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Desiderio - Law 631 - Remedies

Institution **University of New Mexico School of Law**
Exam Mode **Closed**
Extegrity Exam4 > 11.12.9.0

Course / Session **S12 Remedies - Desiderio**
NA
Section All Page 1 of 12

Institution **University of New Mexico School of Law**
Course **S12 Remedies - Desiderio**

Instructor **NA**

Exam Mode **Closed**

EXAMPLE: "A" GRADE

Count (s)	Word(s)	Char (s)	Char (s) (WS)
Section 1	2649	12033	14673
Total	2649	12033	14673

Question 1:

11
Barbara may sue Amy in Tort for her negligence. Because she was physically and economically injured, the economic loss rule will not come into play in this scenario. B may sue Amy for general damages, i.e. direct damages that flow directly and necessarily from the wrong. Here, her injury would need to be valued and proven, along with all the other elements of a tort. With regard to lost wages, B may ask for consequential damages to recover this amount because they are secondary or derivative losses arising from circumstances particular to that party (B). B will be able to recover the entire 10,000 in lost wages despite the fact that she was covered by her insurance policy, which provided her with 5000. A will likely argue that this is an offsetting benefit or something akin to that, and that to give her the entire 10 k would be putting her in a better position than the rightful one. However, we have the rule of collateral sources, which says that when a P receives a benefit from a third party that is wholly independent from the D, that amount does not need to be offset. This is an exception to the offsetting benefit rule. Thus, B can recover for her physical injury and her entire lost wages.

4
Question 2:

B clearly has a breach of contract action here. The route that he

could take is to rescind the contract. If he rescinds (either unilaterally or equitably), he would need to show a basis (here breach of K), he would need to give notice to A, he would need to return the press. If the other party accepts, then the contract is no more, but there may be an unjust enrichment claim - A may want rental value of the press, etc. If it is not accepted, then A is likely to sue.

77

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If B goes after A for breach, he will have to be aware of the liquidated damages clause. This clause sets forth the only relief available in the event of a breach. Typically, in breach of contract, you want and get expectancy or the profit position - the value that would have been if not for the breach. Here, we have a breach of warranty, we also have implied warranty of fitness, express warranty and merchantability warranty. To calculate damages, you take the difference between the value as warranted minus the value as delivered, plus any consequential damages. Here, that would be: $15K - 10K = 5K + 50K$ for a total of 55 k. However, because of the clause, B may not be able to recover this. The clause cannot fail of its essential purpose. There is no mention of consequential damages, but because it states that the clause covers the "exclusive remedy" it looks like consequential damages may be limited unless it is unconscionable. This will likely be enforced because it doesn't appear to be a penalty clause. Still, one could argue that it fails its essential purpose because the damages are very easy to calculate here.

Handwritten initials

Handwritten notes:
consequential
+
penalty
+
unconscionable

Question 3:

In breach of contract actions, typically the remedy is damages. This is a remedy at law. However, sometimes, plaintiffs can ask a court for the equitable remedy of specific performance. This would require the breaching party to perform the contract. This, however, is not the norm. Contracts are supposed to encourage the economy and the law is designed not to punish breachers but to hold them responsible when they do decide to breach. The non-breaching party is entitled to their expectancy. Specific performance is a special form of an injunction, which requires a party to do (or not do) something. Here, the P is asking the court to order the D to perform the contract. However, this remedy is rare. To get specific performance, American Network would have to show that the legal remedy (damages) is inadequate. In this case, P breached because it was efficient to do so - she had a better deal elsewhere. However, we must figure out what AN wants: is it money or is it the benefit of this particular person announce? They would want to argue that there is no adequate remedy at law: how does one calculate damages resulting from the loss of announcer? That would be extremely difficult to do, and therefore that may be one reason to require specific performance. Sonia should raise the defense of undue hardship, which is an affirmative defense that must be pleaded and proven by S. The court would need to balance the equities: look at the hardship to

S if she is required to perform versus the hardship to AN if not.

Here, I would advise AN to go for specific performance and argue that there is no adequate remedy at law and it is difficult, if not impossible, to calculate damages (lack of certainty), and therefore S should be required to perform. Alternatively, I would advise them to seek damages. I'd also advise them to be aware of S's counter-arguments, including undue hardship.

Question 4:

9

adverse possession
prescriptive easement

This question looks like Whitlock all over again - sort of. P will want to sue M for trespass (tort) and to remove the encroachment (injunction). He should ask the court to order that M remove the encroachment, which is the general rule. For the trespass, he will want to ask for loss in value to property and/or rental value of property. M can argue adverse possession or prescriptive easement, but only if sufficient time has passed. She may also asserts laches as a defense if P takes too long to bring the action. M will likely also raise the defense of undue hardship. She will say, look I'm building a structure here, which is already 50 percent completed and has cost me 100 K. I couldn't delay because that would have increased my cost by 50 percent. The court would need to weigh and balance harm to each party: P would essentially have to sell or rent land that he owns (looks like private eminent domain); on the other hand, if M is required

to remove the encroachment, she will lose a lot of money in construction, removal, rebuilding, etc. If the hardship to the D substantially outweighs the remedy to the P, then the court will not use that remedy. To me, it looks like M has a pretty good case of undue hardship. However, we must also take into consideration whether the conduct (M's) was intentional. If it was, then undue hardship does not apply. M claims that she did not believe that she was encroaching, so even after she was informed, she continued building. If her subjective belief that she was not encroaching is enough to show that the conduct was not intentional, then I say she wins. Otherwise, P will get his injunction requiring her to remove the part of the encroachment is on his property. This will at least put him in a good bargaining position - they may want to just settle the case.

Question 5:

2

This one is similar to Somerville, i.e. the Mistaken Improver. Property law rules here and tells us that because the shed is on Otto's property, it belongs to him. Therefore, he can do whatever he wants with it. O doesn't want the shed on his property because he has a contract to sell the land to P, who does not want the shed. This is different from Somerville, because in that case, the owner wanted the structure on the land. If M, who constructed the shed sues O prior to the removal of the shed, she should probably ask for a preliminary injunction barring O from tearing

down the shed during the pendency of the action. Then, she could sue O for the added value to land because she constructed the shed on it (7k). I'm not sure how likely this is however. Probably, since it looks like M is suing O after the destruction, she could still sue for unjust enrichment/restitution and ask for the value of the materials that O now owns and has in his possession. It may not allow her to recover 5K but at least she would be able to get something back. Otherwise, she won't be able to recover from O because she didn't have the K with O, he isn't benefiting from her structure, etc. However, if O knew that she was building on his property and did nothing, she might have a better case. I think that the best thing to do would be to sue Nancy for expectancy under the contract.

Question 6:

I am assuming for this question that it was meant to read, "Please explain remedies, if any, that Brianna has with respect to John, or John's son." Anita doesn't have any remedy - she stole something and exchanged it for money. Brianna, on the other hand, may be able to do something about her stolen Ipod. Brianna will want to ask for her Ipod back or substitutionary damages. To get her Ipod back she'd want to go back to the old days and ask for a writ of replevin. Today, this is called restitution. If B can trace the Ipod to the pawn shop and then to John's son, she may be able to recover it. Tracing is allowed under equitable

11

Good

see
what the
"replevin"
means
- also
A 2000 or
3000

remedies, but not under law. She can then ask the court for a constructive trust (a mandatory injunction ordering the D to return something to P). To do this, there must be identifiable property. Again, if we can trace and there is not BFP, then this is a possibility. She can also ask for an equitable lien, i.e. a "baby constructive trust." If, however, John was a bona fide purchaser for value, then B will not be able to recover it. She will have to accept substitutionary relief, i.e. damages in the amount of the value of the Ipod - here 500. This would come from Anita, not John. (Note: if b didn't know what happened to the Ipod, then she should ask for an accounting.)

Question 7:

9

Here, we have a contract and a clear breach. It wouldn't do Jeff any good to rescind the contract - he wouldn't get anything. It would be as if the contract never was. So, the best thing to do would be to sue the dealer for breach of contract. Because there are no other red mustangs, he might want to ask for specific performance because there is not other adequate remedy at law (because there are no other red mustangs!). This is somewhat like the Campbell soup case in this respect. He'd have to show inadequate remedy, unique property, etc. A good argument may also be that the mustang is irreplaceable. He could also attempt to find another from another dealer, and if he found one but it was much more expensive, he could ask for the difference in the

develop

cost (market price - contract price). The dealers, breach was an efficient one, though which is typically allowed (unless disgorgement is required). If he cannot get specific performance, he will want to ask for damages, which in this case would be market price - contract price - the recent sale of 28 k would be used as market value b/c it was so recent. The dealer may try to argue avoidable consequences because he offered to sell him a mustang in another color for 17,000, which was below market value. So, he would say $28k - 20k = 8k$ minus the avoidable consequences. However, the court is going to look at all of J's options and determine whether he acted reasonably. If he did, avoidable consequences will not apply.

*- best fact
20k*

what is it?

Question 8:

10

We are talking about replevin/restitutionary remedies again. This case is easily distinguishable from Ruffin because we actually have a claim of Unjust Enrichment. M will want to trace that 2 dollars into it's current value. Again, tracing is allowed b/c M is asking for equitable remedies here. The cause of action here would be conversion and unjust enrichment. M will first want to ask for an accounting to determine where the money went. This will allow her to trace the two dollars, into the the lottery ticket, into the 100 K and finally into the apple stock and certificate of deposit - all identifiable property. There doesn't seem to be any bona fide purchasers involved so tracing will not

*breach of K
also*

be cut off. She should then ask for a constructive trust, and equitable lien, accounting, tracing, and damages in the alternative. She should also ask for an injunction barring B from transferring or otherwise using the funds, stock, or certificate. (Otherwise, we might have to resort to the fictions.) These remedies are ideal because she can then get the property and it will give her priority over creditors b/c it will be HER property. With damages, M would just become another creditor. The constructive trust treats M as the equitable owner, and the lien treats the D as the owner but gives P a lien. B might ask for apportionment b/c without her efforts, the 2 dollars would not have turned into 255K. Courts are typically willing to do this to some extent. They'd look at what can be attributed to the D (and D bears the burden). However, because of the wrongful nature of the actions in this case, M may be able to recover everything. B may be required to disgorge the profits.

Question 9:

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Jon is asking for a Temporary restraining order to prevent B from taking the card (wants it returned) before a preliminary injunction can be heard. A TRO may be granted ex parte, but this is not the norm, and in this case, we know that B's lawyer has notice of a hearing on the motion. Thus, we are not dealing with an ex parte TRO subject to FRCP 65. With a TRO, the motion should be accompanied by affidavits and other supporting documents.

HEre, the evidence is presented at the hearing (I am not sure whether this makes a difference). The hearing is scheduled for the following day, so it looks like notice and hearing requirements were met and fair under the circumstances. Granting a TRO is within the court's discretion and is an equitable remedy (there is no adequate remedy at law). J will have to show: likelihood of success on the merits, irreparable injury, that the threatened injury to the P outweighs the injury to the D if the TRO is granted, and the TRO is not adverse to the public interest. (Because we are not talking about a preliminary injunction, the sliding test and sequential test issues do not arise.) Here, it looks like J has a good chance of success on the merits based on the evidence presented, the irreparable injury would be that he may never see this rare, highly valuable card again, which he may have had no intention of ever selling, the injury to J seems to outweigh the injury to B because he just needs to return the card! And, of course, the TRO would not go against public policy - it would be preventing something unlawful. Thus, I think that there is a fair chance that it would be granted. It's duration, however, will be unclear unless a definite time is written into the TRO. It could be the 10 day limitation in R 65 with possible extension, or there could be no time limit, or may be construed as a preliminary injunction. If the order is granted, there is a question as to whether B will abide by it. Regardless of whether he feels that it was issued correctly or incorrectly, he will need to abide by it or face

contempt and possibly other civil and criminal penalties.

For all of the above, do not forget to ask for prejudgment
interest!!!

- Theal want

Exam No.:

631-001 Remedies
Spring 2012

UNM School of Law
Final Examination

Professor R. Desiderio
Th/T: May 3 / 8, 2012
8:30- 11:30 a.m. (180 mins.)

Examination Format: Essay

Professor's Instructions

1. You have **3 hours** to complete this **Limited Open Book examination**. This examination consists of **9 questions**. Answer all questions. Each question will be weighted equally.
2. You may have with you in this examination your casebook, materials that I have handed out, and any notes and/or outlines that you have prepared or participated in their preparation. You may not have any other books, materials, or other information with you.
3. Please explain your reason or analysis in responding to each question. You will receive more credit for a well thought-out answer than for your actual conclusion for each question.
4. If needed, Bluebooks will be provided by the proctor. For Bluebook use, see the "Essay Technical Instructions" below.
5. The UNM School of Law Student Code of Conduct (Honor Code) applies to this exam.

GOOD LUCK!

Essay Technical Instructions

Bluebooks for writing: using black or blue ink only, write on every-other line and only on the front side of each page. On the front cover of each bluebook record the class name, professor's name, date of exam, and your examination number. Make sure to number each bluebook in order. **DO NOT WRITE YOUR NAME ON BLUEBOOKS.**

Laptop for typing:

1. Log off all programs that you are currently running or have opened!
2. Start the Exam4 program.
3. Make sure "**Prepare to start new exam**" is marked and click, "**Next.**"
4. Enter your "**Exam ID**" number and confirm it.
5. Click the drop box next to "**Course**" and select your course and professor and confirm. Click, "**Next**".
6. Optional choices screen: If you choose to change these options please do so. If not, click "**Next**".
7. Notice you should not turn off or restart your computer before contacting a proctor. Check the box marked "**Got it**" and click, "**Next**".

8. Type “**Closed**” for exam mode, check the box below that to confirm and click, “**Next**”
9. At this point Exam4 will indicate “**Wait!**” in the lower right side of the screen.

WAIT!

10. The proctor will tell you when to click “**Begin Exam.**”
11. A “**Security Check**” to scan your computer will run. Please be patient. It should disappear within a short period of time. If not, please exit the room and see a proctor.
12. Use the Tools menu above and select “**Insert Answer Separation**” for a page break.

All Exam Takers

If you have any questions or feel the need to explain/clarify your interpretation/understanding of the question being posed by the professor, please write them on the exam and do not sign your name.

If you have an emergency, procedural question, or issue that may occur during this exam period, **do not contact the professor**, please contact the Proctor or the Registrar’s Office (William or Ernest) at 277-2146/2147 or jackson@law.unm.edu or tafoya@law.unm.edu

You may **not** make/keep a copy of this exam! You are required to return this exam with your answer.

A **five-minute warning** will be given prior to the conclusion of the examination. When time is called, **STOP** immediately.

Bluebook (Writers): At this point immediately stop writing, close all blue books and gather up any materials. If you have not already filled out the exam receipt, exit the room and fill out the receipt at the table(s) provided near the proctor(s), then proceed to the exam check-in table.

Laptop (Typers): At this point immediately stop typing and proceed to save the exam. Select **End Exam, End Exam Now** from the menu bar. Confirm that you want to end the exam. Select **Submit Electronically** and follow either the Mac or Windows user directions below:

Mac users only:

- Wait for the airport icon to indicate you have reconnected to the wireless network.
 - If the “Check Network Connection” screen displays, select OK.
 - Use your Airport to connect to Lobo-Guest, Lobo-WiFi, or Lobo-Sec.
 - Authenticate using your browser as appropriate.
- Return to Exam4 and select **Exam4 Save Options**, then **Submit Electronically**.
- You will receive a confirmation that your exam has been saved successfully. Click **I understand** and **OK**.
- Exit the exam by selecting **Exam4 Save Options, Exit**.
- If the exam **did not submit electronically**, reconnect to either Lobo-Guest, Lobo-WiFi, or Lobo-Sec network, making sure you authenticate as appropriate (open a browser and put in your NetID).
 - Start Exam4 again. Choose **Select existing exam**, highlight the exam name, and click **Submit Electronically**. Click OK to accept the default Start Code.
 - Click **Quit** to exit Exam4.
 - If the exam still did not submit electronically, contact an IT proctor

If you have not already filled out the exam receipt, exit the room and fill out the receipt at the table(s) provided near the proctor(s), then proceed to the exam check-in table.

Windows users only:

- If the Status” window indicates a problem with submitting electronically (usually Error 12: No response), close the window with the Red X and select File and Save Options. Select Exit (don’t worry...the completed exam is saved to your hard drive). Check Network Connection” screen displays, select OK.
 - Exit the exam by selecting **File and Save Options, Exit**.
 - Connect to either Lobo-Guest, Lobo-WiFi, or Lobo-Sec network, making sure you authenticate as appropriate (open a browser and put in your NetID).
 - Start Exam4 again. Choose **Select existing exam**, highlight the exam name, and click **Submit Electronically**. Click OK to accept the default Start Code.
 - Click **Quit** to exit Exam4.
- Click the verification options and/or OK until you return to Exam4. Select **File and Save Options, Exit**.
- If the exam still did not submit electronically, contact an IT proctor.

If you have not already filled out the exam receipt, exit the room and fill out the receipt at the table(s) provided near the proctor(s), then proceed to the exam check-in table.

[Exam begins on the next page]

Tort

1. Amy negligently injured Barbara. As a consequence, Barbara was out of work for one month, losing \$10,000 in wages. Barbara, however, was covered by an income maintenance insurance policy purchased by Barbara's employer as part of her fringe benefits. The insurance policy paid Barbara \$5,000 for her lost wages. If Barbara sues Amy, how much can Barbara recover from Amy? Why?

K

2. Andre contracted with Billie to sell Billie a press able to print on cloth. Andre warranted that the press would print on any cloth. Billie paid \$10,000 for the press. Billie tried to print on linen, but the press would not do so. Other than not being able to print on linen, the press worked fine. As a result of the press's failure to print on linen, Billie lost profits in the amount of \$50,000. The value of the press, if it could print on linen, would be \$15,000. The contract Billie signed stated:

Billie expressly agrees that should Andre be held liable for any reason Billie's exclusive remedy is for Andre to repair or replace the press or return to Billie amount of price Billie paid to Andre.

Please advise Billie as to her remedies in a breach of warranty action against Andre and any response Andre could raise.

3. Sonia contracted to work for American Network for 5 years as a TV sports announcer for \$500,000 a year. At the end of second year, Sonia accepted an offer to announce for National Network, American Network's competitor, for \$1,000,000 a year for 5 years. American Network wants to know whether a court will grant specific performance, requiring Sonia to announce for American Network for three additional years. Advise American Network.

4. In constructing a residence on her property, Maria placed part of the foundation on Pedro's land. The structure encroached 2 feet on Pedro's land. Pedro learned about the encroachment after Maria completed 50 percent of the structure at a cost to Maria of \$100,000. Pedro told Maria to stop until they could come to an agreement or a court decided the case. Maria refused, believing she was not encroaching on Pedro's land, and also because a delay in completion would increase her cost by more than 50 percent. Pedro wants to know if he can prevent Maria from continuing constructing her home. Advise Pedro.

K

5. Maria contracted with Nancy to build a shed on what Maria believed is Nancy's property. Maria built the shed at a cost of \$5,000. Nancy has not paid Maria. In fact, Otto is the real owner of the property and he did not give Nancy permission to have the shed constructed. Otto had contracted to sell the land to Penny for \$20,000, who does not want the shed on the land. Otto, therefore, tears down the shed. The market value of the land with the shed on it was \$27,000. May Maria recover any amount from Otto? If so, why and how much? If not, why not?

6. Anita stole Brianna's I-pod and pawned it at John's Pawn Shop for \$200, owned by John. Anita then lost the \$200 at the race track. John, in turn, gave the I-pod to his son. The value of the I-pod when Anita stole it was \$500. Please explain the remedies, if any, that Anita has with respect to John, or John's son.

7. Car Dealer contracted with Jeff to sell Jeff a limited edition red Mustang for \$20,000, the going market price. Before delivering the Mustang to Jeff, Car Dealer sold the car to Ursula for \$28,000. Car Dealer then informed Jeff that it will not deliver the limited red Mustang to him. There are no other red Mustangs available. The Car Dealer offered to sell a blue, white, or black Mustang to Jeff for \$17,000, a \$1,000 below market. Jeff refused Car Dealer's offer. Please advise Jeff as to all his available remedies against Car Dealer.

8. Mary gave Barbara \$2.00 to purchase a Powerball lottery ticket, which Barbara agreed to do. Barbara purchased the Powerball ticket and that ticket won \$100,000. Barbara refused to give Mary the \$100,000, claiming, wrongfully, that she had purchased the winning ticket with her own money. Barbara spent \$50,000 of the \$100,000 to purchase Apple stock, now worth \$200,000; with the other \$50,000, she purchased a certificate of deposit. With interest, the certificate of deposit is now worth \$55,000. Mary has asked you to advise her as to all her available remedies against Barbara.

9. Jon learned that Billy intends to leave town with Jon's prize baseball card, which Jon let Billy have for a day to show his little league baseball team. (It is a 1910 Honus Wagner card value at \$1,000,000) Jon sues Billy and motions the court for a temporary restraining order ordering Billy to return the card to Jon. Jon's complaint is not verified, nor has Jon executed any affidavit accompanying his motion. Jon's attorney has given Billy's lawyer notice that a hearing is scheduled for the following morning. At the hearing, Jon's evidence is a receipt showing he purchased the card, and testimony of a travel agent that Billy had visited, seeking information about trips to Brazil. Neither Billy nor his attorney appeared at the hearing. Should the judge grant the temporary restraining orders?

END OF EXAMINATION