

KERN COUNTY COLLEGE OF LAW

REMEDIES

Final Examination

Spring 2021

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Instructions:

Your final examination consists of two questions. Each question will constitute 50% of your final examination grade. Therefore, to maximize your grade potential, you should devote equal effort to both questions and all subparts for each question as applicable. Failure to discuss a question or subpart will result in a lower score.

Good luck!

Question One

Randy Trucker was out for a walk with his wife June and 16 year-old daughter Leslie on a Sunday morning. They were each walking on the sidewalk on a busy street in Bakersfield, California. Randy was employed by Allied Trucking at the time and had worked there for ten years, moving from loader, to truck driver, to lead truck driver and dispatcher. He made \$50,000.00 per year, plus company insurance, and a \$5,000.00 per year 401K match. He received very positive reviews in his position and anticipated he could be promoted to trucking supervisor, with an increase in pay of about \$10,000.00 per year. However, competition for that position is very intense and his promotion was far from certain. Randy was 45 years old and anticipated working until he was 55.

June was a stay-at-home mom and Leslie was the number one player on the Stockdale High School Golf team. Randy and June paid for private golf lessons for her, and she showed promise for a future college and potentially pro career. If she made it to the professional level, Leslie could expect to make at least \$100,000.00 per year for ten years. Although June is presently a stay-at-home mom, she was very athletic and briefly played in a semi-pro golf league where she made about \$20,000.00 per year before Leslie was born. She had hoped perhaps to pick that back up again after Leslie left for college in a few years.

While walking along the sidewalk, a delivery truck owned by Enron Organics swerved to avoid running over a squirrel and the truck hit Randy and Leslie and barely missed June. Randy was seriously injured, with his pelvis being crushed and several ribs broken. June was almost grazed by the truck's rear-view mirror, but there was no impact, and she was uninjured. Leslie's right arm was severely damaged and had to be amputated below the left elbow. Randy was immediately knocked unconscious when he was hit, but June observed both Randy and Leslie getting hit and the resulting injuries.

Randy was hospitalized and released after extensive treatment that cost \$800,000.00. Leslie was also hospitalized and received extensive treatment that cost \$1,200,000.00. Both will require further therapy and treatment estimated to cost \$400,000.00 for Randy and \$300,000.00 for Leslie. June now suffers from nightmares and a lack of sleep from the accident and receives therapy for her injuries. The estimated cost of that therapy for the next five years is \$30,000.00. Fortunately, Randy had excellent insurance through his employer and all but \$10,000 of his treatment and \$15,000 of Leslie's was covered by insurance.

Enron Organics has insurance and admitted liability for the accident and the parties have elected to mediate the damages claims that Randy, June and Leslie have asserted against Enron Organics.

In order to aid in the mediation, Randy, June, and Leslie, would each like an estimate regarding much they would expect to get if they went to trial against Enron Organics. You have already told them they were unlikely to receive an award of punitive damages and that you would not factor that into your calculations.

Please provide an analysis of the damages available to Randy, June, and Leslie, including a discussion of any offsets or adjustments that would likely be made in the course of determining their damages awards. Do not discuss punitive damages and there is no contractual basis for damages.

Question Two

Fred Jones is the Senior Vice President of Sales for Kern City Lumber Supply (Kern City), located in Kern City, Nevada. He has been working for Kern City for twelve years. Two years ago, he signed an employment agreement with Kern City that established his base pay and bonus structure. The Agreement also provided that in the event that he ceased to be employed with Kern City he would be precluded from working in the lumber or in the construction industry anywhere in the State of Nevada. The Agreement also contained a confidentiality provision that stated that the pricing of lumber, Kern City's lumber supplies and customer lists were proprietary trade secret information. Finally, the Agreement provided that if there was any dispute arising between the company and Fred, all such disputes had to be resolved through binding arbitration through the American Arbitration Association. The Agreement was presented to Fred late one Friday afternoon before the end of the day, he was given an hour to read it, and was required to sign it before he left work that day. He was not allowed to make any changes.

While an employee at Kern City, the President of the company, James Henry, directed Fred to create phony invoices for lumber sales so that the company could obtain financing from a factoring company against those invoices. For example, if Fred created an invoice for a \$100,000 lumber sale, James could present that invoice to a factoring company and receive \$80,000 in financing. Over the last year, Fred created \$1,000,000 in invoices for lumber sales that did not occur, and Kern City was paid \$800,000 from the factoring company. In exchange for his preparation of the invoices, Fred received \$7,500.

Lumber sales in Nevada is a highly competitive business. Acme Lumber, a national chain of lumber and hardware stores, was seeking to enter the Kern City market and offered Fred the position of store President at the new Kern City Acme Lumber Store. However, in order to obtain that position, Acme wanted Fred to bring with him Kern City Lumber's pricing, supply, and customer information. Fred agreed, abruptly quit his position at Kern City lumber, took a thumb drive containing the confidential pricing, supply, and customer information, and went to work for Acme. Kern City learned of Fred's removal of this information immediately.

Because of Fred's knowledge of the factoring scheme, Kern City did not immediately take action against Fred or Acme. However, over the course of the following two years, Kern City suffered a severe decline in revenues. Many customers left Kern City and moved to Acme, and the company lost competitive bids for lumber work that it previously would have been awarded. It became very clear that Acme was able to obtain the customers and undercut Kern City through Fred's use of Kern City's confidential information. The losses to Kern City totaled \$3,000,000 over that two years.

James has sought your advice on whether he could obtain an injunction against Fred and Acme that would preclude Fred from working for Acme and stop Acme and Fred from using from the confidential information. He also wanted to know whether he could force Fred into arbitration for breach of his employment agreement. Specifically, James would like you to address the following issues:

(a) Would Kern City be able to get a temporary restraining order, preliminary injunction and permanent injunction against Acme Lumber? Include in your discussion any differences in the tests that might be applied in state or federal court. Also, please address any equitable affirmative defenses that might impact Kern City's ability to get that relief.

(b) Would Kern City also be able to force Fred into arbitration for breach of the Employment Agreement for violation of his agreement not to work for a competitor and for taking the confidential information. Include in your discussion any equitable affirmative defenses that might impact Kern City's ability to enforce the Employment Agreement's arbitration provision, the confidential information provision, and the non-compete provision.

(c) For purpose of the above, assume that covenants not to compete are binding in binding in Nevada. However, also briefly address whether the covenant not to compete that Fred signed with Kern City would be enforceable in California.

1)

1.

Tort Remedies

The purpose of remedies in a tort case are to make the aggrieved party whole by placing them in the position they were in prior to the tort. A plaintiff who has suffered a personal injury due to the defendant's tortious conduct is entitled to damages. There are three basic components in computing personal injury damages: (1) physical and emotional consequence of the injury (e.g., pain and suffering); (2) expenses incurred due to the injury (e.g., medical expenses); and lost earnings attributable to the injury.

A plaintiff must look at all the legal remedies first, and if they are not adequate, then they can look to equitable relief. The remedies in tort cases are of the following: (1) compensatory; (2) replevin; (3) ejectment (all legal); (4) constructive trust; (5) equitable lien; and (6) injunctive relief (all equitable). For purposes of this tort, the focus below will be on compensatory remedies.

Compensatory Damages (Legal)

Legal Compensatory Damages are awarded to a harmed plaintiff to make her whole again before she was wronged. Before an action can be brought to pursue legal damages, the following requirements must be satisfied:

- (1) Foreseeable: this is where the damages must have been foreseeable at the time of the injury;
- (2) Certain: the damages must be reasonably certain and not speculative;
- (3) Unavoidable: the damages must be unavoidable, meaning that the plaintiff must mitigate their damages;
- (5) Causation: this is using the "but for" test." The plaintiff must establish that but for the defendant's conduct, she would not have been harmed.

Plaintiffs will argue that it would be foreseeable that the Enron Organics driver could cause injury because of focusing on the squirrel rather than where he was driving -- up on the sidewalk. Enron will argue that this is not foreseeable and argue that anyone would swerve by impulse in order to not

drive-over and kill any living thing. The Court is likely to agree that it was foreseeable that the driver could cause injury by taking his eyes off of where he was driving. This first element would be met.

The damages sustained by Randy and Leslie are certain and not speculative as both sustained severe injuries. Enron will argue that the injuries to June are speculative as she did not sustain any injuries. Plaintiffs will argue that because June now suffers from nightmares and a lack of sleep from the accident, she has had to seek therapy, and even though the facts do not mention it, her therapy will likely include medicines. Defendant will argue that June was not in any way physically injured, and that simply witnessing an accident does not warrant a claim. Plaintiff will argue that June satisfies the element for Negligent Infliction of Emotional Distress (NIED), which will be discussed further below. All three plaintiffs will have satisfied the element of certainty.

As to the element of causation, "but for" the truck driver not watching where he was driving when he drove up onto the sidewalk where they just happened to be pedestrians walking, none of the plaintiffs would have suffered the injuries that they sustained. This element has been met.

A Plaintiff is often required to attempt to mitigate his damages, but here, plaintiffs were unable to mitigate as the accident happened suddenly. Had they had more time to see what was happening, they may have been able to jump out of the way. Plaintiffs have met this element.

The court will rule that all three plaintiffs will be awarded compensatory damages.

NIED

There are two types of NIED: (1) direct cases; and (2) bystander cases.

For a plaintiff to satisfy the elements for NIED directly, they must prove (i) that the plaintiff was within the zone of danger of the accident; and (2) that they subsequently suffered some physical manifestation of emotional distress. Both Randy and Leslie were within the zone of danger and both sustained severe injuries, satisfying their individual claims for NIED. June would be analyzed under the bystander elements, which include: (i) the death or serious injury of another caused by defendant's negligence; (ii) that there is a marital or intimate, familial relationship between plaintiff and the injured person(s); (iii) that plaintiff observed the injuries from within the zone of danger; and (iv) the experience resulted in plaintiff suffering severe emotional distress. June easily meets the first three elements as she witnessed the injuries as they occurred from within the zone of danger of her husband and child. Since June can provide evidence of needing therapy since the accident to help her deal with her nightmares and lack of sleep, June also meets the fourth element.

The court will allow all three plaintiffs to claim NIED.

General v. Specific Damages

Essentially, there are four types of damages that a plaintiff can claim: (1) general damages; (2) special damages; (3) nominal damages; and (4) punitive damages. The focus here will be on general and special damages. General damages (non-economic) are those damages that naturally flow from the wrongful act. These are damages that are foreseeable at the time of the injury and are non economic in nature. An example would be pain and suffering, and emotional distress. Special Damages (economic losses) do not necessarily flow from the wrongful act, and are unique to each plaintiff. Because of this, they must be specifically pled. Special Damages are damages that are unforeseeable at the time of the injury and are economic in nature. Examples of special damages would include medical expenses, loss of earnings and earning capacity.

All three plaintiffs will argue for both general and special damages. Due to the NIED, the general damages element will have been met for all three plaintiffs. Special Damages will need to be reviewed for each plaintiff. Both Randy and Leslie will be able to provide evidence of large amount of medical bills they acquired due to their substantial injuries. Defendant will also provide evidence obtained through discovery that due to Randy's excellent insurance, all of the medical bills had been paid except for \$25,000 collectively between Randy and Leslie. This prompts the Collateral Source Rule, which will be discussed below. As a result of the insurance payment, Defendants will argue that Randy and Leslie should only be awarded the \$25,000 for the portion of the medical bills that were not covered by insurance. Defendant's liability is not reduced by amounts paid by insurance. Although the facts state that June receives therapy for her injuries, it does not appear that plaintiffs have made a general damage claim on behalf of June. The Court will likely award Special Damages for "reasonable" medical expenses incurred by both Randy and Leslie. As to what is "reasonable" will likely be presented by expert witnesses.

Collateral Source Rule

Defendants have long argued that by allowing plaintiffs to collect awards to pay for medical expenses that have already been paid by their insurance, plaintiffs are being unjust enriched. However, under the Collateral Source Rule, if an injured party receives compensation or benefits from a source unaffiliated or independent from the tortfeasor, those payments will not be deducted from the damages a plaintiff might otherwise be entitled to collect. As a result, the court will look at the medical expenses thus accumulated as having never been paid for purposes of calculating general damages.

Medical Expenses

Plaintiffs are entitled to recovery any reasonable expenses that were incurred as a result of injuries suffered as a consequence of defendant's tortious conduct. The cost of future medical expenses is also recoverable, subject to the certainty requirement. Any such expenses must be reasonably certain to be incurred in the future. Evidence has been provided that all three plaintiffs will incur future medical expenses.

Lost earnings/earning capacity

A plaintiff who suffers a tortious physical injury can recover for loss or impairment of earning capacity. Each plaintiff will be analyzed separately below.

Randy

The facts state that Randy made \$50,000 per year, not including his company insurance and \$5,000 per year 401K match. Randy will argue that due to his stellar work history, he was up for a promotion that would add an additional \$10,000 per year to his annual salary. Randy was 45 years old at the time of the accident, and had planned to retire in 10 years. Randy will demand the balance of his salary and 401K match be prorated for this year, and then he should be awarded \$60,000 a year for the next ten years, until he reaches the age of 65, in addition to his 401K match. Defense will argue that they agree that Randy should be compensated for the amount of time he has lost from not working, the facts do not indicate that Randy will be unable to return to work. Therefore, this claim should only include the actual time that Randy will be out of work. As for the promotion and increase in salary, defense will bring to light the fact that Randy's \$10,000 is not certain as the facts state there was a great amount of competition for that position.

Earning capacity damages are often referred to as damages for lost wages or earnings. The focus in determining the amount of damages is on the loss or diminution of the plaintiff's earning capacity. For an employed plaintiff, the impact of the tort on the plaintiff's actual earnings may be the best evidence of that diminution. The Court here will rely on testimony from expert witnesses as to the likelihood of Randy returning to work, and if so, in what timeframe for purposes of calculating missed earnings. If Randy misses a year of work, it is likely that the Court will award Randy one year of salary. As to the possibility of lost future earnings, if it is deemed that Randy, due to injuries sustained from the accident, will be unable to return to work, then his loss of future earnings would be taken into consideration in the calculation of an award of future lost wages. As the possible promotion and salary increase are so uncertain, it is unlikely the Court will add that to the mix. An

award to compensate a plaintiff for the loss or diminution of future earnings capacity must be reduced to its present value in order to avoid overcompensating the plaintiff. The modern trend is also to increase the amount of the award based on anticipated future inflation, which serves as an offset to the present value reduction. Compensation would be calculated from the date of injury to the time of recovery.

Leslie

A variety of factors are taken into account when determining a plaintiff's future earnings capacity, including the plaintiff's age, education, employment history, and physical condition. The facts state that Leslie, a 16-year old who was the number one golfer on her School's team. Her parents paid for private golf lessons for her, and the facts state that Leslie showed promise for a future college and potential pro career. If she made it to the professional level, Leslie could expect,

Leslie will argue that she has suffered a Hedonic Loss, which is the loss of enjoyment of life. It should be noted that whether this loss will warrant separation consideration depends on the state. California will likely combine Leslie's Hedonic Loss with her pain and suffering damages.

For a plaintiff who is unemployed at the time of a tort (child, homemaker), they can be entitled to recover. A plaintiff's life expectancy is taken into consideration when determine an award for future earnings capacity. If a plaintiff suffers a permanent injury or death, the reduction in the plaintiff's life expectancy is not treated as a separate element of damages. Instead, the plaintiff's life expectancy or working life expectancy as of the time of the tort is relevant in determining the plaintiff's earnings capacity. Leslie has a permanent injury with the loss of her arm, which would prevent her from seeking a pro golfer future.

In determining future earning capacity, a mortality table will be used based on the plaintiff's age, to determine the relevant expectancy. Even with Leslie's present golf credits and her parents hope for a scholarship and future pro career, a professional golf career is uncertain. The facts state that Leslie is the top golfer in the Golf Club at her school. Does that mean she is also the best golfer at her school? Has her team competed against other schools? What about a nationwide competition? A parent always has high hopes for their children to succeed in life. However, based on the facts, while Leslie may be a very good golfer, and continued to improve with the added golf lessons, for there to be substantial consideration of calculating a pro golfer salary for Leslie would need more evidence to indicate that it is substantially likely that Leslie would become a professional golfer. Just because Leslie's Mom briefly played in a semi-pro golf league does not mean that Leslie will succeed.

While the court will take into consideration future lost earnings for Leslie for a duration calculated from the Mortality Table, it is not certain at what rate her future lost income will be calculated. Taking into consideration the success of her parents and the likelihood that she would go to college, she would very likely earn more than minimum wage. Exactly what amount may be left up to an expert.

June

The facts state that June made about \$20,000 a year as a semi-pro golfer before Leslie was born -- more than 16 years ago. She has been a homemaker since. While the facts state that June "was very athletic," the court will take into consideration June current physical condition. June had hoped to return to golf after Leslie left for college in a few years, but depending on whether she has the physical capability to again pick up a golfer's career, it is likely that the court will not award June a semi-golfer's salary for future economic loss. While she will be able to recovery something, despite the fact that she was not working at the time, in a few years time, June may still be able to go back to work. Maybe as a semi-pro golfer, maybe not. It will largely depend on medical expert testimony as to the likelihood of June being able to hold down a job in the future given her injuries.

Enron Organics

In the event that Enron wants to bring the tortfeasor, their employee, into the case, they would be required to file a separate action to try and recovery any amounts towards the overall judgment.

In conclusion, the court will like award all three plaintiffs general damages. As to special damages, the medical expenses incurred to date that are certain would be awarded, regardless if the expenses have already been paid by insurance. Any future reasonable medical expenses that plaintiffs are likely to incur would be further evaluated by the appropriate experts. Randy will be compensated for the amount of time he has missed (or is likely to miss) from work. If Randy's injuries preclude him from ever going back to work, then the court would calculate his salary for the next ten years, until Randy's retirement. Leslie will be awarded future lost income. However, a lot of factors will have to be considered as to what the likelihood of the salary she would earn, and a mortality table would be used to calculate for payment for her expected lifetime. It should be noted that Leslie's parent believed Leslie could go pro, and would earn at least \$100,000 for a period of ten years. Not an unreasonable amount of time. Finally, June will likely be awarded future lost income, but the amount will depend on a number of factors, including the state of her health at the time of the accident.

END OF EXAM

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1. Would Kern City be able to get a TRO, preliminary injunction, and permanent injunction against ACME Lumber?

Injunctive Relief

An injunction is a pure equitable remedy that a party may use to stop another party from action (prohibitory injunctions), or in some circumstances, force another party to act in a certain manner (mandatory injunctions). Injunctions are extraordinary remedies and includes provisional injunctions and permanent ones.

Here, Kern City Lumber will be seeking an injunction to stop ACME from using confidential information.

Temporary Restraining Order (TRO)

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. A TRO is valid for 14 days with a 14 day extension if necessary. A TRO can be issued Ex Parte if the plaintiff shows that a good faith effort was made to give notice and a chance to appear. A party seeking a TRO must show: 1) immediate irreparable injury/harm; 2) the movant is likely to prevail; 3) a balancing of the hardships favors the moving party; and 4) inadequate legal remedy.

Immediate Irreparable Injury/Harm

A plaintiff must face a substantial threat of irreparable harm or injury if the TRO is not granted while waiting for the preliminary injunction hearing. Irreparable harm is injury for which a monetary award cannot be adequate compensation. Kern City must show irreparable harm without the court granting the emergency order to stop ACME from using confidential information. Here, Kern has lost \$3,000,000 over two years from ACME's use of the confidential information. Kern City will contend that if a TRO is not issued they will continue to suffer more loss and their trade information will continue to circulate. ACME will argue that Kern City has willfully waited two years to file the lawsuit and that there is no immediacy now. The court may find that injury will occur that is irreparable but there is no immediacy. However, there is an immediacy from stopping a company to continue using trade information that is not theirs.

Movant most likely to prevail on the merits

Fred signed an agreement with Kern City that contained a confidentiality provision that stated that the pricing of lumber, Kern City's lumber supplies and customer lists were proprietary trade secret information. Fred took that information to ACME and are using that information to obtain new clients and contracts. Based on the facts, it appears that Kern City is likely to prevail on the merits of its claims.

Balancing of the Hardships

Under the balancing of the hardships, the court must look at the hardship to the plaintiff in the absence of the injunction against the hardship of the defendant if the TRO is granted. Here, Kern City will suffer vast monetary damages and harm to its company if ACME continues to use and potentially disseminate Kern City's confidential trade information. If the court was to grant the TRO ACME would lose out on revenue they are making from using the confidential trade information; however, the trade information is not theirs to use and ACME would potentially not be making as much money or bringing in competitive bids if they weren't using that information. Therefore, the court would most likely find that Kern City would have the greater hardship.

Inadequate Legal Remedy

The Plaintiff must not have an adequate legal remedy. Money damages are inadequate when damages are too speculative, there is an irreparable injury to plaintiff, or to avoid a multiplicity of suits. Here, unless an injunction is granted ACME will continue to use the trade secret information and Kern City will continue to lose unforeseeable clients and monetary losses. Therefore, there is an inadequate legal remedy.

The court will most likely grant the TRO.

Preliminary Injunction

A preliminary injunction is an injunction entered by a court prior to determination of the merits of a legal case, in order to restrain a party from going forward with a course of conduct until the case has been decided. There are two tests used in deciding to award a preliminary injunction: the traditional test and the sliding scale test.

Traditional Test

Under the traditional rule for awarding a preliminary injunction, similar to a TRO, plaintiff must show each of the elements of (burden on the P): 1) probability of prevailing on the merits; 2) irreparable

injury if relief is denied; 3) the balance of hardships favoring the P; and 4) the public interest favoring the relief. There must also be no valid defense.

Elements 1 through three have been discussed above in the TRO analysis.

Public Interest

The court will take into consideration whether the public interest is in favor of granting the preliminary injunction. There is a great public interest that contracts are enforced. However, in this case ACME was able to benefit from the breach of that contract. ACME is using confidential trade secret information to gain an advantage in the job market. There is also great public interest in protecting trade secret information. If there is no repercussions for illegally gaining an advantage of secret information, then it would allow many others to do the same. There is strong public policy argument.

Alternative Test/Sliding Scale Test

Under the alternative test, the plaintiff must still meet the same elements as the traditional test (see supra), however, the amount of irreparable harm and likelihood of success of the merits can be judged on a sliding scale. A stronger showing of irreparable harm can offset a lesser showing of likelihood of success on the merits. Conversely, a stronger showing of a likely success on the merits reduces the required showing of irreparable harm. Under this approach, so long as Kern City is able to prove a stronger showing of either irreparable harm or likelihood of success on the merits to offset one or the other Kern City will be successful.

Defenses

Unclean Hands

Under the unclean hands defense, a Plaintiff engaged in improper conduct with regard to the subject matter of the lawsuit.

Here, ACME will argue that Kern City engage in improper conduct. Kern City had Fred create phony invoices to obtain financing from factoring companies. Fred created over a million dollars in invoices for lumber sales that did not occur. Kern City will counter that the information had confidential pricing, supply, and customer information and that the improper conduct is not related to the subject matter of the lawsuit.

The court may find the defense does not apply.

Laches

Under the laches defense, there is an unreasonable delay that is prejudicial to the Plaintiff. Laches is concerned with the effect of the passage of time not the length of the passage of time.

Here, ACME will argue that Kern City waited two years to take action because of Fred's knowledge of the factoring scheme. As a result of the delay of two years, Kern suffered over \$3,000,000 in damages.

The defense of laches may be successful.

The court may award the preliminary injunction and possibly not award monetary damages.

Permanent Injunction

A permanent injunction is not a provisional remedy, rather it is awarded after a full trial on the merits. For a permanent injunction, the courts must analyze whether a plaintiff demonstrated 1) irreparable injury; 2) inadequacy of legal remedies; 3) balance of hardship in favor of the moving party, and 4) that the public interest would not be disserved by a permanent injunction. There must also be no valid defenses.

See the discussion in TRO and Preliminary Injunction above for the elements, as well as the defenses.

The court will most likely permanent injunction and possibly not award monetary damages.

2. Would Kern City be able to force Fred into arbitration for breach of the employment agreement?

Specific Performance

Specific Performance is an equitable remedy that the court may utilize to enforce the terms of a valid contract. Specific performance is a mandatory decree by the court, requiring the defendant to perform what was promised under the original contract. There six requirements for specific performance: valid contract, P's contractual obligations must be satisfied, inadequate legal remedies, mutuality, feasibility of enforcement, defenses are lacking.

1) Contract is Valid

To obtain specific performance the plaintiff must be able to show that there is a valid contract with certain and definite terms.

Fred and Kern City had an agreement that laid out its terms and Fred signed the agreement.

2) Contract Conditions of P must be satisfied

The plaintiff must show his contract conditions have been fulfilled. Kern City employed Fred and paid him a salary. Fred quit and broke the agreement. A clause existed in the contract for arbitration.

3) Inadequate Legal Remedy

The Plaintiff must not have an adequate legal remedy. Here, KC has no other legal remedy as it cannot obtain monetary damages to fix the harm.

4) Mutuality of Remedy

Historically, the courts have required that for a party to seek specific performance the party they are seeking it against must also be entitled to specific performance. Modernly as long as the court can secure performance of both parties to its satisfaction, the decree may be issued.

There is a mutuality of remedy.

5) Feasibility of Enforcement

The court must be able to enforce the specific performance. Here the performance is not for services rather it is asking the court to direct the parties to arbitration. The court can enforce the specific performance.

6) Defenses

The defendant cannot have any valid defenses against specific performance.

Unclean Hands

Fred will argue KC had him engage in fraud. Defense likely to fail.

Laches

Fred will argue it took KC two years to bring suit. However, as long as it is within the statute of limitations.

Unconscionability

Procedural and Substantial. Procedural focuses on the contract formation. Here there was no meaningful negotiation as Fred did not have the opportunity to read or make changes. Under substantive unconscionability, the courts look at the contract terms themselves. Here, the Fred's covenant not to compete is not reasonable in time or geographic scope. The agreement provides that Fred is precluded from working in the lumber or in the construction industry anywhere in the State of Nevada. The agreement does not state which can mean indefinitely. The geographic scope is unreasonable as it asks that Fred cannot work anywhere in the state of Nevada in which he most likely resides.

The defenses of unconscionability may apply.

Here, the court will most likely find the contract to be invalid as there was unconscionability in the formation of the contract and its terms. However, the court may also strike those terms and allow the provision of the confidentiality and arbitration to go further.

3. Would covenant not to compete that Fred signed with Kern City be enforceable in California?

Specific Performance- Personal Service and Employment Contracts

California does not follow the general rule that covenants not to compete are valid if they are reasonable in purpose and scope. The courts in California have routinely held agreements purporting to preclude employees from working for competitors upon completion of their employment are invalid. Employee non-compete covenants are void in California even if they are reasonably limited in time and geographic scope. Here, the Fred's covenant not to compete is not reasonable in time or geographic scope. The agreement provides that Fred is precluded from working in the lumber or in the construction industry anywhere in the State of Nevada. The agreement does not state which can mean indefinitely. The geographic scope is unreasonable as it asks that Fred cannot work anywhere in the state of Nevada in which he most likely resides. The non compete covenant would not be enforceable in California.

END OF EXAM
