

KERN COUNTY COLLEGE OF LAW

**REMEDIES**

Final Examination

Spring 2020

Professor S. Belden

INSTRUCTIONS:

There are two (2) questions in this examination.

You will be given four (4) hours to complete the examination.

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Question One

Moon Glow Farms (Moon Glow) grows organic vegetables in a large hot house facility in Tehachapi, California. Moon Glow consumes a large amount of electricity in its operations. Before Moon Glow established its hot house operation, it met with a technician for Edison Thomas Electricity (ET) to discuss the fact that it would require significant electricity and asked if ET could handle the anticipated demand for electricity. The technician, who was on his third day on the job after a short stint at Starbucks, said “sure, we are an electric company, and, since we are the only supplier of electricity up here, you are sort of stuck with us.”

In June 2018, Moon Glow began its operation and purchased its electricity from ET. However, after only a few months, Moon Glow started having problems paying its bills and became very delinquent. On September 8, 2018, ET shut off electrical service to Moon Glow. Prior to disconnecting electricity for nonpayment, ET ordinarily gives its customers notice that they have fifteen days to pay their overdue bills before service is suspended. However, it did not give Moon Glow this fifteen-day notice.

On the morning of September 9, 2018, before electrical service was restored, a grass fire started in a field adjacent to the hothouse. The fire grew quickly and ultimately consumed Moon Glow’s hothouse. When Moon Glow’s employees initially discovered the fire, they attempted to put it out using ordinary hoses, but without electricity, the Moon Glow facility had no running water, and the fire grew.

The fire department was ultimately called, but they had no luck putting out the fire as the well pumps and other sources of water did not have electricity. Firefighters attempted to contact ET to restore electricity to the water sources, but ET

employees expressed reservations to the emergency dispatcher, and the firefighters interpreted their statements as a threat that the fire department would have to assume liability. Firefighters attempted to use reservoir water and to preserve water by using foam and smaller hoses, but the hothouse was nonetheless destroyed.

Moon Glow sued ET in contract and tort for damages resulting from the fire, alleging that if ET had taken adequate care prior to disconnecting Moon Glow's electrical service, firefighters and Moon Glow employees would have had access to water and the fire could have been contained. The trial court found ET liable both in contract and in tort. It calculated total consequential or special damages of over \$21 million, of which \$13.7 million was the net value of lost crops that the facility would have been able to grow in the absence of the fire. The trial court also awarded \$100,000 in punitive damages based on ET's failure to restore energy when requested to do so by firefighters. The Court also refused to apply a provision in the contract between ET and Moon Glow that provided in the event of a breach of contract or tort by ET or Moon Glow, the other party would be entitled to only \$100,000.00.

The trial court also granted ET an offset of \$3.2 million for monies Moon Glow was paid by its insurer, Farm State. Finally, the trial court awarded pre-judgment interest at the rate of 10% for both the tort and contract damage claims.

The trial court stated that Moon Glow would be able to elect between its tort and contract damages upon remand after appeal.

On appeal, the ET does not contest that it was negligent or that it breached its contract with Moon Glow. ET does, however, contest the amounts awarded for consequential or special damages and punitive damages. Additionally, ET contests the award of pre-judgment interest and the trial court's refusal to give effect to the liquidated damages provision. Moon Glow cross appeals on the offset against the damage award for the insurer.

Please address the merits of the trial court's rulings on each of the above issues. Please do not address the standard of review on appeal.

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## Question 2

The Kern County Daily Journal is owned by the Tripper Family Corporation and publishes daily in Kern County, Iowa. Channel 17 News is a broadcast news company that is located in Old Kern, Kern County, Iowa. It is in fact the only broadcast news outlet accessible by antenna in Kern County and its beloved anchor, Fred Olsen, is a well-known beloved figure in the community.

Fred Olsen is employed by Channel 17 News pursuant to a five year written employment that provided, among other terms, that if he left the employment of the news station for any reason, he could not be employed by another news station within a 200 mile radius for two years following the termination. An agreement like Fred's has been found to be a valid negative covenant under Iowa law.

The Tripper family had been looking for an opportunity to shore up the flagging newspaper industry and thought that purchasing Channel 17 News would be a great way to do that. Therefore, the Tripper family entered into an agreement with the owners of Channel 17 News, the Oak family, to purchase Channel 17 news and all of its assets for \$2.5 million dollars. The Tripper and Oak families were old-fashioned and each insisted on a very short agreement, that basically set forth the price for all of the assets of Channel 17 in exchange for \$2.5 million dollars.

A closing of the deal was set for May 1, 2020. However, on April 15, 2020, Fred Olsen stated that he was not interested in working for the Tripper family and instead was going to terminate his contract and work at Channel 23 News in Davenport Iowa, less than 200 miles from Old Kern. After the agreement was entered into between the Tripper Family and the Oaks, Channel 23 had stated its intent to boost its signal so that it would reach Old Kern.

Upon Olsen's announcement and after learning of Channel 23's plans, the Tripper family stated that it would not proceed with the deal unless the Oaks ensured that Fred was not going to leave. The Oaks then immediately went to court to enjoin Fred from departing Channel 17 while at the same time suing the Trippers for specific performance. The Oaks sought the provisional remedies of an ex parte

application for temporary restraining order and preliminary injunction, along with a request for permanent injunction.

**Part One:**

Please discuss the likelihood of the Oaks obtaining specific performance against the Trippers and obtaining the provisional relief and permanent injunction against Fred Olsen. Include discussion of any equitable defenses you see to any of the relief being sought by any party.

**Part Two:**

Assume that the court issued the injunctive relief and Fred Olsen violated it anyway. What relief would the Oaks be able to seek to address Fred's violation of the injunction?

**Part Three:**

Assume Kern County was in California, would the ability of the Trippers to get injunctive relief of any form against Fred Olsen be any different than under Iowa law?

## Remedies Final Question One Outline

### A. Damages:

#### a. Contract Damages:

- i. The basic purpose of compensatory damages for breach of contract is to place the injured party in as good a position as if full performance had been rendered under the contract.
- ii. Expectancy damages protect the injured party's bargained for expectation under the contract.
- iii. The common law of contracts classifies damages as either general or special. Special damages are proper only when the evidence establishes that the breaching party should have reasonably foreseen the kind of harm resulting from their non-performance at the time the contract was entered into.
- iv. Courts have traditionally held that a new business cannot recover lost profits; however, the growing trend is to allow such damages when the injured party can establish such lost profits with reasonable certainty.

#### b. Tort Damages:

- i. Like contract damages, the goal of tort damages is to place the injured party in approximately the same position they were in prior to the injury. Other goals such as efficiency and avoidance of waste are relevant to the determination of the amount of compensation. Such damages must be established with reasonable certainty.
- ii. The usual measure of damages when personal property is destroyed is the fair market value of such property.
- iii. With respect to growing crops, if the plaintiff can prove the value of the crops at maturity with reasonable certainty, it is appropriate to award that value as damages.

- c. Foreseeability: Foreseeability is a limitation on all compensatory damages, tort and contract. (*Hadley v. Baxendale*). In contract, the inquiry regarding foreseeability is determined at the time of contract formation. In tort, it is determined as of the time immediately prior to the harm committed.

## B. Punitive Damages:

- a. Courts will generally not award punitive damages for breach of contract. However, if the breach of contract is incidental to a tort that would itself support a claim for punitive damages, punitive damages may be awarded for the tortious conduct.
- b. Typically, punitive damages are available where the defendant acts with ill will, evil motive, malice, intent to injure or intent to defraud. Malice may also be established where the wrongdoer acts with reckless indifference to the rights of others.
- c. The factors used to determine the amount of punitive damages include (a) nature and reprehensibility of defendant's conduct, (b) seriousness of the harm, (c) the defendant's awareness and motivation regarding the potential harm, (d) the duration of the harm and any efforts to conceal the misconduct, (e) the profitability of the defendant's misconduct, (f) the defendant's wealth, the relationship between the harm and the amount of punitive damages, and the deterrent effect of awarding damages.

## C. Liquidated Damages Provision:

- a. A liquidated damages provision will be upheld when it meets the standard of a good faith, reasonable estimate of actual damages. The traditional test to evaluate the validity of a liquidated damages provision is whether, at the time of the contract, the stipulated amount bears a reasonable relationship to the anticipated or actual losses caused by the breach and such damages are difficult to determine. This difficulty in ascertaining damages is viewed from the date of contract formation.

## D. Offset for Insurance Payment:

- a. 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.

## E. Pre-judgment Interest:

- a. Prejudgment interest is awardable to compensate the prevailing party for the loss of use of money that will be awarded later at judgment. The award focuses on the period for accrual of the claim until judgment.
- b. Courts are generally not inclined to award prejudgment interest where liability and damages are in dispute or uncertain. The modern rule is that the damages should be readily determinable or liquidated before prejudgment interest is appropriate.

## Remedies Question 2 Outline

### Part One:

Please discuss the likelihood of the Oaks obtaining specific performance against the Trippers and obtaining the provisional relief and permanent injunction against Fred Olsen. Include discussion of any equitable defenses you see to any of the relief being sought by any party.

### Discussion

#### A. Specific Performance:

- a. Specific performance is an equitable remedy to enforce contractual rights and duties.
- b. The requirements for specific performance are (a) the existence of a valid contract with definite and certain terms (b) whether the claimant is able and ready to perform and has satisfied his/her conditions to obtaining performance (c) whether the breaching party is able to render performance (d) no adequate remedy at law and (e) the balance of interests and relative hardships weighs in favor of the claimant.
  - i. Inadequate remedy at law is the most important factor in obtaining specific performance. The issue is whether money damages would be an adequate remedy for the breach.
  - ii. Mutuality of remedies, or the ability of each side to compel specific performance, is another way of describing the ability of both sides to perform the contract.

#### B. Injunctive Relief:

- a. Ex Parte Relief:
  - i. To obtain Ex Parte relief, the moving party must show irreparable harm pending a hearing on the preliminary injunction.
  - ii. A TRO is limited in duration, with the federal rules limiting it to 14 days unless good cause is shown.
- b. Preliminary Injunction
  - i. The purpose of a preliminary injunction is to avoid irreparable harm pending the outcome of a trial on a permanent injunction.
  - ii. The traditional test for a preliminary injunction is (a) a likelihood of success on the merits, (b) irreparable injury if the relief is delayed, (c) the balance of hardships favoring the movant, and (d) a showing that the injunction would not be adverse to the

public interest. The burden of prove on these elements is on the moving party.

1. Under an alternative test used by federal courts, a lesser showing of merits may be offset by stronger showing of irreparable harm. Under that test, the movant must either show a likelihood of success on the merits and some irreparable harm or a serious question on the merits and that the balance of hardships decidedly tip in the favor of the moving party.

c. Permanent Injunction.

- i. Similar factors are analyzed to determine whether to issue a permanent injunction. A plaintiff must demonstrate (a) irreparable injury, (b) inadequacy of legal remedies, (c) balance of hardship in favor of the moving party, and (d) that the public interest would be not be disserved by a permanent injunction.
- ii. Speculative nature of damages or the need for successive lawsuits are two ways to establish inadequacy of remedies at law.
- iii. Irreparable harm must also be established and can be established through a continuing injury that results in substantial prejudice or a pattern of past invasions that are varied and unpredictable.

Part Two:

Assume that the court issued the injunctive relief and Fred Olsen violated it anyway. What relief would the Oaks be able to seek to address Fred's violation of the injunction?

- A. Contempt: Courts are empowered to issue contempt orders to maintain the orderly administration of the judicial system and to ensure proper respect and compliance with their orders. There are two general types of contempt: criminal contempt and civil contempt.
- B. Civil contempt serves a remedial and compensatory function designed to coerce a party into prospective compliance with a court order.
- C. Criminal contempt is punitive in nature and is designed to ensure the proper respect for the court and the administrative of justice.
  - a. Criminal contempt can be direct, which is to punish conduct that occurs in the court's presence, and indirect, which is to punish



conduct that constitutes defiance through the disobedience of a lawful order.

- b. The requirements for indirect criminal contempt are: (a) a valid order (b) notice by the party of the terms of the order and (c) the ability of the party to comply with the order and (d) the intentional or willful noncompliance with the order.

D. Coercive civil contempt is also a remedy to obtain compliance with a court order. A court can award an incremental fine or imprisonment to obtain compliance with the order. However, once the order is complied with, the coercive penalties must end.

### Part Three:

Assume Kern County was in California, would the ability of the Trippers to get injunctive relief of any form against Fred Olsen be any different than under Iowa law?

Under California law, with these facts, the Trippers would not be able to obtain injunctive relief against Fred Olsen as noncompetition agreements prohibiting employees from competing against their former employers are generally unenforceable under California law.

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A remedy is a judicial mechanism for protecting, or enforcing, a person's legally protected right. There are two type of remedies: legal and equitable. Legal remedies involve a court requiring a defendant to pay money for harm caused by the defendant. Legal remedies are intended to make the plaintiff whole, usually through the award of compensatory damages. Equitable remedies involve a court order requiring a defendant to either take action or to refrain from taking action. Equitable remedies are intended to stop the defendant from continuing to harm plaintiff, or prevent future harm, usually through an injunction. There cannot be an equitable remedy awarded unless there is an inadequate legal remedy. Courts generally have discretion on whether to award equitable remedies.

**Legal Remedies - Contract - Compensatory Damages:**

*Whether the trial court was court in awarding \$13.7 million in special damages for lost crops?*

Compensatory damages are the most common type of legal remedy in contract cases. Compensatory damages are awarded to make the plaintiff whole, or to put the plaintiff in the rightful position he would have been in had the defendant's wrong not occurred. In order to receive compensatory damages, plaintiff must show (1) causation; (2) foreseeability - tested at the time of contract formation; (3) certainty; and (4) avoidability. There are two main categories of compensatory damages: general and special. Plaintiffs may recover both types of damages only if they can prove monetary losses by a

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preponderance of evidence with reasonable certainty. Compensatory damages should not be awarded in an amount so as to overcompensate a plaintiff.

Special damages are damages that result as a secondary consequence from the defendant's breach of contract. Special damages in a contract case may only be recovered if (1) they were within the subjective contemplation of the parties at the time of contract formation or (2) they were reasonably foreseeable to the defendant at the time the parties entered in the contracted. Otherwise, special damages are considered too remote for recovery.

Here, the Court has awarded Moon Glow \$13.7 million in special damages.

**Causation:** Moon Glow will argue that the damages it has suffered were caused by ET's negligence in turning off the electricity to Moon Glow's facility, and subsequently for not turning the electricity on when the fire department asked. ET turned the power off because of nonpayment, however, ET did not follow procedure in giving notice to Moon Glow. Therefore, ET's conduct was the cause for the damages because there was no access to water due to ET's actions.

**Foreseeability:** Moon Glow will further argue that the damages were foreseeable at the time of contracting because ET should know that when the electricity is shut off, water is not available, and if there was a fire, there would be no way to extinguish it. ET should also know that Tehachapi is a very spacious town and has large empty fields. Grass fires are prevalent in fields and spread quickly to surrounding areas. Plaintiff will argue that it was foreseeable that a

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fire would cause significant damage if there was not water to put it out.

**Certainty:** Compensatory damages do not need to be calculable with mathematical accuracy, but may be approximated if there is a rational basis in the evidence. Damages should not be awarded solely on speculation. Plaintiff will argue that the damages are certain. The court's award of \$21 million includes \$13.7 of net value of lost crops that Moon Glow would have grown had the fire not happened. This award is Moon Glow's expectancy damages. Expectancy damages are based on Moon Glow's expectancy interest. Expectancy damages are intended to give plaintiff the benefit of the bargain by awarding money that puts the plaintiff in as good a position he would have been in had the contract been performed. Here, had ET provided electricity to Moon Glow, and followed proper procedures for nonpayment, the fire would not have destroyed the facility, and Moon Glow would have earned \$13.7 million in crops. Moon Glow can give the Court calculations based on prior years of sales. The facts do not tell us if the hot house in Tehachapi was Moon Glow's first hot house, or if they have been established in other areas. But based on Moon Glow's knowledge that they would be consuming large amounts of electricity for its operations, and that they had been running for months and crops were already growing, it is probable not a new business. BUT, if it were a new business, the Courts would probably increase the degree of certainty in calculating the damages in lost crops.

**Unavoidability:** Unavoidability deals with plaintiff's ability to mitigate damages. Plaintiff's have a duty to mitigate or avoid

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consequences that would exacerbate damages when it is reasonable to do so following a breach. Failure to mitigate usually results in a reduction to the awarded damages. Defendant has the burden to show mitigation did not occur. ET will need to show the court that Moon Glow could have set up operations elsewhere and grown more crop, however, this may not be possible, since Moon Glow was having issues paying its bills. There probably was not money to start over from scratch after a fire.

The court of appeal will find that plaintiff has met the required elements to be awarded special damages, in the amount of \$13.7 million for lost crops.

### **Legal Remedies - Tort - Compensatory Damages:**

*Whether the trial court was correct in awarding \$7.3 million in special damages for the damage to Moon Glow's facility?*

Compensatory damages are the most common type of legal remedy in tort cases. The objective is to make the plaintiff whole, or put him in the rightful position he would have been in had the defendant's wrong not occurred. In order to receive compensatory damages, plaintiff must show (1) causation; (2) foreseeability - tested at the time of contract formation; (3) certainty; and (4) avoidability. There are two main categories of compensatory damages: general and special. Plaintiffs may recover both types of damages only if they can prove monetary losses by a preponderance of evidence with reasonable certainty. Compensatory damages should not be awarded in an amount so as to overcompensate a plaintiff.

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Special damages in a tort case are damages that result naturally, but not necessarily from, the defendant's tortious conduct.

Here, the court has awarded \$7.3 million in special damages to Moon Glow for damages to its property.

**Causation:** Moon Glow will argue that the damages to its hothouse occurred because of ET turned off the electricity. Had ET not shut off the electricity, water would have been available, and the fire would not have completely destroyed the hothouse. The employees would have been able to extinguish the fire before it got out of hand. The fire was not caused by the lack of electricity, but because there was not electricity, there was no way to extinguish a fire.

**Foreseeability:** Moon Glow will further argue that the damages were foreseeable at the time of contracting because ET should know that when the electricity is shut off, water is not available, and if there was a fire, there would be no way to extinguish it. ET should also know that Tehachapi is a very spacious town and has large empty fields. Grass fires are prevalent in fields and spread quickly to surrounding areas. Plaintiff will argue that it was foreseeable that a fire would cause significant damage if there was not water to put it out.

**Certainty:** Compensatory damages may be awarded for torts that affect a plaintiff's use of his real property. When property is damaged because of another's actions, the objective is to restore the property as nearly as possible to the state it was in immediately before the damage occurred. Plaintiff is entitled to recover restoration costs and diminution in value. Damages that result from

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fire are usually measured by the diminution in value of the property caused by the fire or, if not disproportionate to the diminution, the cost of repairs - if there is not total destruction, plus loss of use. Here, the hothouse was destroyed by the fire. Moon Glow will show the court the market value of the property immediately before and after the damage occurred. He is entitled to recover the difference. When fires occur, the land is often destroyed. Moon Glow will need to restore the land and get the facility restructured. If the amount is not disproportionate, the Court will award Moon Glow the restoration costs and the diminution in value.

**Unavoidability:** Unavoidability deals with plaintiff's ability to mitigate damages. Plaintiff's have a duty to mitigate or avoid consequences that would exacerbate damages when it is reasonable to do so following a breach. Failure to mitigate usually results in a reduction to the awarded damages. Defendant has the burden to show mitigation did not occur. If there is another location for Moon Glow to set up shop, it would be wise to do so in the time it takes to restore/rebuild the destroyed building. This would lower the award for loss of use damages. ET will need to show the court that Moon Glow could have set up operations elsewhere and grown more crop, however, this may not be possible, since Moon Glow was having issues paying its bills. There probably was not money to start over from scratch after a fire.

The court of appeal will hold that Moon Glow has met the requirements to be awarded special damages as a result of ET's conduct.

**Nominal Damages:** nominal damages do not come into play here because there was actual damages. However, where a plaintiff can prove defendant's liability for breach of contract or a tort, but cannot establish any damages, either because damages are too uncertain or remote, or because the harm caused was extremely minimal, a judge or jury may award nominal damages.

**Punitive Damages:**

*Whether the court was correct in awarding \$100,000 in punitive damages?*

Punitive damages differ from all other types of monetary damages. They are solely intended to punish a defendant for his egregious conduct and deter the defendant and other people from engaging in the same type of misconduct in the future. Punitive damages may only be awarded, in most jurisdictions, if the defendant committed certain serious torts. Punitive damages are subject to judicial review for excessiveness. Punitive damages are not usually awarded for breach of contract cases. However, most jurisdictions permit a plaintiff to recover punitive damages for a defendant's breach of contract that also constitutes an independent tort. Punitive damages are not available unless a plaintiff proves that a defendant's mental state was sufficiently culpable (willful, wanton, or malicious), and his tortious conduct resulted from more than mere negligence.

Here, Moon Glow will show that ET's breach of contract - turning off the electricity, which resulted in no running water, which led to the destruction of the hothouse - constitutes an independent tort -



damage to real property. Moon Glow will also show that ET's conduct was willful. When the firefighter's requested that the electricity be restored, ET's employees expressed reservations and made statements that made the fire department think ET would expect payment from them for the use of electricity. ET knew that a fire was occurring and destroying property, yet they failed to restore the power. This was willful and malicious. It was certainly more than mere negligence because ET had the power to restore energy to Moon Glow's facility. ET's conduct was reprehensible. The court of appeal will look at the amount of punitive damages awarded to make sure that the amount is reasonably related to the award of compensatory damages. The courts have found that a single digit ratio is proper. Here, \$100,000 is chump change compared to the actual damages awarded.

The court of appeal will hold that the award of punitive damages was correct.

### **Liquidated Damages Clause**

*Whether the court was right to not enforce the liquidated damages clause limiting damages to \$100,000?*

A liquidated damages clause is one that specifies, in the event of a breach of contract by one of the parties, that party must pay the other party a set amount of damages. The effect of such a clause could mean that the breaching party may end up paying more or less than the party would owe without the clause. These types of clauses are permissible, if they are valid. Plaintiff must show that (1)

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damages are difficult to ascertain at the time of the contract formation; and (2) estimate was a reasonable forecast of what the damages would be. If the amount is too high, the court may view it as a penalty. If the clause is valid, only the liquidated damages amount will be awarded. If it is invalid, the court will dismiss the clause and determine actual damages. A plaintiff cannot get both compensatory damages and liquidated damages.

Here, the clause only called for \$100,000 in the case of a breach of contract or tort by either party. \$100,000 is not at all reasonable because the damage for lost crops alone was \$13.7 million. The Court will likely rule this clause was invalid because there is no justice in awarding \$100,000 to such extreme damage.

### **Collateral Source Rule**

*Whether the trial court was correct in offsetting the award by \$3.2 million for monies Moon Glow received from its insurer?*

There is an exception to the general rule that a plaintiff's compensatory damages will be offset by other payments. This is known as the collateral source rule. In a tort case, where the plaintiff receives money, from its own insurance company or some other third-party unrelated to the defendant, for the harm that was suffered due to defendant's conduct, the plaintiff's damages will not be offset by the amount received. This rule also prohibits juries from learning about the benefits received by plaintiff.

Here, Moon Glow received money from its insurance company, Farm State. This should not have been told to the jury (if there was a jury, the facts don't tell us if this was a jury trial, or if it was told to them). Further, the court should not have offset the compensatory damages award by the amount of money Moon Glow received from its insurer.

The court of appeal will remand for a ruling that includes money previously offset by the trial court.

### **Interest Rate**

When a plaintiff is awarded damages, a court must compute the damages in a manner that reduces them to present value. The present-value discount is determined using the interest rate on the best and safest investments. The rationale behind this is to make sure the plaintiff receives the full amount of lost money. Cases are determined on a case-by-case basis.

10% is a high amount of interest. The court of appeal may hold that this is unreasonable and order the trial court to adjust the amount to a safer rate.

**END OF EXAM**

2)

Remedies are a judicial mechanism for enforcing or protecting a parties rights and they can be legal, equitable, or restitutionary. Legal remedies are money damages intended to make the plaintiff whole and include: compensatory, consequential, incidental, nominal, liquidated, punitive, and nominal. Equitable remedies are only available if monetary damages are inadequate to remedy the harm and include: court order to act or stop doing something. Restitutionary remedies disgorge the defendant of unjust enrichment or return of property.

(1) **Whether the Oaks can obtain specific performance against Trippers?**

**SPECIFIC PERFORMANCE**

In contracts, specific performance is an equitable court order telling the defendant to comply and perform the contractual obligations and the burden in on the moving party at all times. Specific performance is usually only available for unique goods and real estates. In order for a plaintiff to be entitled to specific performance, there must be a breach of the contract. Elements include: (1) valid contract with clear and definite terms; (2) mutuality of performance; (3) inadequate legal remedies; (4) balance of the hardships; (5) feasibility of enforcement; and (6) no defenses.

(1) valid contract (offer acceptance and consideration) with clear and definite terms - The Tripper and Oak families were "old-fashioned" and insisted on a short contract. While the facts are not specific as to exactly what that entails, the Oak family agreed to give all assets of Channel 17 in exchange for \$2.5 million. The terms of the agreement don't show the full intent of the parties. Oak will argue that Olsen's contract was part of that agreement as well as the building, equipment, goodwill of the business, etc. Since Tripper doesn't want to perform the contract because of Olsen leaving and going to Channel 23, they will argue the terms are ambiguous, not clear and definite and do not meet the traditional elements of a contract which are offer, acceptance, and consideration. Oaks will argue that both "old-fashioned" families knew what they were getting into and the contract is valid.

(2) mutuality of performance (both parties willing and able to perform all conditions under the contract) - Oak will state that both parties can perform the limited terms of the contract. Oak can turn over Channel 17 and the Trippers can take ownership and run it. They have wanted to get into the news business and expand from the newspaper and this is their opportunity. Tripper will argue they cannot perform the terms of the contract because when they agreed to buy it, it included

Olsen. If Olsen leaves, a portion of the value of the business is gone as well. Both parties seem to be able to perform.

(3) inadequate legal remedies (money damages are not enough) - The purchase price of \$2.5 million presumably includes the station, staff, equipment, contracts, etc, however, the terms are not specific. Since these items are difficult to quantify without a more formal contract, this would be hard to meet. However, since legal remedies are monetary damages and it would be difficult to determine how much damage the Oak family has endured, this prong is likely met.

(4) balance of the hardships (balance harm to P and harm to D without enforcement) - Tripper would be harmed if Olsen was not the news anchor because they would be getting the benefit of their bargain. When they agreed to purchase the station, they were getting the beloved, well-known anchor, which add good will. Oak will argue they will lose out on the money, but the value of the company is still there if they remain the owners. It appears Olsen would not be looking to move to another market if Oak still owns it, so they have lost anything but the sale of business and other potential opportunities to use the money from the sale. Tripper would likely prevail here.

(5) feasibility of enforcement (can a court enforce) - The court may have a tough time seeing the enforcement of the contract. Tripper has anticipatory repudiated the contract, however, the courts may not be able to enforce the sale. Oak should sue for legal damages possibility in lieu of specific performance considering ambiguity in contract terms.

(6) no defenses - Tripper would look to other defenses to allow the contract to not be enforced. Tripper may claim unclean hands, mistake, impossible to perform in order to not be able to perform the terms of the contract. Tripper may argue that the Oak family knew that Olsen was only loyal to them and that by entering into an agreement that they knew he would stick around for, they acted with unclean hands. The same argument may be used for misrepresentation of the material facts of the situation. Tripper may argue that they mistakenly entered into the contract without all the terms. Additionally, they may argue laches, but since that involves undue delay and prejudice to the defendant, that is likely not a good argument.

It is likely the court would not enforce specific performance against Tripper as the elements have not been met.

#### ANTICIPATORY REPUDIATION

If a party unequivocally expresses their intent not to perform the contract, they have anticipatorily repudiated the contract and the other party can sue. Tripper stated they did

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not want to proceed with the sale since Olsen was leaving to go to Channel 23, which was less than 200 miles away with the capacity to reach the Old Kern market. Tripper will argue they have a valid reason as they initial agreement to purchase the station with everything including Olsen was not met. Oak can sue because they were aware that Tripper was not going to perform on the contract.

**Whether the Oaks can obtain provisional or permanent injunctive relief against Fred Olsen?**

**RULE 65**

Rule 65 is the procedural requirements to be followed before the issuance of a Temporary Restraining Orders and Preliminary Injunctions. TRO's last 14 days and is pure Ex Parte (no notice to other party required) until a hearing on the merits can be set. TRO's are not appealable, but preliminary injunctions are. Courts may require a bond from the moving party that gives security in an amount the court deems proper to pay costs and damages if the non-moving party is wrongfully enjoined and applies to injunctions and specific performance. Since the Oaks are looking for injunctive relief against the Trippers and Olsen, the procedures from Rule 65 must be followed. From the facts, it appears the proper procedures have been followed. Ex Parte situations discussed below.

**INJUNCTIONS**

An injunction is an equitable court order requiring an individual to do (mandatory) or refrain from doing something (negative). Injunctions are extraordinary remedies and includes provisional injunctions and permanent ones. A party seeks a provisional injunction through a preliminary injunction or temporary restraining order.

**TEMPORARY RESTRAINING ORDER (TRO)**

A TRO is an emergency court order granted in equity that preserves the status quo until a preliminary hearing on the matter can be heard. A TRO is valid for 14 days with a 14-day extension is needed. TRO can be Ex Parte if plaintiff shows good faith effort to give notice and why it wasn't able to be given and some hearings require no notice if the adverse party is unknown, irreparable harm so immediate there was no time for notice, or notice to

defendant would undermine plaintiff's actions. A party seeking a TRO must show: (1) irreparable harm; (2) balancing of hardships in favor of granting; (3) likely to prevail on the merits, and (4) inadequate legal remedy.

(1) irreparable harm: Oaks must show irreparable harm without the court granting the emergency order to stop Olsen from leaving. They must show that without the order, no other remedy would be available. Because Olsen's employment contract specifically forbids him from going to another news station within 200 miles and 2 years of leaving 17, the irreparable harm to the station would be shown in the failure to obtain a high sales price and possibly losing the sale if he leaves before it is complete. Olsen is beloved and well-known, which no doubt increased the sales price of the station to the Tippers. If he leaves, the station will suffer harm that may not be recouped. The amount of harm is unknown, which is what classifies it as irreparable.

(2) balancing of hardships in favor of granting: Oaks must prove that by not granting the TRO, the hardship to them would be greater than the hardship to Olsen. Olsen has a job currently at 17. He is not in danger of losing that job. Oaks however is in danger of losing the sales contract if he is no longer with the new station. His hardship is significantly outweighed by Oaks possible loss of a \$2.5 million contract. The hardship is greater to Oaks than Olsen.

(3) likely to prevail on the merits: Oaks and Olsen have a valid employment contract with a valid (per the state of Iowa) negative covenant not to compete. Olsen knew the terms of his contract when he signed on for 5 years. Oaks would have an opportunity to present additional information about his contract at the preliminary hearing, but the TRO would need to be granted. Olsen stated on April 15 that he was going to be going to Channel 23. The deal with the Trippers was scheduled to close on May 1. Even though it is 15 days, the TRO can be extended 14 days past the initial issuance and a preliminary hearing on the merit will be able to be granted. (assuming courts are open after coronavirus :))

(4) inadequate legal remedy: Money damages would not replace the beloved news anchor in time for the Tripper family to still want to purchase the news station for \$2.5 million. Therefore, legal remedies are inadequate.

The court should grant the TRO with or without notice to Olsen.

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## PRELIMINARY INJUNCTIONS

A preliminary injunction is similar to a TRO and includes the elements discussed above as well as (5) public interest; (6) notice and opportunity to be heard; and (7) no defenses. For all of the same reasons discussed above in TRO's, the other elements must be present in order for the TRO to turn into a preliminary injunction. The balancing of hardships between the parties is significantly higher for preliminary injunctions, meaning that the harm to Oaks must be higher than the harm to Olsen in order for the court to grant. Olsen will argue that the injunction is interfering with his ability to make a living. He will claim that the undue burden on his restriction to take whatever job he wants is a great harm to him and his family. Oaks will maintain the same argument that the loss of a \$2.5 million contract is a way greater harm than Olsen having to work for Tripper and fulfill the terms of his contract.

There is a great public interest in enforcing contracts. If contracts are routinely broken with no repercussions just because one party doesn't like if a business got sold or the work they were being asked to do, contracts wouldn't mean anything. Trippers wanted to expand into the news station market and selected Channel 17 because they had a well-known anchor, were established, were able to reach the households they want to reach in Kern, Iowa, and expand their business. The goodwill of the company was a direct result of Channel 17 and their contracts. The public policy to uphold that is great.

There are two ways to analyze injunction elements. The traditional method discussed above or the alternative test. Under the alternative test, the courts use a sliding scale where the balance the hardships in favor of the plaintiff; however, the higher the success on the merits, the lower showing required for irreparable harm. Under this approach, so long as Oaks is able to continue to show that they stand to lose the \$2.5 million contract without the injunction against Olsen, the measurable amount of harm can be less and still be a valid injunction.

## PERMANENT INJUNCTIONS

Permanent injunctions are final judgments that occur after the court has conducted the full adversarial process and are designed to prevent further harm. The test is similar to preliminary injunctions and requires: (1) inadequate remedy at law; (2) plaintiff suffer irreparable harm without permanent injunction; (3) balancing the hardships in plaintiff's

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favor; and (4) injunction further public interest. If the provisional injunctions discussed above need to continue in order for the sale of the news station to the Trippers, the Oaks need to show that if they did not get a permanent injunction, there would be further harm.

### SP - PERSONAL SERVICES/EMPLOYMENT CONTRACTS

Courts cannot affirmatively order specific performance for personal service contracts such as employment contracts, but they can compel negative covenants, such as the covenant not to compete. Iowa law has a valid negative covenant that include ability to limit an individual from performing personal services for another business within 200 miles of their previous employment for a period of 2 years. Fred Olsen is still under a 5 year contract with 17 news. He agreed to the terms of the contract which included the notion that if he left, he would have to be at least 200 miles away from Old Kern for 2 years. Since he is attempting to take another job with another station (23 news) and it is less than 200 miles away, 17 news would be able to prevent him from taking that specific position as it does not conform to the valid Iowa law. The negative covenant is valid in Iowa.

### DEFENSES

Part performance - Olsen will argue that he partial performed on the terms of his employment contract. The facts do not state how many years of his 5 year contract have already been performed, but since he is well-known and beloved, it may close to the end of the term or it was renewed.

Undue Influence - When someone is a confidential contractual relationship exerts pressure and steer their course of action, they can argue undue influence. Oaks is attempting to influence Olsen's career choices by limiting his mobility and job opportunities. If the court forces him to stay with Channel 17, the opportunity to move may be lost forever.

Unconscionable - A contract may be unconscionable when a party with higher bargaining power imposes a contract limitations or other terms that are not fair. Olsen will argue that the 2 year suppression of jobs within 200 miles is a contract limitation that cannot be sustained.

**(2) Whether the Oaks would be able to seek relief for Fred's violation of the injunction and compel compliance?**

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## CONTEMPT

Contempt is the method in which courts enforce equitable orders such as criminal or civil. If the courts granted Oaks' order for an injunction and Olsen is required to continue working for Channel 17 until his contract is up (or unless he quit and did not try to work within 200 miles or 2 years), a violation of the order would allow a civil contempt case to occur.

Civil Contempt - A civil contempt order is similar to a civil tort claim and private parties can bring the action and the contempt charge falls when the underlying claim fails. In this case, if the court makes the judgment for Olsen to continue working, a violation could fall under criminal contempt since he would be violating a court order.

Criminal Contempt - A prosecutor can enforce against a defendant who is capable of complying and refuses to do so and can be direct or indirect. A direct criminal contempt occurs in the courts presence. An indirect criminal contempt occurs outside the presence of the court. If Olsen violates the order, it would be outside of the court so it would fall under indirect. As the goal is compliance and order, any attempt to ignore judgments will be handled appropriately.

### (3) Whether the ruling would be different if the case was in California instead of Iowa?

#### SP - PERSONAL SERVICES/EMPLOYMENT CONTRACTS

See rule above. California traditionally does not enforce negative covenants not to compete because the state favors open competition and mobility. Some factors that are considered include whether the sale of the business has goodwill or whether the job is more generic, such as a doctor or attorney. Fred's job as a news anchor would be more generic in nature. While the Oaks and Trippers may say that the fact that he was so well-known in the community and loved by the community created goodwill for the station, California will likely not care. His position is generic in nature and moving to another news station would be allowed in California. An injunction requiring Fred to comply would likely be invalid. Alternatively, an injunction would not have been granted at all due to the personal services nature and general rule not to enforce negative covenants.