

Question 1

In May 2017, George graduated from law school. In June 2017, George attended an in-person California bar examination preparation course offered by the Best Bar Course ("BBC"), a professional bar exam preparation company. In July 2017, George took the California bar exam for the first time. In November 2017, George learned that he passed the bar exam with a perfect score. It was the first time anyone had ever earned a perfect score on the California bar exam. The California State Bar issued a press release lauding George's perfect score. George appeared on national news programs and became an instant legal celebrity.

Soon after the press release, BBC asked George to be its national spokesperson in its advertising campaign for the next five years. The ad campaign involved George appearing in written, electronic and television advertisements endorsing BBC's courses materials, and instructors. George agreed, and the parties entered into a written contract dated January 1, 2018.

The contract provided that George would receive \$200,000 a year for the next five years, payable in advance on the first day of each year starting January 1, 2018. The parties acknowledged that if BBC were to hire an experienced lawyer or an actor with the same level of name recognition as George, it would have to pay at least \$400,000 per year. The contract prohibited George from taking other bar examinations, endorsing other bar examination preparation courses or making any derogatory comments about BBC. The contract also allowed BBC to terminate the contract without cause, but required BBC to pay George \$500,000 if it did so.

On January 1, 2018, BBC paid George \$200,000, and George began work as its national spokesperson. George proved to be a charismatic and effective spokesperson and the national advertising campaign was extremely successful. By the end of the first year, BBC enjoyed a substantial increase in sales and a \$5,000,000 increase in its net value. On January 1, 2019, BBC paid George another \$200,000.

On May 1, 2019, a large Miami, Florida law firm offered George a job as an associate attorney with a \$300,000 annual salary, starting on November 15, 2019. The offer was conditioned on George passing the Florida bar examination. George accepted the offer, moved to Miami and attended an evening on-line bar preparation course offered by the Famous Florida Bar Course. During daytime hours, George continued to work as BBC's spokesperson.

On July 1, 2019, George took the Florida bar examination. On November 1, 2019, George received notice that he passed the examination with the highest score in the

history of the exam. A few days later, the name of each person who passed the bar was published in the Miami Herald newspaper. BBC recognized George's name on the list. On November 15, 2019, George began his new job at the Miami law firm. To celebrate his first week at the law firm, one of the firm's partners invited him and ten other law firm associates to go to happy hour at a nearby bar. While at the bar, George and his new colleagues paused and watched a television commercial featuring celebrity Kim Kardashian, in which she announced that she had just passed the California bar after taking BBC's bar preparation course, and was proud to be its new national spokesperson.

Moments after the commercial ended, George received a text message from BBC's Chief Executive Officer. The message said: "Dear George, We are terminating your BBC spokesperson contract effective immediately because you took the Florida bar exam in breach of our agreement. We will not pay any more money on the contract. We wish you well in your career."

On December 1, 2019, George did not receive a \$200,000 annual payment from BBC.

On January 1, 2020, George sued BBC. BBC filed a cross-complaint against George. The complaint and cross-complaint are referred to as the litigation.

**QUESTION: What damages is George likely to recover in the litigation?**

Question 2

The facts of Question 2 are identical to the facts of Question 1 (below)

In May 2017, George graduated from law school. In June 2017, George attended an in-person California bar examination preparation course offered by the Best Bar Course ("BBC"), a professional bar exam preparation company. In July 2017, George took the California bar exam for the first time. In November 2017, George learned that he passed the bar exam with a perfect score. It was the first time anyone had ever earned a perfect score on the California bar exam. The California State Bar issued a press release lauding George's perfect score. George appeared on national news programs and became an instant legal celebrity.

Soon after the press release, BBC asked George to be its national spokesperson in its advertising campaign for the next five years. The ad campaign involved George appearing in written, electronic and television advertisements endorsing BBC's courses materials, and instructors. George agreed, and the parties entered into a written contract dated January 1, 2018.

The contract provided that George would receive \$200,000 a year for the next five years, payable in advance on the first day of each year starting January 1, 2018. The parties acknowledged that if BBC were to hire an experienced lawyer or an actor with the same level of name recognition as George, it would have to pay at least \$400,000 per year. The contract prohibited George from taking other bar examinations, endorsing other bar examination preparation courses or making any derogatory comments about BBC. The contract also allowed BBC to terminate the contract without cause, but required BBC to pay George \$500,000 if it did so.

On January 1, 2018, BBC paid George \$200,000, and George began work as its national spokesperson. George proved to be a charismatic and effective spokesperson and the national advertising campaign was extremely successful. By the end of the first year, BBC enjoyed a substantial increase in sales and a \$5,000,000 increase in its net value. On January 1, 2019, BBC paid George another \$200,000.

On May 1, 2019, a large Miami, Florida law firm offered George a job as an associate attorney with a \$300,000 annual salary, starting on November 15, 2019. The offer was conditioned on George passing the Florida bar examination. George accepted the offer, moved to Miami and attended an evening on-line bar preparation course offered by the Famous Florida Bar Course. During daytime hours, George continued to work as BBC's spokesperson.

On July 1, 2019, George took the Florida bar examination. On November 1, 2019, George received notice that he passed the examination with the highest score in the history of the exam. A few days later, the name of each person who passed the bar was published in the Miami Herald newspaper. BBC recognized George's name on the list.

On November 15, 2019, George began his new job at the Miami law firm. To celebrate his first week at the law firm, one of the firm's partners invited him and ten other law firm associates to

go to happy hour at a nearby bar. While at the bar, George and his new colleagues paused and watched a television commercial featuring celebrity Kim Kardashian, in which she announced that she had just passed the California bar after taking BBC's bar preparation course, and was proud to be its new national spokesperson.

Moments after the commercial ended, George received a text message from BBC's Chief Executive Officer. The message said: "Dear George, We are terminating your BBC spokesperson contract effective immediately because you took the Florida bar exam in breach of our agreement. We will not pay any more money on the contract. We wish you well in your career."

On December 1, 2019, George did not receive a \$200,000 annual payment from BBC.

On January 1, 2020, George sued BBC. BBC filed a cross-complaint against George. The complaint and cross-complaint are referred to as the litigation.

**QUESTION 2 : What damages is BBC likely to recover in the litigation?**

Question 3

Darla the developer owns commercial property in Serenity City and wants to develop a holistic wellness center on it. The facility will include gyms, saunas, treatment rooms for facials, massages, cryotherapy, light therapy and vitamin iv drips, yoga studios, a juice bar, a café, and several classrooms and medical offices. For the last six months, Darla has been negotiating with Bart the builder to build the wellness center.

Two weeks ago, the Serenity City Council passed a local ordinance requiring that all new commercial construction must be equipped with an environmentally sensitive light system that detects and destroys surface viruses and maintains pristine interior air quality. Darla had no qualms about having the special light system installed in the new wellness center. Unbeknownst to Darla, the special light system cost \$1 million.

Preliminary contract negotiations were done by emails electronically and between Darla and Bart. In an early email, Bart asked Darla if she wanted the special light system included in his construction contract price, because he was unfamiliar with it, had never installed one, and he suggested it would be cheaper if the manufacturer installed it. Darla emailed back that "Bart, I want you to do the whole thing" and "I am confident that you can do the installation and I trust you to do a good job."

Eventually, Darla and Bart negotiated a draft contract and sent it to their own lawyers for review and approval. The final contract price was \$50 million and by the time the lawyers were done negotiating the details, the final contract was 50 pages. Among other things, it contained the following provisions:

1. "Bart shall furnish a state-of-the-art light system."
2. "Bart shall construct a paved parking lot with designated parking for at least 50 electric vehicles."
3. "Bart shall be paid as follows: 10% (\$5 million) upon completion of the foundation; 15% (\$7.5 million) upon completion of the framing; 50% (\$25 million) upon installation of all walls, floors and heating, ventilating and air conditioning systems (HVAC); and 25% (\$12.5 million) upon beginning of all operations, to be after issuance of a Certificate of Occupancy issued by the City Building Department certifying the project complies with the building codes and is in a condition suitable for occupancy, and issuance of a Certificate of Substantial Compliance by the project architect certifying that the project complies with the plans and specifications approved by the City Building Department.

4. "This Contract contains the entire and final agreement of the parties, and there are no promises, understandings or other agreements pertaining to this agreement other than those contained herein."

The foundation and framing were completed on schedule, and Darla paid \$5 million and \$7.5 million for that work, pursuant to the contract. The walls, floors and HVAC installations were also completed on schedule; however, the special light system had not been installed by that time. Darla sent Bart an email, demanding that the special light system be installed before she would make the third payment. Bart sent a reply email, insisting that it was his understanding that she wanted the manufacturer to install the light system to save time and money on the project, and based on that, he did not include it in his contract price. Darla responded that she was certain that they had agreed that Bart would install the system as part of his contract price, and that in any event, she was not going to make any further payments until it was installed.

Bart's subcontractors and suppliers and other creditors were clamoring for payment, and Bart was facing a huge payroll coming due in two weeks. Feeling that pressure, he reluctantly agreed to obtain and install the special light system on an expedited basis, and sent Darla an email that he was doing so "under protest." The manufacturer charged Bart more than the regular price for the system and required payment in advance, because Bart wanted immediate delivery and had insisted that the manufacturer's installers do the work. Bart's total cost to purchase and install the special light system was \$4 million. Bart paid the \$4 million to the manufacturer, and Darla paid Bart \$25 million when the installation was completed.

Around the time that construction of the wellness center project was nearing completion, the City of Serenity began to downsize its operations. Two weeks before Bart had scheduled a final inspection with the City Building Department, the City filed for bankruptcy and shut down its Building Department. By that time, the construction was complete except that Bart had neglected to provide designated electric vehicle parking. It would cost \$100,000 to provide this designated parking. The project architect refused to certify the project without that designated parking.

Bart requested Darla to make the final \$12.5 million payment. Darla refused. She sent Bart a letter explaining that she would not make the final payment because (1) no County Certificate of Occupancy was issued; (2) no architect Certificate of Completion was issued, and (3) Darla had decided to hold off on opening the wellness center because she was having a difficult time attracting tenants for the therapy rooms, café and medical offices.

You are a lawyer. Bart has asked for your advice regarding:

A. Whether he is entitled to some or all of the final payment; and

B. What will happen if he does not provide designated parking for electric vehicles?

C. Whether he is entitled to reimbursement for the \$3,00,000 he paid to purchase and install the special light system.

**QUESTION: What is your advice to Bart? Please explain.**

## Question 1 - Answer Outline

### George's damages

For George to recover damages, BBC must have breached the contract. The only potential grounds to allege a breach are the termination of George's employment and the failure to pay. There are four types of damages for George to consider: liquidated damages, expectation damages, reliance damages and restitution damages. In a typical contract case, only the aggrieved (non-breaching) party can recover damages, with the caveat that in certain circumstances even a breaching party may recover restitution.

#### A. Liquidated damages

The contract between George and BBC included a clause that allowed BBC to terminate the contract without cause, but required BBC to pay George \$500,000 if it did so. The issues are whether that clause applies and if so, whether it is enforceable as a liquidated damages clause.

A liquidated damages clause allows parties to determine the amount of damages in advance of a breach. To be enforceable, a liquidated damages clause must be intended to operate as agreed-upon damages and not as a penalty, it must reasonably estimate the anticipated harm at the time the contract is executed, and the amount must be reasonable in relation to the actual harm.

The total contract amount is \$1,000,000, the estimated cost to employ a replacement spokesperson for the remainder of the contract is approximately \$1,200,000, and the agreed-upon damages amount is \$500,000. Under this scenario, \$500,000 is a reasonable estimate because it provides George 50% of the entire contract amount and there are no facts indicating that the liquidated damages clause was intended as a penalty. Accordingly, the clause is likely to be enforceable if George was terminated without cause.

#### B. Expectation damages

Expectation damages are the amount of money necessary to restore an aggrieved party to the position he would have been in if the contract had been fully performed.

Expectation damages are calculated as the loss of value of the breaching party's performance, plus any incidental and consequential costs caused by the breach, less any payments received from the breaching party, less any costs avoided by the breach.

If BBC breached the contract, the loss of value of BBC's performance is the loss of what it was to pay George for the remaining three years of the contract (\$600,000), plus any incidental and consequential costs to George caused by the breach (none are indicated in the facts), less any payments George received from BBPC after the breach (none are indicated in the facts), less any costs George avoided as a result of the breach (none are indicated in the facts).  $\$600,000 + 0 - 0 - 0 = \$600,000$ .



If George elects to recover expectation damages and he did not breach the contract, he will recover \$600,000 reduced to present value, plus interest.

### C. Reliance damages

When expectation damages are not available, an aggrieved party may recover reliance damages. Reliance damages are the amount of money necessary to restore an aggrieved party to the position he would have been in before the contract.

Reliance damages are calculated as the sum of the expenses incurred by an aggrieved party to prepare for performance of the contract or to actually perform the contract, less any loss the breaching party can prove that the aggrieved party suffered if the contract had been performed. The latter must be reasonably certain.

The facts do not indicate that George incurred any expenses to prepare for or perform the contract. Consequently, George had no reliance damages.

### D. Restitution damages

George can elect to recover either restitution damages or expectation damages, but not both.

Restitution damages are calculated as either the reasonable value of the benefit conferred on the breaching party, or the extent to which the breaching party's property increased in value as a result of the aggrieved party's performance.

The reasonable value of the benefit that George conferred on BBC is the market value of George's services at the breach. The contract price can be admitted as evidence of the market price, as well as the price that BBC agreed to pay Kim to replacement George as its spokesperson. George's restitution damages will be at least \$400,000 (\$200,000 x 2 years) and as high as either Kim's contract price or BBC's \$5,000,000 net value increase.

Although a breaching party may recover restitution damages, he must also restore any benefit that he received. As a breaching party, George's restitution damages would be reduced by \$400,000. If \$400,000 is the reasonable value of George's services to the date of his breach, he has no restitution damages.

## Question 2 - Answer Outline

### BBC's damages

For BBC to recover damages, George must have breached the contract. The potential grounds for a breach are when George's attended the online Florida bar examination prep course and when he took the Florida bar examination. There are several types of damages for BBC to consider: expectation damages, consequential damages, incidental damages, reliance damages and restitution damages.

#### A. Expectation damages

Expectation damages are the amount of money necessary to restore an aggrieved party to the same economic position as full performance.

Expectation damages are calculated as the loss of value of the breaching party's performance, plus any incidental and consequential costs caused by the breach, less any payments received from the breaching party, less any costs avoided by the breach.

The loss of value of George's performance is either the cost of his performance ( $\$200,000 \times 3 \text{ years} = \$600,000$ ) or the market value of his performance measured by the net increase in BBPC's market value if George had fully performed (at least  $\$5,000,000$ ), plus any incidental and consequential costs, less any payments received, less any costs avoided by the breach ( $\$200,000 \times 3 \text{ years of nonpayment of George's fee} = \$600,000$ ), for maximum expectation damages of  $\$600,000 + \$5,000,000 - \$600,000 = \$5,000,000$  reduced to present value.

#### B. Consequential damages

An aggrieved party may also recover consequential damages if they are certain, foreseeable and unavoidable. Consequential damages are the monetary losses suffered by the aggrieved party after the breach and as a consequence of the breach. The facts do not indicate that BBC suffered any losses as a result of George's conduct.

#### C. Incidental damages

An aggrieved party may also recover incidental damages if they are certain, foreseeable and unavoidable. Incidental damages are out-of-pocket expenses incurred after the breach that would not have been incurred except for the breach and were made in an attempt to mitigate the damages. It is reasonably foreseeable that George's breach might cause BBC to fire him and hire a replacement spokesperson. It is also reasonably foreseeable that it might cause the advertising campaign to fail and trigger a reduction in BBC's net value. However, it is doubtful that either the amount of reduction in net value or the need to hire a celebrity spokesperson at a fee higher than  $\$400,000$  per year was either foreseeable or disclosed to George at the time of contracting. Consequently, BBC will not be able to recover the loss if its net value, or any excess difference in fees for the last three years of George's contract.

#### D. Reliance damages

An aggrieved party can elect to recover the money necessary to restore him to the position he would have been in before the contract. BBC paid George \$400,000 for the first two years of the contract. However, those payments were earned by George under the doctrine of part performance doctrine.

#### E. Restitution damages

BBC can also seek restitution damages for the value of the benefits it paid George. However, to obtain restitution, BBC must return any benefits that it received. As discussed above, BBC received an increase in its bet value of at least \$5,000,000 and a substantial increase in sales revenue. Even if discounted, the offset of those benefits against the \$400,000 paid to George would reduce BBC's restitution damages to less than zero.

### Question 3 - Answer outline

#### A. Whether Bart is entitled to some or all of the final payment.

Bart's right to some or all of the final payment will depend on whether it is subject to express conditions precedent. The contract describes three events or actions that must occur before Bart is entitled to the final payment: (1) the issuance of the County's Certificate of Occupancy; (2) the issuance of the project architect's Certificate of Substantial Compliance; and (3) the beginning of all operations at the wellness center.

The first issue is whether any of the contract provisions describing those events are express conditions, or promises. A condition is an event, not certain to occur, which must occur, before a contract obligation becomes enforceable. An express condition is a condition that is stated in a contract.

An express condition is strictly enforced. When the condition is not met, the other party to the contract is not obligated to perform unless the non-occurrence of the condition is excused. There are several grounds for a non-occurrence to be excused. The general rule is that where it is unclear whether a contract provision is a condition or a promise, it is construed as a promise in order to avoid a forfeiture.

Whether a contract clause is an express condition or a promise depends on the language, structure and circumstances of the contract. If the wellness center contract provisions are conditions and their non-occurrence is not excused, Darla has no contractual obligation to make the final payment.

#### 1. No County Certificate of Occupancy

(a) The contract language that "Bart shall be paid as follows: . . . 25% (\$12.5 million dollars) upon beginning of all operations, to be after issuance of a Certificate of Occupancy issued by the City Building Department certifying the project complies with the building codes and is in a condition suitable for occupancy) . . ." is an express condition that is strictly construed. A certificate of occupancy is a public document authorizing the use of a building, and its issuance is an event or action. The condition is the happening of an event or action, i.e., the issuance of the certificate. The condition must be satisfied (the event or action must occur) before Darla is obligated to perform, i.e., to pay Bart the final payment.

(b) The next issue is whether the non-occurrence of the condition (the lack of a certificate of occupancy) is excused. The failure of a condition is excused when it has been waived by the party who benefits from the condition, when the beneficiary acts in bad faith to interfere or to prevent the condition from being satisfied, when excusing the condition will prevent a forfeiture, and when it becomes impossible for the condition to be performed.

The condition of issuing a City Building Department Certificate of Occupancy did not occur because the local government agency department responsible to issue the certificate was disbanded by the local agency. Those circumstances made it impossible for the condition to be satisfied. If the existence of a specific thing is necessary for the performance of a duty, its failure to come into existence so as to make performance impossible. Impossibility will excuse a condition when the condition goes to a basic assumption of the contract. The existence of the City Building Department and its ability to issue a certificate of occupancy was a basic assumption of the contract because the certificate is a legal requirement for occupancy and operation of the wellness center, and the purpose of the construction contract was to facilitate the building of an occupied and operational wellness center. Accordingly, the failure of this condition is excused by impossibility.

The condition may also be excused in order to avoid a forfeiture, i.e., Bart's loss of the final payment, depending on whether the extent to which the loss to Bart is disproportionate to the prejudice to Darla, whether the lack of a City certificate is failure is due to willfulness or serious neglect, whether the issuance of the condition has been delayed but not denied, whether Darla was involved in the failure to obtain a City certificate, and whether the issuance of a City certificate relates to a minor contract provision and not a material contract provision. The strongest argument to excuse the condition to avoid a forfeiture is that the City will likely have to make alternate arrangements with the County in which the City is located to issue certificates of completion. Under this scenario, a certificate of completion or its functional equivalent eventually may be issued on the City's behalf.

## 2. No Architect Certificate of Substantial Compliance

The project architect's issue of a certificate of substantial compliance is another express condition to Darla's obligation to pay. Contracting parties may agree that the occurrence of a condition can be based on a third party's satisfaction. In those circumstances, the third party may use his subjective discretion to decide if the condition is satisfied, but he must do so in good faith. Provided that the wellness center architect decided in good faith to refuse to issue a certificate of substantial compliance, Darla's duty to pay is unenforceable due to a non-occurrence of an express condition.

If Bart can establish that he has substantially complied with the contract and the issuance of the project architect's certificate of substantial completion is not a material part of the contract, the non-occurrence of this condition may be excused to avoid a forfeiture and Bart would be entitled to the final payment.

## 3. No "beginning of all operations"

The non-occurrence of a condition can be excused when the party who benefits from the condition acts in bad faith. Bad faith includes action or inaction that interferes with or delays the satisfaction of a condition. Where a breach by non-performance contributes

materially to the non-occurrence of a condition of one of the party's duties, the non-occurrence is excused.

Darla's decision to delay opening the wellness center prevented, hindered and at the very least delayed an express condition requiring the "beginning of all operations" before the final payment became due. Darla's conduct breached the duty of good faith and fair dealing implied in all contracts, and excused the non-occurrence of the condition. This contract provision is analogous to "pay when paid" construction contract provisions which are prohibited by many states as a matter of public policy.

B. What will happen if Bart refuses to provide designated parking for the electric vehicles?

If the non-occurrence of the express conditions are excused, Darla's final payment obligation becomes unconditional. As an unconditional obligation, it is subject only to an implied condition that Bart is not in material breach of the contract. The issue is whether Bart's failure to designate electrical vehicle parking is a material or immaterial breach. If it is a material breach, Darla can suspend the final payment. If it is an immaterial breach, Darla then would must make the final payment, subject to her right to seek damages resulting from the breach.

Several factors will determine whether a breach is material. The most relevant is the extent to which the injured party will be deprived of the benefit it reasonably expected. Darla bargained for a fully functional building and parking for the wellness center's tenants and their clients. The issue is whether the lack of designated electric vehicle parking will reduce Darla's ability to attract tenants and clients to the wellness center. Probably not. The \$100,000 cost to provide the designated parking is also strong evidence that this particular provision is an insignificant component of a \$50 million dollar project and its absence is an immaterial breach.

C. Is Bart entitled to reimbursement for the \$3 million dollars he paid to purchase and install the special light system?

The first issue is whether the contract required Bart to supply and install the special light system. The second issue is whether parol evidence is admissible to allow Bart and Darla's emails, and their testimony about their own understanding of the meaning of "state of the art light system" to be used as evidence of an agreement.

1. Did the written contract require Bart to supply and install the special light system?

The parties' early email includes one from Darla stating that she "wants Bart to do the whole thing." Objectively, this language suggests that Bart has the obligation to supply and install the special light system. However, Darla did not know even the original \$1,000,000 cost for this item, suggesting that there was no meeting of the minds on this

item or there was a mistake. If there was a mistake, the issue is whether it was a unilateral mistake and who must bear the risk of the mistake.

## 2. Parol evidence

The parol evidence rule prohibits admission of negotiations and communications that occurred prior to and contemporaneously with the execution of an integrated written agreement. An agreement can be completely integrated or partially integrated.

A completely integrated agreement is a complete, exclusive and exhaustive statement of all of the terms of a contract. Terms that are outside of a completely integrated contract are not part of the contract. A partially integrated agreement is intended to be the final agreement of the parties as to the specific terms contained in the agreement. It applies only to those specific terms, and leaves open the possibility that there are other provisions not included in the agreement.

Parol and other extrinsic evidence are admissible for a court to decide whether a contract is fully or partially integrated. A merger or integration clause is evidence that a contract is completely integrated. Here, the contract is a fully negotiated and lengthy agreement with a merger clause. The contract likely is completely integrated.

However, even where there is a completely integrated written contract, parol evidence is admissible to explain or interpret the terms of the contract. If a contract is completely integrated, parole evidence is not admissible to supplement or contradict the terms of the contract. The parties' email and testimony will be admitted to explain what the words "state of the art lighting system" means. If the court determines they mean what the local ordinance requires, i.e., "an environmentally sensitive light system that detects and destroys surface viruses and bacteria and maintains pristine interior air quality," then Bart will not be entitled to reimbursement under the contract but he can try to recover it as restitution to avoid unjust enrichment.

1)

Bart v. Darla

This contract will be governed by the common law because it involves services, not goods. The UCC governs contracts for goods.

A. Is Bart entitled to some or all of the final payment?

#### CONDITIONS

A condition is an uncertain event that must occur before a party can be required to perform. Conditions set the time and order of performance. Express conditions are conditions that the parties explicitly agreed to. Implied conditions are implied by law to avoid injustice, e.g. the implied condition of good faith and fair dealing which is implied in every contract. There are conditions that are characterized by time: a condition precedent is an act or event that must occur before liability attaches, where as a condition subsequent is an act or event that must occur to discharge liability. Concurrent conditions are ones that must happen at the same time.

Here, the condition for the final payment is an express condition subsequent. Darla will pay Bart the remaining \$12.5 million dollars upon beginning of all operations, after issuance of a Certificate of Occupancy, and issuance of an architect Certified Substantial Compliance.

#### EXCUSES OF CONDITIONS

If a condition fails to occur (a non-occurrence) there are five grounds for the conditions to be excused: Impractical, Estoppel, Waiver, Disproportionate forfeiture, Bad faith.

There are multiple excuses for the non-occurrence in Bart's case.

Impracticability is when through an event that neither party anticipated, performance is made extremely burdensome or significantly more costly.

1. The non-occurrence of the condition for the final payment that the City Building Department certify the project will be excused due to impracticability. Neither Darla nor Bart would have been able to anticipate that the city building department would go bankrupt.



2. The non-occurrence of the condition for the final payment that the project architect certify that the project complies will likely not be excused. Bart neglected to provide the designated parking spots. There was no excuse for the non-occurrence here.

3. There is a condition "upon beginning of all operations." Darla was the one who decided to hold off on opening the wellness center, but it will likely be excused due to impracticability because the first two conditions were not met and it could not be fully functioning and up and running. For this condition, she was the obligor who was obligated to pay Bart upon the beginning of all operations (among other things.)

Where the non-occurrence of a condition is excused, the obligor must perform her obligations under the contract. Darla will likely be responsible for paying for a portion of the final payment.

## REMEDIES

### EXPECTATION INTEREST

The expectation interest is the non-breaching party's benefit of the bargain or what they expected to receive as a result of the contract. Expectation damages are the amount that will put the non-breaching party in the position that he would have been in if the contract had been fully performed. Expectation damages are calculated by the loss in value to the injured party of the other party's performance caused by its failure or deficiency, plus any incidental or consequential loss caused by the breach, less any cost or other loss that he has avoided by not having to perform.

Incidental damages are the costs and expenses that would not have incurred if the contract had been performed, but which were incurred as a result of the breach in an attempt to mitigate damages. Consequential damages are the costs, expenses, and losses incurred by the non-breaching party as an indirect cost of not receiving the performance he was promised. Consequential damages must be foreseeable.

Bart will likely argue that he is entitled to some of the final payment. He will also argue that he had to rush the order of the light system which cost him \$4 million out of pocket. But, he did not complete the paved spots which would be an additional \$100,000 to perform. The ideal expectation damages for Bart would be calculated as such:

loss in value: \$12.5 million +

Consequential and incidental damages: \$4,000,000 -

---

Loss avoidance by not performing: \$100,000 =

\$16.4 million

Darla will likely argue that she did not breach the contract and that Bart didn't finish performance by not securing the county certificate or completing the parking spaces and securing the architect's certificate of completion.

Bart will likely not be entitled to expectation damages.

### RELIANCE INTEREST

Reliance interest is the losses that occurred as a result of reasonable reliance on the other party's promise. There are meant to put the non-breaching party back in the position he would have been in if the contract had never been made.

Bart could argue that he spent an extra \$4,000,000 to ensure the installation of the state of the art light system. He could argue that he would not have had to pay for the immediate delivery if he would have known that she was going to hold off on opening the wellness center.

Bart's reliance damages would be:

Expenses to prepare for performance: \$4,000,000

### CONCLUSION

Bart will likely recover \$4,000,000 in reliance damages, and some of the final payment.

B. What will happen if he does not provide designated parking for the electric vehicles?

### CONDITIONS

A condition is an uncertain event that must occur before a party can be required to perform. Conditions set the time and order of performance. Express conditions are conditions that the parties explicitly agreed to. Implied conditions are implied by law to avoid injustice, e.g. the implied condition of good faith and fair dealing which is implied in every contract. There are conditions that are characterized by time: a condition precedent is an act or event that must occur before liability attaches, where as a condition subsequent is an act or event that must occur to discharge liability. Concurrent conditions are ones that must happen at the same time.

---

The condition to provide parking is an express condition precedent. Bart needed to provide paved parking for at least 50 electric vehicles per the contract terms and he negligently did not provide them. If he doesn't provide them, the \$100,000 will likely be factored into the final equation for what he is owed under the contract, or Darla could seek specific performance and have it ordered that Bart pave the parking spots.

## CONCLUSION

Bart will likely need to provide the designated parking spots or face the remedy that Darla seeks in court.

C. Whether he is entitled to reimbursement for the \$4,000,000 he paid to purchase and install the special light system.

## CONDITIONS

See rule above.

The light system was an express condition precedent of the contract.

## EXCUSES OF CONDITIONS

If a condition fails to occur (a non-occurrence) there are five grounds for the conditions to be excused: Impractical, Estoppel, Waiver, Disproportionate forfeiture, Bad faith.

Bart will likely argue that the non-occurrence should be excused due to Estoppel. He was facing a huge payroll and felt pressure to perform. He changed his position relying on the money he was receiving for the remainder of the contract to pay his subcontractors and suppliers by agreeing to obtain and install the light system.

## PAROL EVIDENCE

Parol evidence is extrinsic evidence outside the four corners of the document. This excludes oral and written evidence of the parties' negotiations prior to and contemporaneous with the contract execution. Parol evidence is used to explain or interpret a term in the contract, but will not be admissible to contradict a term in the contract. Evidence will be admissible unless it is a completely integrated document. A full or partial integrated document is a contract in which the terms are final, but only those particular terms. A completely integrated document is a contract in which the terms are final and are the only terms of the parties' agreement.

---

The contract stated that it contains the final agreement of the parties.

Darla will likely argue that the contract was not completely integrated and that evidence of her telling Bart he needed to install the light fixture should come in. She will likely argue that the evidence explains the term of the light fixture, not contradicts it. Also she will likely argue that he should have included the price in the original contract since it specifically stated he is responsible for it.

Bart should argue that the contract was completely integrated and that the provision stated that he shall furnish a state of the art light system, but it did not say "install." He did not include the price of installation and therefore had to pay \$4,000,000 out of pocket. Upon installation Darla paid Bart the \$25 million, per the contract.

#### RELIANCE INTEREST

Reliance interest is the losses that occurred as a result of reasonable reliance on the other party's promise. There are meant to put the non-breaching party back in the position he would have been in if the contract had never been made.

Bart could argue that he spent an extra \$4,000,000 to ensure the installation of the state of the art light system once he was aware that he was responsible for installing it. He could argue that he would not have had to pay for the immediate delivery if he would have known that she was going to hold off on opening the wellness center.

Bart's reliance damages would be:

Expenses to prepare for performance: \$4,000,000

#### CONCLUSION

Bart will likely recover \$4,000,000 in reliance damages

**END OF EXAM**

2)

### **Conditions**

A condition is a term that specifies that a certain event is required to occur before one of the parties is required to perform. There are two types of contractual conditions. The first is an express conditions, i.e., conditions that appear expressly in the contract. The second type of condition is an implied, or constructive condition. Implied conditions are conditions which are implied by law and include the duty to act in good faith and fair dealing or a condition which is imposed by statutory regulations. Further, conditions can be either a condition precedent, i.e., a condition that must be met before triggering one's duty, a condition concurrent, i.e., a condition that is performed by both parties simultaneously, or a condition subsequent, which is a condition that a party must fulfill after the performance of the other parties duty.

Here, the agreement between George and BBC contained a non-compete express condition precedent that that BBC would pay George \$200,000 a year for five years provided that George does not did not take any other bar exams, endorse another bar prep course, or make derogatory statements about BBC. BBC's yearly payments were predicated on George's fulfilling the condition for each of the five years. This condition failed when George breached the contract on May 1, 2019 about a year and a half into the contract.

### **Breach**

The injured party is generally entitled to remedy for breach if the other party fails to perform the agreed terms. A breach constitutes a failure to fully perform the contract. If the party only commits a minor breach the non-breaching party is required to render performance. However, if there is a material breach then the non-breaching party may suspend their performance, and a non-breaching party's duty to discharge occurs if the breaching party does not cure the breach in a reasonable time, a cure is either impossible or not forthcoming, or lastly the breaching party repudiates the contract.

Here, George made a material breach of the contract by not fully performing the agreement made between himself and BBC. This is evidence by his failure to adhere to the condition that he does not take the bar exam in another state. Given that George breached his contract in May 1 and did not try to cure the breach within a reasonable time BBC has been discharged for their duty to perform giving rise to BBC's claims to damages.

## **Damages**

Generally, courts use compensatory damages for the party's actual losses. The three types of compensatory damages include expectation damages, reliance damages, or restitution. If one receives Expectation damages they will not receive reliance, or restitution damages. Further, if they receive restitution damages, they would not receive expectation or reliance damages

### **Expectation Damages**

Expectation damages are intended to put the injured party in the position that they would have been in if the contract had been fully performed. The injured party has the right to receive the benefit of their bargain. In calculating expectation damages the court takes the loss of value to the injured party, plus any additional incidental or consequential consequences, and subtracts the cost or loss that has been avoided by non-performance of the contract.

Here if BBC were to seek expectation damages they would likely receive compensation for the two years paid to George plus consequential damages. If the contract had been fully performed BBC would have paid George \$1,000,000 over the course of the five year contract. BBC would not be entitled to incidental or consequential damages because George's breach discharged their duty. George was fully aware of this termination clause, and had reason to know if he breached the contract and he would likely be terminated, thus triggered the \$500,000 payment. In calculating the expectation damages the court would take the \$1,000,000 paid to and then subtract the costs saved by the non-performance of the contract. The costs saved or avoided would be the three years that BBC did not have to pay George due to his breach, or \$600,000. Thus, BBC would be entitled to expectation damages of \$400,000

### **Reliance Damages**

Reliance damages are designed to put the breaching party in the position they would have been in had the contract never been made.

In this case, if the contract had never been made then BBC would be entitled to the \$400,000 paid for the first two years of service in addition. However, it is likely they will be seeking

### **Restitution Damages**

Restitution damages are equal to the benefit conferred upon the breaching party, but are not equal to the total loss of the party seeking restitution

---

At the time of termination BBC had only conferred the first two years payment, so if they were to seek restitution damages they would only be entitled receive the benefit already conferred upon George, or \$400,000. Since George's breach discharged their duty, it is unlikely that BBC would seek restitution damages since they would likely be able to get expectation damages of the same value.

**Conclusion**

BBC would be entitled to received \$400,000 in expectation damages.

**END OF EXAM**

3)

We assume that a valid contract exists.

### Conditions

Conditions set the time and the order of performance. Conditions are classified by time as: precedent, subsequent, or concurrent, and by type: express, implied or constructive. . A condition precedent can be satisfied or excused and it will trigger the performance of the contract. A condition subsequent will discharge a duty to be performed once this condition is satisfied. A condition concurrent is one that happens during and at the same time of the contract. An express condition occurs where the parties explicitly agree to a condition. An implied condition is an uncertain event that must occur before a party can be required to perform their duty. The condition is implied by the law in order to avoid an injustice. There is no absolute duty for one to perform conditions. Conditions must be either satisfied or excused which matures the other party's obligation to perform under the contract and failure to perform is a breach of said contract. In this case there are three conditions:

1) That if BBC were to hire an experienced lawyer or an actor of the same level of name recognition as George, it would have to pay at least \$400,000. The facts state that the parties acknowledged this condition. This is an express condition since the parties explicitly agreed to it. It is also a concurrent condition because it happened during the contract. If that facts meant to pay George the \$400,000 if BBC were to hire an experienced lawyer or actor of same recognition level, then the concurrent condition reasons that if BBC hires said lawyer/actor, then they have to pay George \$400,000. This happens during the contract and at the same time. One party cannot complain about the failure to perform until they perform themselves.

George will argue that BBC breached this condition because they didn't pay him \$400,000 when they hired Kim Kardashian. However, BBC may argue that Kim Kardashian isn't the same level of name recognition as George but a much higher level. BBC may also argue their breach of this condition is excused due to George's bad faith since George decided to take the Florida Bar Exam and attend a preparation course after this contract was made. However, it is unclear whether or not BBC knew this before they hired Kim Kardashian. It seems like they did since they published the recognition of his passing. Thus, George may prevail in this argument. If the court finds in favor of him on this argument then he may seek the \$400,000.

2) That George cannot take other bar examinations, endorse other bar examination prep courses or make any derogatory comments about BBC. This is an expressed condition subsequent. It is



expressed because the parties explicitly agreed to it and in the facts the parties acknowledge it. It is concurrent because one may argue that it happens during the contract.

Here, George went and took the Florida bar exam and attended a bar preparation course. BBC will argue that because of George's actions, he did not satisfy this condition. Next it is important to see if George has any excuses to this condition. George may argue that his services made BBC's business increase in sales and a \$5,000,000 increase in its net value, and that because of that, he should have gotten paid more. Thus he will argue that he took the bar exam went to take an offer at another law firm to earn more money. George will also argue the excuse of a waiver. George will argue that since BBC didn't fire him until two weeks after he had received his bar exam score, that BBC waived this condition. George will also argue that he took the bar exam on July 1st and it took BBC four months since he took his bar exam to fire him. BBC will rebut this argument and claim that they did not know George took the bar or received these scores until the day they fired him. George will prevail in the waiver defense since BBC recognized his name on the newspaper list of people who passed the Florida Bar.

3) That BBC can terminate the contract without cause, but has to pay George \$500,000 if they do that. This is an express condition concurrent. It is express because the parties explicitly agreed to it in the contract. It is a concurrent condition because it happens during the contract. George may argue that BBC terminated him without cause and that he is owed \$500,000. However, BBC will argue that BBC did terminate George with a cause. George breached the contract by taking another bar exam and attending another prep course. Since George did this, and this is the reason he was fired, the termination was with cause and BBC does not owe George the \$500,000. George will then argue that the termination was without cause because BBC waived the second condition by taking so long to terminate him. George's argument holds more weight and George may recover the \$500,000.

### Damages George May Recover

#### Expectation Damages

Expectation damages are the non-breaching party's benefit of the bargain. What the non-breaching party expected to receive as a result of the contract. These damages are the amount that will put the non-breaching party in the position that he would have been in if the contract had been fully performed. Here, George's contract was \$200,000 for five years of employment. He was expecting his annual payment of \$200,000 from BBC per year. He had already been paid two years worth of his salary. Had the contract been fully performed, then he would have earned his \$600,000 more.

---

Thus, George may recover \$600,000 under expectation damages. However, it is important to note that he will only recover this amount if the court finds that there was a waiver on condition number two.

### Restitution Damages

Restitution damages are what it would take to restore the aggrieved party any benefit he conferred on the other party. Here, George can argue unjust enrichment in regards to restitution damages. If the court finds that George honored the contract, that condition number 2 was waived, and that he was fired without cause, then he may recover restitution damages. Thus, George will have honored the contract and BBC benefitted from his work. BBC did not get paid for the last 11 months that he worked. Under restitution, he can recover the amount of money for the benefit he conferred under the contract, since he was only paid 2 years out of a five year contract, and not the last 11 years he worked, it would be for those eleven years. If he recovers restitution damages then he cannot recover under expectation damages. He can only recover under one of them. Also if the court finds that he was fired without cause, then he will recover the \$500,000 from that condition statement.

### Incidental Damages

Incidental damages are the costs and expenses that would not have been incurred if the contract had been performed, but which were incurred as a result of the breach in an attempt to mitigate damages. Here, George could try to recover incidental damages for the amount of money it cost him to study for and take another bar exam in order to work elsewhere where he would earn more money. However, it was his choice to go through this process to work elsewhere when he currently had a job. He chose to look elsewhere before he found out that Kim K was hired and that he was fired. But George would claim that he made BBC make so much more money that he chose to work elsewhere because he wasn't getting paid enough for the job he was doing.

### Punitive Damages

Punitive damages are intended to punish the wrongdoer and deter others. If the court finds that BBC acted willfully, maliciously, or fraudulently in terminating George (i.e. if there was a waiver to condition 2 and BBC purposely acted like they didn't waive the condition), then George may recover punitive damages.

**END OF EXAM**

---