purchase money security interests, Jane's Deed of Trust will have priority.

Order of Payment:

Foreclosure proceeds are not distributed in proportion. So, the court will not rule that a proportionate share of the foreclosure proceeds should be given to her. However, that does not mean that Jane's interest will necessarily be adversely affected. When a creditor forecloses on a property and provides notice to any junior interest, at the sale of the property the junior interest is extinguished. Here, Acme initiated the public foreclosure sale, and had Jane's deed of trust been a junior interest, then Jane was required to notice, but her interest would be extinguished at the end of the sale, whether or not she received proceeds. A senior interest remains intact on the property when a junior interest initiates the foreclosure. When a foreclosure is executed, the priority of payment is that (1) all fees are paid for the foreclosure, (2) Senior creditor interests are paid first and in order to the junior interests, and (3) anything left over is given the debtor, or owner of the property.

Here, Jane's interest in the property has priority to Acme's because her deed of trust was executed first, Acme was aware of the deed of trust, and both interests are purchase money security interest. Accordingly, Jane's interest will not be extinguished by the foreclosure sale by Acme. If the proceeds from the sale produce enough to pay

both the debts of Acme and Jane, then both will be paid, and any remainder will be given to Ira. If not, Acme's foreclosure sale will be subject to Jane's deed of trust, and the sale will not extinguish that interest. Jane will be able to foreclose on the property regardless of who purchases the shop during the public foreclosure sale.

CONCLUSION:

In conclusion, though the court will not order Acme to split the proceeds from the foreclosure sale with Jane proportionally, Jane's deed of trust is superior to Acme's mortgage, and the public foreclosure would not extinguish her interest in the machine shop.

QUESTION 4: SELECTED ANSWER B

1. Ira v. Donna

The first issue is establishing what obligations, if any, Donna owes to Ira as a neighboring property owner.

Ira is claiming damages against Donna for the damage caused by Donna's excavation for the construction of an office building. Duties between neighboring property owners can arise in several ways, namely, through contract or tort law. Under contract law, if parties enter into covenants with each other to do something or refrain from doing something on their land, they may be obligated under contract law to fulfill those obligations. Another way in which neighboring property owners may owe each other a duty is through tort law. If Donna and Jane (Ira's predecessor) or Donna and Ira had created a covenant not to interfere with one another's sublateral support, Ira may have a claim for damages under that theory. However, it does not appear that they have an explicit agreement.

Tort law will also impose duties on neighboring property owners in some instances. For example, if one property owner's use of the property is in a way that causes a nuisance, that may give rise to liability under tort law. Likewise, neighbors have a general obligation to refrain from engaging in hazardous or inherently dangerous activities on their property that may interfere with others outside of their property. Additionally, property owners may have a duty under either a strict liability or negligence theory for interfering with a property owner's sublateral support.

Inherently Dangerous Activities

Ira may argue that Donna's use of the neighboring property (using an excavator) constitutes an inherently dangerous activity. When a property owner engages in an inherently dangerous activity she will be held strictly liable for injuries resulting as a

consequence of that activity's inherently dangerous propensities. In order to be considered inherently dangerous, an activity must be: 1) unusual for the community; 2) one that cannot be made safer by safety measures; 3) one whose utility is outweighed by the danger it is likely to cause.

In this case, Donna is excavating her property to build an office building. Donna is doing so in a zone that specifically permits office buildings. One may assume that if office buildings are allowed in the zone, their construction is also a usual activity for that area. Further, there is utility in developing a community for business and thus, there is utility in building office buildings. Further, the construction of office buildings can be made safer by taking safety precautions, by having licensed contractors, putting up warning signs, etc. Therefore, using an excavator will likely not constitute an inherently dangerous activity and Ira does not have a cause of action under this theory.

Interference with Sublateral Supports

An alternative theory will arise by asserting that Donna has interfered with Ira's subadjacent property rights. In cases where a neighbor excavates and causes a disturbance in their neighbor's sublateral support for their property, the neighbor whose property was damaged may have a cause of action under either a negligence theory or a strict liability theory. Which theory applies depends on whether or not the neighbor (Ira) can show by clear and convincing evidence that her property and the weight of his buildings did not contribute to the damage. That is, there would have been damage regardless of whether or not the buildings were constructed. If the plaintiff (Ira) cannot show that his buildings did not contribute to the ultimate injury, then he must make out a case in negligence. If he can, then he may make out a case in strict liability.

In this case, when Jane owned the machine shop it already had a slightly buckled wall. Therefore, when Ira took the building, the wall was likely still buckled or even made worse with the passing of time. Because of this, the unsecured nature of the construction likely contributed in some way to the building's ultimate destruction.

Therefore, strict liability is not available to Ira because he cannot demonstrate that the buildings on his property in no way contributed to the damage.

Therefore, Ira must make out a case in negligence. In order to make out a case in negligence, a plaintiff must show that: 1) defendant had a duty to the plaintiff; 2) defendant breached that duty; 3) the breach was the actual and proximate cause of the damage; 4) there were damages.

In this case, a duty has already been established under the sublateral support doctrine. The standard of care is an objective, reasonable person standard. Negligence causes of action incentivize individuals to act in a reasonable way in their interactions with others. The standard of care in this case would be what a reasonable person excavating property next to a neighbor's property would do.

The next issue is whether or not the defendant breached that duty. In this case, it appears as though Donna initially was acting as a reasonable person; as discussed, she was excavating property to build an office building in an area zoned for that use. However, Ira complained to Donna that the excavation was causing the shop's wall to buckle further. After Donna was put on notice of creating this damage, the question becomes whether a reasonable person would have done something to attempt to avoid the damage. In this case, Donna did nothing at all. It seems that a reasonable person would have assessed whether it was possible to move the location of the excavation or adjust construction in some other way to avoid the damage. Because there is no evidence that Donna did this, a court may find that she breached her duty toward Ira.

The next issue is whether her breach was the actual cause and proximate cause of the damage. Actual cause is but-for cause: but for the breach, would the damage have occurred? Actual cause may also be substantial cause if there are two or more contributing causes, either one of which may have been sufficient to cause the damage. In this case, it appears as though Donna's actions were the but for cause of the building's collapse. Ira complained to Donna that the excavation was causing the

building to further buckle. While it may ultimately be an issue of fact regarding whether it was the buckling of the wall or the excavation, for the purposes of getting the question to a jury a court would likely assume this element was met.

The next question is whether the excavation was the proximate cause of the injury. Proximate cause is the philosophical nexus between the act taken and the damage done -- it requires more than just actual cause and requires that the cause be something foreseeable from the defendant's actions such that it comports with notions of common sense and justice to hold the defendant liable for his actions. Under Palsgraf, the relevant question is whether the injury was foreseeable to the actor. A minority view would hold any damage is foreseeable if it resulted from the action. In this case, because Donna had notice of the damage the excavation was causing, and the excavation was occurring right under the building, it seems foreseeable the damage to the building was likely. Therefore, the proximate cause element is likely met.

Finally, Ira must show there was damage resulting from the breach. In this case, there was actual destruction of his building, resulting in substantial damage, so this element is also met.

Note, most jurisdictions would reduce the amount of damages that Ira receives based on a pure comparative negligence standard, which reduces the amount of recovery that plaintiff receives by her amount of fault. In a traditional comparative negligence state, the recovery would be reduced entirely if the plaintiff was at all at fault. In this case, it does seem as though Ira was partially to blame for not strengthening his wall or doing anything to avoid the damage. Therefore, his damage award will likely be reduced based on the findings of a jury.

2. Ira v. Town

Is the ordinance valid under the Constitution?

Ira's case against the town arises from the Town's refusal to permit him to rebuild a machine shop in a zone that permits office buildings and retail stores, but not manufacturing facilities.

The first issue is whether or not the town's adoption of a zoning ordinance is permissible under the Constitution. The Constitution permits state actors to take or incur on a private citizen's property rights for the public good provided they are given just compensation, measured by the value to the property owner, not the benefit conferred to the government. Generally, zoning ordinances, although they are not complete takings under the Constitution, are analyzed under this framed work.

The general rule is that if the government possesses a private actor's property, no matter in what degree, it will constitute a taking under the Constitution and the property owner will be entitled to compensation. In this case, because the Town has not physically possessed Ira's property, this does not constitute a complete taking.

However, a regulatory regime that destroys all economic viability will also constitute a complete taking under the Constitution and will require the property owner be justly compensated. In this case, the zoning ordinance is a regulation. However, it does not completely destroy the value of Ira's property because he could still build an office building, retail store, sell the property, etc. Therefore, it is not a complete taking under this theory either.

Finally, a partial taking may also require compensation under the Penn Central balancing test if a property owner's property interests are interfered with and his property value decreased. Courts look at: 1) the investment-backed expectations of the property owner; 2) the nature of the government action; 3) the benefit to the public and harm to the individual property owner and what the owner should rightfully have to bear for the benefit of the public. In this case, it is unclear whether Ira's property rights decreased. Clearly, he cannot do what he wants with the property, but that does not

mean it does not have other values. Therefore, a court would likely find the Town's refusal to issue a building permit proper under the Constitution.

Is a variance warranted?

The question becomes then, whether or not Ira is entitled to continue using the facility pursuant to a zoning variance for prior use. A zoning variance may be granted if the owner of property can show that the use of their property in the manner previously used will cause undue hardship to the owner and would not cause significant harm to the community if the variance was granted. Notably, when the zoning ordinance is valid, as this one is (see previous discussion), a Town has some discretion in balancing the harms to the application and to the community.

In this case, the zoning ordinance permits office buildings and retail stores, but not manufacturing facilities. The reasoning behind this ordinance seems apparent: manufacturing facilities are generally larger, more disruptive, more likely to emit noise, debris, etc. A town has a reasonable basis for preferring to have a community comprised of stores and office buildings, were people can shop and work without distraction and interference. Therefore, the harm to the community if the variance were granted seems great.

However, Ira does have an argument that because of the pre-existing use of the machine shop by Jane, he is entitled to a variance under the theory that he was grandfathered into the ordinance. However, there are three problems with this argument. First, as previously discussed, the Town has good reason for not wanting manufacturing facilities in the retail/office area of town and variances are discretionary. Second, there are privity issues between Jane and Ira and the Town. It was Jane, not Ira that had been using the building as a machine shop (presumably a manufacturing facility, though Ira might raise a classification argument), when the ordinance was passed. Third, the pre-existing use generally must be consistent if a variance is granted for pre-existing use. When the machine shop collapsed, it was no longer used as a

manufacturing facility and Ira likely lost his ability to claim any sort of entitlement to use the property as a manufacturing facility under the pre-existing use doctrine.

In conclusion, a court will likely deny Ira's request that the Town issue a building permit.

3. Jane v. Bank (re: proportionate share of the foreclosure proceeds)

The issue this question raises is how to be characterize the security interests that Jane and Acme have in the machine shop property and what the priority of those interests are.

Generally, mortgages are security interests in property, used by a mortgagee to secure a debt that she has issued to a mortgagor. In this case, Ira purchased the machine shop from Jane for $500,000, but as he clearly did not have that much money, he took out loans. A loan may be either secured or unsecured. An unsecured loan is one that does not have any collateral that a lender may use as compensation in the event of default. A secured loan is one that has property of some sort as collateral for the repayment of a loan. Unsecured loans take a second seat to secured loans when property is foreclosed upon.

Generally, mortgages are prioritized in the order they were made. A bank that loans money to a home purchaser will take a first mortgage on that home. If the purchaser later borrows more money, that lender may also secure the repayment with a mortgage on the home, but it will be subject to the first lender. Once the first lender is paid in full, the second lender will be entitled to proceeds. This is why second mortgages often have higher interest rates or are otherwise on less favorable terms -- they are less secure because they are subordinate to another's interests in the property. The proceeds come from a foreclosure sale, which occurs when the property securing the debt is sold to pay off the lenders.

Finally, there are special types of loans/mortgages called "purchase money mortgages". The mortgages occur when the money lent to a mortgagee is used for the purchase of the item itself. This typically occurs with owner financing -- if a homeowner sells her home and loans money to the purchaser to buy it, there is a purchase money mortgage in the house. These types of mortgages will take priority, even if there is a primary lender that attached prior to the purchase money mortgage being issued.

In this case, Ira purchased the machine shop from Jane for $500,000. Obviously Ira did not have that cash up front. Instead, he paid $50,000 in cash to Jane, which is hers to keep and is not up for grabs at the foreclosure sale. Next, he gave her a promissory note for an additional $50,000 secured by a deed of trust. Then he borrowed another $400,000 from Acme Bank, which recorded a mortgage.

If the $50,000 from Jane was secured by an interest in the machine shop, the very property the loan was made to purchase, this loan will take priority and Jane will be entitled to the first $50,000 received in the foreclosure sale.

Acme will argue that it is the primary lender and that it is entitled to all the money from the foreclosure sale, until it exceeds its $400,000 loan, at which case it may spill over to secondary lenders. There are two problems with this argument: 1) First, as discussed above, Jane's loan to Ira was a purchase money mortgage and takes priority over the Bank's loan. Even if it were not a purchase money mortgage, Jane was still the first lender. 2) Second, Acme knew of Jane's promissory note and deed of trust prior to the close of escrow. Notably, although Jane did not appear to record her mortgage, a recording is not required to secure an interest. Rather, a recording system serves to give subsequent mortgagees and purchasers notice, something Acme already had.

The issue then becomes, what is the effect of Acme's knowledge on its mortgage in the property? Generally, in order to take priority, a mortgagee must be a holder in due course, or a bona fide mortgagee, who takes without knowledge of any other interests in the property. In this case, because Acme knew about Jane's deed of trust, Acme was

not a bona fide mortgagee or holder in due course; therefore, Acme's mortgage could be subordinated on this ground.

Note: Generally the holder in due course requirements are intended to protect a subsequent mortgagee who takes from a first mortgagee. A holder in due course will be protected if he takes a negotiable instrument, made out to the holder, without notice of impediments, for valuable consideration and in good faith. A holder in due course will be free from personal defenses raised by the mortgagor (e.g., lack of consideration, waiver), but will take subject to non-personal defenses (e.g., duress). In this case, Acme did not take the mortgage from another mortgagee, but rather was the first mortgagee. Therefore, this doctrine does not apply, but its principles still do. Generally, courts do not reward mortgagees or other property holders who take knowing of another's interest in land.

In sum, Acme, although it was the first to record, under either a notice or race-notice jurisdiction, Acme is not entitled to bona fide purchaser/mortgagee status because it took knowing of Jane's mortgage. Further, Jane is protected by her status as a purchase money mortgagee. Therefore, a court will likely rule that she is entitled to $50,000 from a foreclosure 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.

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

QUESTION 2

Amy and Bob owned Blackacre in fee simple as joint tenants with a right of survivorship. Blackacre is located in a jurisdiction with a race-notice recording statute.

Without Bob's knowledge, Amy gifted her interest in Blackacre to Cathy by deed. Amy and Bob then sold all of their interest in Blackacre by a quitclaim deed to David, who recorded the deed. Shortly thereafter, Cathy recorded her deed.

David entered into a valid 15-year lease of Blackacre with Ellen. The lease included a promise by Ellen, on behalf of herself, her assigns, and successors in interest, to (1) obtain hazard insurance that would cover any damage to the property and (2) use any payments for damage to the property only to repair such damage. Ellen recorded the lease.

Five years later, Ellen transferred all of her remaining interest in Blackacre to Fred. Neither Ellen nor Fred ever obtained hazard insurance covering Blackacre. While Fred was in possession of Blackacre, a building on the property was destroyed by fire due to a lightning strike.

David has sued Ellen and Fred for damages for breach of the covenant regarding hazard insurance for Blackacre.

1. What right, title, or interest in Blackacre, if any, is held by Cathy, David, Ellen and/or Fred? Discuss.

2. Is David likely to prevail in his suit against Ellen and Fred? Discuss.

QUESTION 2: SELECTED ANSWER A

1. What right, title, or interest in Blackacre, if any, is held by Cathy, David, Ellen and/or Fred?

At common law, there were no recording statutes and the rule was that the first in time prevailed. Under this jurisdiction, there is a race-notice statute that will govern the facts of this case. If the statute does not apply, then the common law does. A race-notice statute provides that any subsequent purchaser of property will take if they are a bona fide purchaser (BFP) and recorded first. To be a BFP, a party must pay value and take without notice of any prior recordings that may affect their title to the property. Notice can be by: (1) actual notice; (2) constructive notice; or (3) inquiry notice. Actual notice is that the party knew there was another party with a claim on the property. Constructive notice is when a recording in the grantor-grantee index gives notice to a party that there are other parties claiming interest to the land. Lastly, inquiry notice is when the party is given facts that there may be other possessors to the property and that party has a duty to inquire further (i.e., if they see a house built on the land with occupants, that party has a duty to inquire why they are on the land).

A. Cathy

A joint tenancy is created with a right of survivorship when the four unities are met: time, title, instrument and possession. In other words, the parties must acquire their joint tenancy at the same time, with the same amount of title, in the same instrument and each have the right to possess the entire land. The right of survivorship allows that when one of the joint tenants die, the entire estate goes to the surviving joint party. However, if the joint tenancy is severed, the parties become tenants in common and the right of survivorship no longer exists. The joint tenancy can be severed by a unilateral conveyance of one of the joint tenants to another party.

Here, Amy and Bob owned the land in fee simple as joint tenants with the right of survivorship. The facts do not give details as to if the four unities of time, title, instrument and possession were met. However, the facts assume that these elements

were met. As such, Amy and Bob owned Blackacre as joint tenants with the right of survivorship to begin with. Amy thereafter gifted her interest to Cathy. This bequest severed the joint tenancy between Amy and Bob. At this point in time, Bob and Cathy were then owners to Blackacre as tenants in common. However, as will be discussed in the following section, because Cathy failed to record her deed, David will take Blackacre under the recording statute and Cathy has no interest in Blackacre.

B. David

As mentioned, under the recording statute in this jurisdiction, a subsequent purchaser will take if they are a BFP and record their interest first. Amy and Bob sold all of Blackacre to David. Although Amy no longer had any interest in Blackacre because she had conveyed her interest to Cathy, David was unaware of that fact. David was a BFP as required under the statute. First, he paid value for the property. And secondly, based on the facts, he did not have knowledge about Cathy's conveyance. There are no facts to indicate that he had actual knowledge of the conveyance to Cathy. Additionally, David did not have constructive notice of the conveyance to Cathy. A BFP only has a duty to check the grantor-grantee index when the conveyance is made to him. He does not have to subsequently check the index for good title. Therefore, when he checked the index before accepting the property, there was no notice of Cathy's deed. Lastly, David did not have inquiry notice. It doesn't appear that Cathy lived on the land or made any assertions of title over the land. As such, David qualified as BFP because he took without notice and paid value for the land. Also, to prevail under a race-notice statute, the subsequent purchaser must record. Here, David recorded his deed promptly. As a result, David's interest in the land is superior to Cathy's.

C. Ellen

David had good title to the property as discussed above and therefore, was free to do what he wanted with the land. He subsequently leased the property to Ellen. Ellen is a BFP under the recording statutes as well. She is paying value for the lease through rent payments and took without notice of Cathy's interest. Similar to David, there is no actual or inquiry notice for the same reasons as stated above. Additionally, she just not

have constructive notice. Although Cathy has now recorded the deed, it is not within the chain of title that Ellen would have to search. Even if Ellen did have notice of Cathy's interest, she would be protected by the Shelter Doctrine, which allows subsequent parties to assume BFP status from the prior conveyance, even if that purchaser did not have BFP status. Here, David was a BFP and recorded his deed; thus, Ellen is a BFP under David anyway.

However, David's conveyance to Ellen was not a fee simple, but rather, a lease for a term of 15 years. Thus, by the terms of the lease, Ellen has a possessory interest in the property for the next 15 years. At the time of the lease, she was in privity of contract with David (through the lease) and privity of estate with David (by occupying the land).

D. Fred

Parties are generally free to assign their interests under a contract or lease to another party. An assignment is where a party gives the remaining interest under the lease to a subsequent party. Alternatively, a sublease is where a party gives less than the full interest left on the lease. Thus, the courts are to look at the actual interest conveyed and not what the parties might have labeled it.

The lease between David and Ellen did not contain an anti-assignment clause. Rather, the lease applied to Ellen, her assigns, and successors in land. Thus, an assignment of Ellen's interest was valid under the lease. (Even if it wasn't, David would have likely waived the anti-assignment provision because he continued to accept rent from Fred). Additionally, the facts state that Ellen transferred "all her remaining interest in Blackacre to Fred." Therefore, it was an assignment, since all her interest, the remaining 10 years on the lease, was transferred to Fred. As such, Fred assumed Ellen's interest in the land. As such, Fred is lawful tenant with possessory interest in Blackacre for the next ten years.

E. Conclusion

Because this is a race-notice jurisdiction and the statute applies under the facts of this case, David has superior title to the land. Cathy does not have any interest in the land because she failed to record her interest. David conveyed his possessory interest

to Ellen, who assigned her interest to Fred. As such, David holds title in fee simple to Blackacre and Fred has possessory interest in Blackacre for the next ten years under the terms of the lease between David and Ellen.

2. David v. Ellen & Fred

As mentioned above, there was a valid assignment of Ellen's interest to Fred under the lease. Ellen, as the assignor, remains in privity of contract with David. Fred, as the assignee, remains in privity of estate with David. The terms of the lease between David and Ellen contained two covenants: Ellen, on behalf of herself, assigns, and successors was to: (1) obtain hazard insurance that would cover any damage to the property and (2) use any payments for damage to the property only to repair such damage. Neither Ellen nor Fred ever obtained hazard insurance covering Blackacre. Unfortunately, lightning struck the property and destroyed a building on the property. Thus, the issue is whether David can prevail on a damages claim based on these covenants against Ellen and Fred?

A. Ellen

As mentioned, Ellen remains in privity of contract with David under the terms of the lease. A novation occurs when two parties agree that one party will no longer be held liable under the terms of the contract.

Under the facts, Ellen and David entered into a 15-year lease agreement. Five years into the lease, Ellen assigned her interest to Fred. There does not appear to be any agreement between David and Fred relieving Ellen of her liability under the lease. As such, no novation has occurred. Because David and Ellen are still in privity of contract, David can bring claims against Ellen for damages for breach of the covenant regarding hazard insurance for Blackacre.

B. Fred

For a covenant to run with the land and bind successors in interests, certain requirements must be met depending on whether the interest in the burdened (servient) or benefited (dominant) estate is being transferred. The servient estate is the estate that incurs the burden of the covenant, while the dominant estate is the one that

benefits from the covenant. If the covenant is on the servient estate, the covenant will run with the land if: (1) the parties intended the covenant to run with the land; (2) the covenant touches and concerns the land; (3) the servient estate has notice of the covenant; (4) there exists horizontal privity; and (5) vertical privity.

Here, the covenant burdens the lessee estate, since Ellen and her successors/assigns are required to maintain hazard insurance and use that insurance to repair the damages. Thus, David will have to show the above five elements in order to be able to collect damages from Fred.

i. Intent

The parties to the original agreement must have intended that the covenant be perpetual and continue to bind successors in interest of the land. Here, the parties specifically included in the written lease agreement that "Ellen, on behalf of herself, assigns, and successors in interest" will maintain hazard insurance and use the proceeds of such insurance to fix any damage caused by any hazards. Therefore, the express language of the parties in the lease provide that they intended the covenant to bind all successors in interest.

ii. Touch and Concern the Land

To bind successors in interest, the covenants must also touch and concern the land. Courts have held that a covenant touches and concerns the land if it conveys a benefit onto the land. For example, the payment of rent is a sufficient covenant that touches and concerns the land. Here, the covenant is to provide insurance to protect the land in case of damage and to repair the land in the event that such hazardous damage does occur. This is for the benefit of the land to maintain the premises and therefore, it touches and concerns the land.

iii. Notice

The successor in interest must have notice of the covenant in order to be bound by the terms of it. As mentioned above, there are three types of notice. Here, Fred had constructive notice because Ellen recorded the deed in the grantor-grantee index.

Therefore, Fred would be able to know the terms of the lease because it was within the chain of title and will be deemed to have constructive notice of the covenants.

iv. Horizontal Privity

Horizontal privity must exist between the original parties to the covenant, such as grantor-grantee or lessor-lessee. A covenant agreement alone is insufficient to establish horizontal privity. Here, David and Ellen have horizontal privity as their relationship was that of lessor-lessee. Thus, horizontal privity exists.

v. Vertical Privity

Lastly, vertical privity must exist between the successor in interest and the previous owner of the servient estate. Here, Ellen conveyed the remainder of her interest on the lease to Fred. Therefore, there is a vertical privity between Ellen and Fred.

Thus, all five elements are met for a covenant to run with the land and David may hold Fred liable for damages for the breach of the covenants.

C. Conclusion

David may hold Ellen liable for damages for breach of the two covenants because she is in privity of estate with David. Additionally, David will be able to hold Fred liable for damages because the two covenants run with the land and Fred had notice of such covenants.

QUESTION 2: SELECTED ANSWER B

1. **What right, title, or interest in Blackacre, if any, is held by Cathy, David, Ellen and Fred.**

Classify the Interest: Joint Tenants with a Right of Survivorship

A joint tenancy is a concurrent interest in land in which case at least two individuals own an undivided interest in the whole of the property. A joint tenancy is created with express language that the tenancy carry with it the right of survivorship. The right of survivorship means that when one joint tenant dies the other co-tenants take the deceased tenant's interest in the property. A joint tenancy is created when four unities are present at the time of creation. These unities are the unities of time, title, interest, and possession.

Here, facts indicate that Amy and Bob owned Blackacre in fee simple as joint tenants with a right of survivorship. Thus, the original property relationship was that of a joint tenancy because the right of survivorship was expressly provided for.

Severance of the Joint Tenancy

A joint tenancy is severed whenever any one of the four unities of time, title, interest, and possession is disturbed. When one of the four unities of a joint tenancy is disturbed a tenancy in common results and the right of survivorship is extinguished. In this event the tenants in common own a undivided interest in the whole of the property which is then freely alienable.

Here, the facts indicate that Amy gifted her interest in Blackacre to Cathy by deed. By gifting her interest in the joint tenancy, Amy disturbed the four unities, particularly the unity of title. As indicated above, when a joint tenancy is severed a tenancy in common is created. Thus, since the joint tenancy was severed, at this particular point in the facts

Amy held no interest, and Cathy and Bob held the property as tenants in common. The right of survivorship was extinguished and both Cathy and Bob had an undivided interest in the whole of the property.

Amy's Conveyance to David / Recording the Interest / Recording Statute

The facts indicate that after Amy gifted her interest in Blackacre to Cathy by deed she and Bob sold all of their interest in Blackacre to David. These facts implicate the rules for the relevant recording statue.

In a race-notice jurisdiction, a subsequent bona fide purchaser (BFP) is protected by the recording statute provided that he takes without notice and is the first to record his interest in the deed. There are three different kinds of notice. There is actual notice, record notice, and inquiry notice. Actual notice refers to the extent to which a BFP actually knows that someone else claims an interest in the land. Record notice refers to the extent to which the BFP is notified by researching the record of title. And inquiry notice refers to the extent to which a BFP inspects the property and discovers someone else asserting a claim to the property. Additionally, it should be noted that the recording statutes are designed to protect subsequent BFP's and not gratuitous grantees of real property.

Here, the facts indicate that Amy and Bob sold all of their interest in Blackacre to David after Amy gifted her interest to Cathy by deed. The facts also indicate that David recorded his deed before Cathy recorded her deed. Thus, for the recording statute to apply and for David to take title to the property he must be a subsequent BFP who took without notice and who recorded first. The facts indicate that David did in fact record before Cathy recorded. Thus, the "recorded first" element is satisfied. The next question that must be determined is whether David had notice of Amy's interest. There is nothing in the facts which says that David had actual notice of Cathy's interest. Additionally, although the facts do not indicate that David inspected the property, the facts also do not indicate that Cathy occupied the property so as to put David on notice

had he inspected the property. The real question is whether David had record notice. Determining record notice is a two-step process. First, the BFP must go to county recorder's office, locate the particular property and construct the chain of title. The chain of title can be constructed by looking first at the grantee index and then building the chain of title back in time. Next, the BFP must adverse each link of the chain. This is done by looking at the Grantor index and following the chain of title until the BFP reaches his interest. Here, David will not discover Cathy's interest in Blackacre. Cathy recorded her deed too late. By recording her deed after David recorded his deed David would not be put on notice as to Cathy's interest in Blackacre. Also, although not directly relevant, it should be noted that Cathy, as a gratuitous grantee, is not likely to receive any protection under the recording statute.

On balance, David obtained lawful title to Blackacre as a subsequent BFP who took without notice and was the first to record his interest.

2. Is David Likely to Prevail in his Suit Against Ellen and Fred

The Lease with Ellen

A tenancy for years is a specific type of tenancy that has a specific start date and a specific end date. A tenancy for years need not be for a terms of actual years but rather only needs a specific starting and ending date. A tenancy for years is terminated upon the end of the specified date.

Here, the facts indicate that David entered into a valid 15-year lease of Blackacre with Ellen. Since the lease has a specific start date, and a specific end date, it is likely considered a tenancy for years.

Ellen's Transfer to Fred

A sublease is a legal relationship in a leased property that arises when the tenant conveys out less than his entire interest under the lease. In this circumstance, sublessor has privity of estate with the lessor. An assignment occurs when the lessor conveys out all of his durational interest under the lease. In the case of an assignment the original lessee is no longer in privity of estate with the lessor but depending on the circumstances may still remain in privity of contract with the lessor. Privity of estate means that two individuals share an interest through their relationship to a leased property and privity of contract is a contract obligation between two contracting parties.

Here, the facts indicate that five years into the lease, Ellen transferred all of her remaining interest in Blackacre to Fred. Thus, because all of the remaining interest was transferred as opposed to only some or part of the interest Ellen executed a valid assignment. The results of this assignment is Fred is not in privity of estate with David. However, because Ellen was the original contracting party with David, she remains in privity of contract with David.

Breach of the Covenant: Ellen

A restrictive covenant is a written promise with respect to land either to take an affirmative action or to refrain from taking action. Liability for the restrictive covenant may attach to parties that are either in privity of contract with the lessor or privity of estate. In the event of privity of contract, the contracting party remains liable under a contract theory of recovery. If an express contract between the lessor and the lessee is breached by failing to satisfy the written covenant then the landlord may sue to evict the tenant and/ or assert a claim of money damages.

Here, as noted above, Ellen is in privity of contract with David. She is the original party under the lease, who signed the lease and who had knowledge of the covenants in the lease. The fact that she assigned her interest to Fred means only that she is not under privity of estate with David, but she is still liable under privity of contract. The lease included a promise by Ellen to obtain hazard insurance and to use any payments for

damage to the property to repair such damage. Ellen breached the lease covenant because she never obtained hazard insurance covering Blackacre and because a building on the property was destroyed by fire.
Thus, because Ellen is in privity of contract with David, David can elect to sue Ellen for breach of the express contractual covenant.

Breach of the Covenant: Fred

Restrictive Covenant

A restrictive covenant is a written promise with respect to a particular piece of property to do or to refrain from doing something on that particular property. Restrictive covenants run with the land to successive assignees if the covenant makes the land more beneficial or useful. In order for the burden of a restrictive covenant to apply there must be intent and notice, the covenant must touch and concern the land, there must be vertical privity and horizontal privity. In order for the benefit of a restrictive covenant to apply there need only be the elements of intent, touch and concern and vertical privity. Vertical privity is present when the successor in interest has the entire interest in the property. Horizontal privity refers to the fact that the original parties to the agreement had a mutual interest in the property outside of the covenant agreement.

Here, the facts indicate that the lease expressly stated that the covenant to obtain hazard insurance and to use its proceeds would apply to "Ellen, on behalf of herself, her assigns, and successors' interest." Thus, because there was intent that the covenant apply to subsequent parties, the intent element is met. The facts also indicate that Ellen recorded the lease and that the covenants were expressly written in the lease. Thus, it appears that Fred had notice of the lease provisions. The next element that must be satisfied is the touch and concern element. As discussed above, in order for the covenant to touch and concern the property it must make it more beneficial or more useful. Here, the covenant was that Ellen and her assigns obtain hazard insurance which would cover any damage to the property. If a particular piece of property is

covered by insurance, then it is more likely than not to be benefitted and thus, as a result will be more valuable. As noted above, vertical privity must also be satisfied. Here, Ellen conveyed out all of her remaining interest on Blackacre. Additionally, there is nothing in the facts to suggest that anyone else other than Fred not presently occupies the property. Thus, vertical privity is satisfied. Finally, there must be horizontal privity. David owns the property outright. Additionally, David and Ellen had no interest in the property outside of the lease. Thus, horizontal privity is satisfied.

Based on the foregoing analysis, it appears that the burden of the restrictive covenant to obtain hazard insurance does run to Fred, a party in privity of estate with David. Thus, because Fred failed to obtain insurance and because the property was destroyed implicating the need for the insurance, David is likely to prevail in his suit against Fred.