

MONTEREY COLLEGE OF LAW

REMEDIES

Final Examination

Spring 2019

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INSTRUCTIONS:

There are three (3) questions in this examination.

You will be given three (3) hours to complete the examination.

Question 1

Bill Star is a basketball player going into the fifth year of a five year contract with the Louis Town "Losers" basketball team.

He has asked for a trade to a winning basketball team which the "Losers" have refused to do. He has responded by telling the "Losers" that he will not play another game for them. He has also begun talks with the Golden State "Winners" team who have offered him a new five year contract at 40% higher than his current contract rate.

The owner of the "Losers" consults with you as to what she can do. She has paid him 25% of his 10 million dollar salary for the upcoming season in advance.

Can she force Star to play per his contract? Explain. If she can't, can she prevent him from playing for Golden State? Explain.

What can she sue him to collect?

For each question, explain both potential legal and equitable remedies.

Question 2

Bob's son's friend Art steals a valuable large coin collection from Bob's house during a party that Bob's son was having. Art foolishly uses some quarters worth thousands of dollars in coin parking meters, washing machines and newspaper machines unaware of their value. He takes the large majority to Shady, a coin dealer, who, knowing that Art probably acquired them in a dishonest manner and is not an informed coin collector, pays Art twice the amount of their face value knowing they are worth at least 50 times that amount.

Shady sells one half of the coins to B.F. Ponce for \$100,000 who is an innocent buyer with no knowledge of their origin. Shady takes the \$100,000 and remodels his kitchen and adds a room to his \$500,000 house. Shady keeps the other half of the coins for resale at a later time, knowing they will increase in value.

What remedies can Bob seek against Art, Shady, and B.F. Ponce? Discuss.

What defenses, if any, can they raise? Discuss.

Question 3

Penny, a research engineer at Knox University in State Red, discovered a process for greatly delaying the failure of metals under stress. Penny freely offered her new process to the public. Danny, a manufacturer of internal combustion engines, adopted Penny's process.

Danny offered to pay Penny \$300,000 for the exclusive right to use Penny's name and picture in advertising the fact that he used Penny's process, but Penny declined the offer.

Danny nevertheless began an advertising campaign in which he used Penny's name and picture, the latter bought from a press photographer who had taken it with Penny's consent.

A statute of State Red provides that the commercial use of the name or picture of another without consent is a misdemeanor, punishable by fine and imprisonment.

The use of Penny's name and picture is also contrary to the policy of Knox University and has brought Penny into disrepute among her professional colleagues. One colleague was so appalled that he refused to continue to collaborate with Penny on an unrelated project.

Penny contacted the local district attorney who declined to file charges against Danny because of court congestion.

What remedies are available to Penny against Danny? Discuss.

What is the likelihood that Penny will obtain the following against Danny:

1. A temporary restraining order? Discuss.
2. A preliminary injunction? Discuss.
3. A permanent injunction? Discuss.

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Question 1 Outline

- I. Damages
 - a. Reliance
 - b. Expectancy – speculative
 - c. Restitution to prevent unjust enrichment
- II. Specific Performance – no involuntary servitude
 - a. B
 - b. K
 - c. C
 - d. I
 - e. F – not able to supervise
 - f. M
- III. Injunction
 - a. I
 - b. F
 - c. P
 - d. I
 - e. B

Remedies Question 2 Outline

Conversion

Replevin

BFP

Tracing

Equitable Lien

Remedies Question 3 Outline

- I. Theories of Liability:
 - a. Contract- none formed
 - b. Defamation – publication holds P up to ridicule and contempt of colleagues and thus is defamatory.
 - i. Damages may be recovered without proof of special damages.
 - ii. Damages speculative and conjectural, and might not result in termination of the advertising.
 - iii. Injunction – likely denied because of freedom of speech and prior restraint.
 - c. Invasion of Privacy – in states recognizing this right, person is granted protection against the commercial exploitation of her name and picture.
 - i. Damages – no adequate b/c no precise way to measure and future publication.
- II. TRO
 - a. Irreparable harm
 - b. Balance hardships
 - c. Likelihood of success
 - d. Bond
 - e. Service?
- III. Preliminary Injunction
 - a. Irreparable harm
 - b. Balance hardships

- c. Likelihood of prevailing on the merits
 - d. Inadequate legal remedy
 - e. Notice
 - f. Bond
 - g. Defenses
 - i. Unclean hands
 - ii. Laches
 - iii. Misrepresentation
- IV. Permanent Injunction – prohibiting further publication
- a. Four types of Injunctions: Preventive, restorative, prophylactic and structural
 - b. Preventive-purpose to prevent the defendant from inflicting future injury on P. Must prove that D was likely to do harm absent the order, that legal remedies would be inadequate and that such harm would be irreparable
 - c. Enjoining Speech or Litigation
 - i. When freedom of speech is exercised in a way that seriously interferes with other important rights, a court may restrain it with a narrowly tailored order.
 - d. Injunction of criminal act? usual rule is that an injunction will not be granted to enjoin an act which is already declared to be a crime. Possible exceptions:
 - i. Equity has always made an exception where the criminal law remedy is inadequate and the wrong is classified as a public nuisance. In jurisdictions where public nuisance is given an expansive definition, it could be argued that false advertising, as in the instant case, falls within the exception.
 - ii. Legislative purpose of statute to permit civil remedies where criminal law ineffective. The possibility of prosecution by public officials of a misdemeanor such as this does not provide an effective remedy for an injured party.

1)

Owner v. Star

In order to determine the appropriate remedies the area of substantive law must be determined. It is also necessary that plaintiff has a case which requires relief. Damages can be legal, restitutionary, and equitable. Here, the fact pattern indicates a possible breach of contract by Bill Star (anticipatory repudiation). The owner of the "Losers" does not have to wait for Star to actually breach the K before she can bring suit and is able to seek legal and equitable remedies. It is up to plaintiff to seek the remedy that will provide her with the greatest award (this is what attorneys are for!).

Legal Remedies - Damages

In a K case, damages fall into five different categories: 1) expectancy; 2) consequential; 3) incidental; 4) nominal; and 5) liquidated. Punitive damages are not permissible in a K case. The purpose of damages is to put the non-breaching party in the position that they would have been were the K fully performed. The different types of damages will be discussed *infra*.

Expectancy

Expectancy damages are ones that flow naturally from the K. In order to receive expectancy damages the elements of causation, certainty, foreseeability, and unavailability must be met. Here, the facts state that the owner has already paid star 25% of his 10 million dollar salary and it is likely that she would seek to recover the 25% as a result of Star's breach. In the case at bar, causation is met as Star's breach would cause the owner to lose money. The damages are certain as Star's K is set at a specific price, which allows for an accurate determination of the amount of damages that would be incurred. It is

foreseeable that injury would occur if Star were to breach his five-year K as the team would not only lose the money paid to secure his spot on the team, but would also lose one of its players. Lastly, under the requirement of unavailability, plaintiff has a duty to mitigate his or her damages. Here, it would be difficult for the owner of the "Losers" to replace a player at the start of the season, and it is safe to conclude that the damages incurred are unavoidable.

Consequential

Consequential damages can include hardships such as negative impact on reputation and lost profits. Here, the owner may claim that she is entitled to consequential damages. Given his last name (Star), it is likely that Bill Star is a valuable player. If he breaches his K, there is a chance that the team may receive a blow to their reputation a significant portion of their fan base. As a result of Star's exit, the owner may find it difficult to recruit another player to replace Star as others may believe that the team is mismanaged and poorly coached as a result of their losing streak.

Incidental

Incidental damages are damages incurred as a result of the breach of K (cover, etc.). Here, if the owner is required to seek a player to replace Star, she may need to do so by paying the player a higher price than normal. The facts indicate that it is the start of the season and this is a point in time when complications with players are not ideal. She could seek to recover the cost incurred as a result of replacing Star.

Nominal

Nominal damages are applied when an injury has not occurred, however these damages are not appropriate given the facts.

Liquidated

If damages are difficult to ascertain than contracting parties may opt to include a liquidated damages clause. There is no indication of such a clause in the given fact pattern.

Restitutionary Remedies

Restitutionary remedies are based on the value received by the defendant and aim to prevent unjust enrichment. Here, the owner may bring an action for restitution as Star was unjustly enriched as a result of the 25% of his salary already paid to him.

Equitable Remedies

Specific Performance (SP)

Specific performance is a unique remedy in K law and certain requirements must be met in order to have SP granted. Under SP, the elements required include : 1) certain and definite terms; 2) inadequate legal remedies; 3) mutuality; 4) feasibility; and 5) defenses (lack thereof). This case presents a questionable situation as it does not involve goods or land, but rather involves a person, Bill Star. Courts are reluctant to apply SP to force a person to perform an act as involuntary servitude is not favored in our society. Hence, the

Permanent

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owner would be unable to seek SP as a remedy. A more appropriate equitable remedy the owner might consider is injunctive relief, discussed below.

Injunction

An injunction requires a defendant to do or refrain from doing something. An injunction can be preliminary (pending a trial on the merits) or permanent (after a trial on the merits). A permanent injunction can be negative (to prevent an act) or mandatory (to perform an act). The types of injunctions will be discussed further *infra*.

Preliminary

A preliminary injunction is granted prior to a trial on the merits. In order to obtain a preliminary injunction certain elements must be met. There must be 1) irreparable injury; 2) likelihood of success on the merits; 3) balancing of hardships in favor of the moving party; 4) notice; and 5) bond posted by plaintiff. Here, the owner may seek a preliminary injunction to prevent Star from leaving the team. She would argue that the team would incur irreparable injury as his absence from the team would cause the "Losers" to lose (no pun intended) one of their key players. Moreover, she would argue that the hardship balances in her favor as she would be required to find another player to replace Star and would most likely need to pay a significant amount of money to secure the player. Star would not have difficulty finding another team to play for as he is already talking with other teams such as the "Winners".

2)

Bob (B) v Art (A)

B's action against A is for the tort of conversion. Tort remedies are intended to compensate for the harm suffered and put the aggrieved party in the position they would have been in if the tort had not occurred. Both legal and equitable remedies are available. All damages must be caused by the Defendant (D), and they must be *foreseeable, unavoidable and certain*

Compensatory damages from A.

B will be able to show that *but for* A stealing the coin collection they would not have gotten lost, sold, and resold, therefore the *causation* is easily proven. B will be able to argue that the loss of a valuable large coin collection was *foreseeable* when it is stolen by a kid at a party who had no idea of its value. Also that these damages are *unavoidable* he kept them in a safe place and a reasonable parent should be able to trust his son's guests. Also he will be able to show that the value of the coin collection is certain. Although the facts don't specify a dollar amount a serious coin collector would have a reasonable estimate and documentation of the value of the collection.

On the other hand A will argue that the theft was avoidable. The facts don't state if it was difficult for A to steal the coins, but they also don't indicate that he was a master thief, just some kid partying with his friends. A will argue that a reasonable collector with a large valuable collection should have had the collection locked in a safe, maybe even with an alarm. A will argue that B failed to mitigate his damages by securing the collection. This is a good argument. If A is just a kid and was able to steal such a valuable collection someone else likely would steal it if he did not.

As compensatory damages are a legal remedy and may be tried in front of a jury, B will not succeed because of his failure to mitigate, the damages were avoidable.

Nominal damages.

Nominal damages are to establish the right of a P when there has been no actual harm. Here although there has been actual harm B may want to pursue nominal damages so he can then ask for Punitive damages.

Punitive damages are awarded by the court to punish a tortfeasor. D must have acted with willful, wanton or malicious conduct and award must be a single digit multiplier of the other damages awarded, they cannot be disproportionate to the harm. In these facts, if the jury does not award the compensatory damages(see above) then if B can get an award of nominal damages he may get some punitive damages. However there are no facts to show that A's conduct was wanton , or malicious, he was just some kid stealing quarters at a party.

Equitable restitution

B will be able to disgorge the ill gotten gains that A received when he sold the collection to Shady for twice their face value. The purpose of disgorging is that the Defendant should not profit due to their malfeasance. Because A did steal the coin collection, he should not profit from the sale. Even though he only got a fraction of what they were worth, B will be able to get the profits that Shady(S) gave to A. ✓

B v S

B's Cause of Action (COA) against S will also be for tortious conduct.

Although S did not steal the coins he knew that A had "probably acquired them in a dishonest manner", and paid him way less than what the collection is worth because A is "not an informed collector". Because of this he is not a Bona Fide Purchaser(BFP), and cannot get protection as such.

Legal Restitution, Replevin

Replevin and Ejectment are similar, both must show a wrongful withholding by D and a right to possess by P, Replevin is for personal property and Ejectment is for real property. In a Replevin action P will not succeed against a BFP.

First B should pursue a replevin action against S to get his coins back. S is not the rightful owner even though he bought them from A he only gave him a fraction of their value(insufficient consideration) and he knew they were stolen. Therefore S is wrongfully withholding. Secondly, B has a right to possess the collection as it is his property, and he likely has documentation to prove ownership.

The court will grant B's replevin of the personal property.

Equitable restitution, constructive trust and Equitable lien

Constructive trust is available to a P when they can trace the ill gotten proceeds to a substitute form of property. For this they must show that the property was acquired using solely the ill gotten proceeds, it cannot be co-mingled or invested in an already existing property.

Equitable lien is a remedy when the P can trace the proceeds to a co-mingled account or to an investment for improvement of a property. The court will force a sale of the property and a payment from the proceeds to the plaintiff. If the funds are insufficient P may seek a deficiency judgement for the balance.

S took the \$100k that he got from the sale of the collection and invested it into his new kitchen and new bedroom to his \$500k house. B will not be able to get a constructive trust for the whole property but he will be able to request an equitable lien. Because S used the \$100k to make the improvements the money will be easily traced to the construction costs.

The court will order S do sell his property and disgorge the \$100k he received from the sale of the stolen coins.

B v B.F. Ponce

Replevin (see rule Statement above).

B will ask for a second replevin action against BF Ponce (BF) because he wants his coins back. However, because BF is a BFP. He gave valuable consideration for half the coin

collection (\$100k) and he was an innocent buyer with no knowledge of their origin. Because he is a BFP this replevin action will not be granted.

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* Where is analysis for defamation & invasion of privacy?

3)

Penny (P) v. Danny (D)

What Remedies are available to Penny against Danny?

Legal Damages

Legal damages are supposed to put P in the same position as if a tort never occurred. Legal damages include (1) Compensatory damages, Nominal Damages and Punitive damages.

Compensatory Damages

To be awarded compensatory damages, the court will look to see if the damages were foreseeable, unavoidable and certain.

Here, P discovered a process for greatly delaying the failure of metal under stress. P then freely offered her new process to the public. D offered to pay P \$300,000 for the exclusive right to use P name and picture in advertising that he used that process. P declined the offer. P will seek compensatory damages against D for her being brought into disrepute among her professional colleagues.

Foreseeable

D will likely argue that this was not a foreseeable result from him using P's name and picture in an advertising campaign. D would argue that he had no idea that this was contrary to the policy of Knox University since it would be unlikely that he would have been able to obtain a Knox policy manual unless he was employee there.

Unavoidable

P will argue that this was an unavoidable outcome and foreseeable due to her refusing the 300k that D offered her to use her photograph and therefore D should have respected her instructions to not use her photo. P will argue that she knew the policy of Knox and therefore was one of the reasons she declined the money.

Certain

The problem with P receiving Compensatory damages is that it is very uncertain what type of damages she would suffer from and therefore will not be able to put a dollar amount on her damages. P will argue that her reputation has come under attack and is suffering from her professional colleagues. P will argue that one colleague was so appalled that he refused to continue to collaborate with P on an unrelated project. If this project caused some financial difficulty for P she could possibly figure a dollar amount.

It is unlikely that P would be able to win or obtain any relief under compensatory damages.

Nominal

Nominal damages are used when someone has not suffered any real damages but wants their rights vindicated for other legal avenues, like receiving an injunction.

Here, P would be able to obtain a Nominal decision because D has used her photograph without consent in violation of a State Red statute. The statute provides that the commercial use of the name or picture of another without consent is a misdemeanor. The DA has declined to file criminal charges for this statute but P would have other remedies available to her like an injunction discussed below.

Punitive

To obtain punitive damages, the D must do something that is willful, wanton or malicious. Punitive damages are limited to a single digit recovery. For example, if P was to win 100 dollars in nominal damages, then the court could apply 9 x 100 for 900 in punitive damages for a total recovery of 1k.

It is likely that the court would grant punitive damages against the D, because he used P's photograph for commercial purposes against her wishes. It would be a very nominal amount based on the nominal victory.

Equitable Restitution

Equitable restitution is granted by the court to address unjust enrichment by D. The D should not be able to be unjustly enriched from his tortious conduct. The court had two avenues it uses to address unjust enrichment, (1) a Constructive Trust and (2) and Equitable lien.

Constructive Trust (CT)

A CT is a vehicle used by the court which makes the D a "trustee" and orders them to hold title to property in trust until it can be giving back to the P. This property has to be solely traceable and generally is used for real property or property that has appreciated over time.

Here, the facts do not indicate if D has made any money off the advertisements using P's photo. If P can trace any gains that D might have made over the course the advertisement were being run, then P would be entitled to those funds.

P would not be able to get any money from the use of her formula as she freely gave that to the public therefore became a volunteer.

Volunteer

A Volunteer cannot claim file an unjust enrichment case when they reasonably could have foreseen what was going to happen when you give something away.

P would not be able to obtain any profits from D's use of the formula but would be able to obtain any moneys he received due to the advertisements if P was able to figure out how much was obtained from them.

Injunction

A Injunction is a court order to do (affirmative / mandatory) some act or Stop (negative) doing some act. injunction include temporary restraining orders, Preliminary injunctions and permanent injunctions. A negative or order to stop doing something is easier for the court to enforce and can enforce it by Contempt.

Temporary Restraining Order (TRO)

*— Where is rule and other elements: — Balance of hardships
— Likelihood of success
— Don't notice*

A TRO requires a showing to the court that there will be immediate and irreparable harm done if one is not granted. They are obtained via Ex-parte as long as a good faith effort was used to give property notice to D. This a short order that only lasts until a preliminary injunction can be obtained.

Here, P would file for a TRO due to the violation of the policy at Knox University, not to mention her reputation being in disrepute among her professional colleagues.

It is very likely that a TRO would be granted based on the above facts as well as a criminal statue is being violated and it being something the DA cannot or will not prosecute. Courts do not normally provide injunctions on criminal statues because they are already a crime, but in this case the court would likely grant the TRO.

✓ Preliminary Injunction

A preliminary injunction is an order granting an injunction pending a full trial on the merits of the case. This injunction lasts while litigation is pending. A preliminary injunction requires a irreparable harm to P if one is not granted, a likely win on the merits of the case, an inadequate legal remedy, a balancing of the issues and lack of defenses.

Here, P would suffer an irreparable harm if an injunction is not granted, P is likely to win on the merits of the case, there is an inadequate legal remedy. A balancing of the issues is that D used her photo against her wishes and in violation of a state statute, and d has no legal defenses such as laches. The facts don't indicate that there was any time delay with P bringing the case to court. There is no defense of Unclean hands, as P's hands would be "clean" and P did nothing wrong.

P would be able to obtain a preliminary injunction pending a full trial on the merits based on the above fact.

Permanent Injunction - *to do what? Rule for perm. inj.*

A permanent Injunction is granted by the court after a full trial on the merits of the case. The court looks to several factors prior to granting a permanent injunction. The court looks to see if there is (1) an inadequate legal remedy, (2) Personal stake or property right, (3) if enforcement is feasible, (4) it balances the issues in favor of P, but also if there is any public utility, and finally (5) if there is any lack of defenses.

Here, P would make the same argument as for a preliminary injunction. The difference here and an additional factor, is that P has a personal stake and a commercial property right in having her photograph used in a commercial advertisement, and would ask the court to issue a negative injunction ordering D to not use her photograph or name. Id D

- Preventative - purpose of injunctions

- Enjoining speech or litigation - Did not address

- Injunction... at criminal... of 17... cases?

Bond? Notice?

handslips

laches

misrepresentation?

Types?

violated that order, P could bring it to the attention of the court, who then could proceed with contempt charges.

P would be granted a permanent injunction.

END OF EXAM

*Might be sufficient to pass
bar. if you had not
missed first call of question*