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QUESTION ONE

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Nay Ive (NI) and Bild have entered into a construction contract with no attorney's fee clause or timeframe. As time is an essential term in a construction contract, this becomes an issue, because it is not clear what "soon" means when Bild says he will start soon. At law, time is of the essence in all contracts, but in equity it needs to be expressly stated in the agreement.

When Bild asks for, and receives from NI, two \$250,000 payments on the contract, he obtains the money deceitfully, saying he needs the money to purchase materials but actually uses it to pay off tax liens. By doing so Bild commits fraud - intentionally misrepresenting the truth. He also commits the tort of conversion. Bild also violates the implied covenant of good faith and fair dealing in all contracts by his actions.

When a contractor breaches on a building contract before the work is done, the owner can get general damages, as well as consequential and incidental damages. General damages are presumed contemplated at the time of contract formation, whereas consequential damages need to have been reasonably in the contemplation of the parties at the time of contract formation. In this case, NI can get the difference between the cost of the new contractor and the contract price, which is \$75,000, minus the \$5,000 actually used for materials. The purpose of contract damages is to place the non-breaching party in the position she would have been in had the contract been performed, which this measure of damages will do. However, Bild has taken NI's \$500,000, and the fact that he has used it to pay off tax liens suggests he is insolvent, therefore her remedy at law will likely be inadequate. NI can seek specific performance in a court of equity to require Bild to perform on the agreement to build her home on a lot for \$750,000. In order to obtain specific performance, not only does the non-breaching party need an inadequate remedy at law, but he also needs to have a contract with definite and certain terms, the plaintiff able and ready to perform and has met conditions precedent, a defendant able to perform, and, in the balance of hardships, the hardship would be greater on the plaintiff seeking specific performance if it isn't granted, than on the defendant. Here, the balance of hardships weighs heavily in favor of NI, and the court would grant specific performance.

Because Bild has committed fraud and been deceitful, NI could seek rescission of the contract. The grounds for rescission have to be present at the time of contract formation, and, if granted, place the non-breaching party in the position she would have been in prior to the contract being formed. Here, unless NI can get her \$500,000 back, rescission would not prove equitable, thus is not a remedy she should seek, since she would be out all that money if the contract is rescinded, and Bild is relieved of needing to perform. The doctrine of election of remedies requires that there be consistency in any remedy sought in equity and law, thus NI would not be able to seek specific performance and rescission, because rescission nullifies a contract, whereas specific performance presumes a contract.

Bild has been unjustly enriched by NI's money, which he has converted to pay off his

tax liens. NI can resort to the restitutionary remedies of either a constructive trust, or an equitable lien to try and get her money back. Unfortunately, because Bild used the money to pay off tax liens, it won't be possible for NI to get the money back from the government, so she would probably be better off placing an equitable lien against Bild's business for the sum specific of \$500,000, plus prejudgment interest.

Bild might seek specific performance on the contract, however he has unclean hands, and equity requires clean hands. This means that NI will be able to raise this defense successfully by arguing that equity requires the party bringing the claim not to have engaged in any improper conduct on the very claim he seeks a remedy for. NI will also, of course, also have as defenses to specific performance that Bild committed fraud and intentional misrepresentation.

Because the written contract does not have an attorney's fee clause, NI will need to pay her own attorney's fees, based on the America Rule that requires each party to pay the cost of litigation, unless she qualifies for an exception to the Rule. There are three exceptions: contract, fee-shifting statutes and equitable discretion. As none of these exceptions apply to NI, she will probably have to pay her own attorney's fees.

The facts say that if NI gets a new contractor, she will have to pay not only 75,000 more than agreed to in her contract with Bild, but that interest rates have risen. This means that if she were to seek damages at law, she could possibly recover for the increased cost of borrowing the money. Prejudgment interest is an element of compensatory damages and its purpose is to award a plaintiff for the loss of the use of money from the time the cause of action accrued to the time of judgment. In those jurisdictions that permit prejudgment interest, not all civil cases are granted the interest award - wrongful death and personal injury, for example - though some jurisdictions do permit award of prejudgment interest for all civil cases. Generally, this form of interest is granted on damages that are liquidated at the time of judgment. Here, NI might be granted prejudgment interest on the interest rate increase and the increased cost of going to a new contractor. However, it isn't clear what the date of accrual is. If the date of accrual is the date Bild fraudulently took the first \$250,000 from NI, followed by the second \$250,000, then the interest would be liquidated by the time of judgment. Prejudgment interest is usually simple, though some jurisdictions use compound interest.

Bild might try to argue, in defense, that he is protected by laches. Laches is a common law defense that requires a person not unreasonably delay in bringing a suit, if it unduly prejudices the defendant. Here, NI permits 10 months to go by before seeking to enforce the agreement. But this is a weak argument, because unless the statute of limitations on contracts for this jurisdiction has run, it will be difficult for Bild to prove that he has been unduly prejudiced. Bild will say that the contract was relaxed about the timeframe, and that he has not breached by taking his time.

NI has a duty to mitigate damages, and she has done this by getting a bid from another contractor and attempting to get financing for a new loan.

Regarding the mechanic's lien that Bild put on her property, NI can seek a mandatory

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injunction to have the lien removed. Because this prevents her from getting additional financing, she would want a Temporary Restraining Order (TRO), which she will be able to obtain by showing that she will be immediately and irreparably harmed by Bild's actions if she doesn't obtain the restraining order, which can be granted ex parte, though she will have to post a bond as indemnity for Bild. To obtain an injunction also requires that she be likely to succeed on the merits, which NI will be able to show, that the balance of hardships weighs in her favor, which it does, given that not only has Bild taken her money, but he's made it impossible for her to get new money, and that there is no reason adverse to public policy why she shouldn't obtain the TRO, which there isn't. Although courts of equity are more reluctant to issue mandatory injunctions than prohibitive injunctions, it has discretion to do so.

2)  
QUESTION TWO

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Wrongful death action Acme

The law permits the heirs of a deceased to file a wrongful death suit to recover from the death of a family member. Wrongful death suits are a creature of statute, and the plaintiffs, and beneficiaries, in this action are the heirs at law. Thor had no children and leaves one clear heir, Prim. Although Thor names Vicky as the sole beneficiary of all his property in his will, she legally might not qualify as an heir at law, thus permitting her to file a wrongful death suit. Nevertheless she will, along with Prim, bring this action into the court against Acme.

A wrongful death action permits recovery of general, pecuniary damages, as well as non-pecuniary damages, the intent being to make the injured party as whole as possible. This will permit Prim to recover for medical expenses and funeral expenses. Prim will be able to recover for Thor's lost future wages, based on his established financial success as a writer. Lost future wages are calculated with the use of experts, and the first step the court will go through to calculate Thor's lost future wages is to estimate how long Thor would have lived and brought in income. Although Thor is only 40 at the time of death, the facts say he is a hard drinking spendthrift, which will be factored into the calculation of his estimated lifespan. The expert will make adjustments to this figure to account for any fringe benefits Thor might enjoy, such as retirement or pension plans and social security, and will deduct from this figure taxes and transportation costs. The expert will then look to discount this figure. Discounting refers to the rate at which the sum of money at the current net value, if safely invested in conservative securities, would give the person the amount of lost wages they would earn at the time of retirement. Some jurisdictions offset the discount rate and the

inflation rate, rationalizing that both are unreliable and therefore offset each other; other jurisdictions permit the jury to calculate the discount rate and inflate rates separately and then offset them. The expert will then factor in inflation, which will include cost of living, changes in the economy, and changes in the deceased's potential earning power. Because Thor is a best selling writer, and his new proposed book, of which he outlined the first chapter, was predicted by his publisher to be his biggest book to date, Prim will be compensated significant damages on lost future wages in the wrongful death action. Also factored into this sum will be expected royalty payments that Thor would receive on his existing publications and any derivative works created from them.

Most jurisdictions permit recovery for non-pecuniary damages in a wrongful death action for loss of the comfort, society, and protection of the deceased person. Grief and suffering are not generally recoverable separate from pain and suffering, though a minority of jurisdictions do permit grief and suffering recovery as a separate element. Prim will have to present evidence justifying recovery for this element of the wrongful death damage award, because she publicly announced she would divorce Thor when she learned that Thor had removed her as the beneficiary on the insurance policy and replaced her with Vicky. On the other hand, the facts say that Prim has been Thor's faithful spouse for 20 years, so she will likely be awarded non-pecuniary damages.

Because Vicky is not a legal heir, being just Thor's girlfriend, she will not be able to recover pecuniary damages for medical expenses incurred as a result of depression and treatment required. The depression will probably have a non-pecuniary element as well, but Vicky will not be able to get recovery for any of these damages.

Survival action against Acme.

If Prim were the executor of Thor's estate, she may also file a survival action against Acme. Survival actions are a personal injury action that covers the period of time from injury to death. The Plaintiffs in a survival action are not the heirs, however, and any recovery goes into the deceased person's estate. Often these two causes of action (wrongful death & survival) are joined together, however, it is important to remember that they are two different causes of action. Here, whoever is Prim's executor (although he left all his property to Vicky, it's not clear if she is the executor) of his estate will be able to bring a survival action, which permits recovery on lost income from the time of injury to time of death, plus medical expenses and funeral expenses, though no double recovery is permitted with funeral expenses if they are already recovered through the wrongful death action.

Insurance policy

The million dollar insurance policy taken out on Thor's life mistakenly names Thor as the owner of the policy, rather than Prim, who is also the beneficiary. Since the policy is a contract between the insured and the insurance company, she could argue that her mistake was innocent and that the court should reform the contract by removing that term with the one that accurately embodies the intention of the parties (Thor and Prim) at the time the policy was purchased and the contract was made. The fact that she has been paying the premiums with their community property assets is evidence of this, but there would also have been an agent for the insurance company who would likely have helped draft the particulars of the policy and could verify that Thor and Prim wanted her

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to be the owner of the policy. This is significant, because Vicky is going to file a claim that she is the rightful, legal beneficiary to the policy, and that Thor is, as the policy expressly states, the rightful owner. If the court does not reform the policy, then Vicky will be the beneficiary on the policy.

#### Thor's Will

Thor has written a will that leaves all his property to Vicky. Prim, as his wife, will have rights, and the facts suggest they live in a community property state, which means that she will inherit her half of their community property. Whatever separate property Thor had can go to Vicky, but Prim will have a right to her share of all the earnings during their 20 year marriage. This includes her half of royalty rights to his work.

Prejudgment interest is an element of compensatory damages and its purpose is to award a plaintiff for the loss of the use of money from the time the cause of action accrued to the time of judgment. In those jurisdictions that permit prejudgment interest, not all civil cases are granted the interest award - wrongful death and personal injury, for example - though some jurisdictions do permit award of prejudgment interest for all civil cases. Generally, this form of interest is granted on damages that are liquidated at the time of judgment. Here, Prim might be able to get interest awarded on the future lost wages and royalty payments that would have accrued from the time of death to the time of judgment. And she also could get interest on Thor's lost income from the time of his motorcycle injury to the time of death.

Prim and Vicky will each have to pay their own attorney's fees, as they do not qualify for an exception to the American Rule that obliges each party to cover the cost of litigation.

### 3) QUESTION 3

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Lou Ser, the seller, and Victor, the buyer, have entered into a valid contract. During escrow the tsunami that inundates the property severely damaged the house, and the facts say that the home was insured for fire but not for flood. The fire was caused by the tsunami, which is a flood, and this occurs while the property is in escrow, thus the contract has been signed, and Victor breaches the contract before escrow closes and after the house has been damaged.

When a buyer breaches on a real property contract, the seller can recover general expectation damages measured by the difference between the fair market value of the property at the time of breach and the contract price, which was \$350,000. The seller can also recover any consequential or incidental damages. Here, the property has dramatically lost its market value due to the tsunami and subsequent fire that destroyed the home. Lou Ser will try to recover from the insurance company the \$200,000, however, the insurance company will argue it doesn't have to pay because the fire was caused by the tsunami, leaving it for the jury to decide as a question of fact whether the insurance company is liable for the damage to the home. This still leaves Lou Ser a loss of \$150,000, which he can try to recover from Victor.

When property is damaged or destroyed during the period between contract signing and escrow closing, the doctrine of equitable conversion becomes relevant in helping determine who bears the risk of loss, the buyer or the seller. During this period, the buyer, in this case, Victor, becomes the equitable owner of title and the seller, Lou Ser, remains the legal owner, but as trustee of title. In the majority of jurisdictions, the risk of loss falls on the buyer. In the minority of jurisdictions, the risk of loss falls on the seller. If this is a minority jurisdiction, and Lou Ser is liable for the loss, he will optimally prevail in his claim against the insurance company and receive the 200,000, however, if the damage is material, the courts permit the parties to rescind the contract and negotiate a new bargain. If the seller had no insurance, he cannot recover. If the damage is minor, the court will offset the damage against the selling price, and will enforce the contract. In this case, Victor will argue the contract should be rescinded, because the damage is major. However, Lou Ser will argue that Victor had openly intended to tear the house down and build a restaurant on the property, thus if anything he has saved the cost of removing the house. In this case, Mr. Clean's cost of \$15,000 to clear the debris would be offset against the court's assessment of the damage award to Victor for the destruction of the house.

If this is a majority jurisdiction, then Victor bears the loss for the damage to the property before escrow closes, and since he wanted to tear the house down and build a restaurant on the property, he could get consequential damages from Lou Ser for the cost of clearing the debris, as this would be reasonably contemplated by the parties at the time of contract formation.

When Victor breaches, Lou Ser could seek specific performance on the contract as an equitable remedy and seek incidental damages for the expense of paying Mr. Clean, however, Mr. Clean was hired by Victor. Mr. Clean might attach a lien against Lou Ser's property, however, in an effort to recover, if he can't get recovery from Victor. This is probably the best remedy. Because this is a land sale, and land is considered unique and resale value speculative, Lou Ser will be able to seek a remedy in equity. There are certain and definite terms and both parties are able to perform on the contract, even though Victor wants to repudiate the contract. The balance of hardships weighs in favor of Lou Ser, and the court will probably grant specific performance.

Mr. Clean has been hired by Victor to remove the debris and can seek general damages for the service performed.

All parties will have to pay their own attorney's fees, since these facts do not indicate any exceptions to the American Rule.

Prejudgment interest is an element of compensatory damages and its purpose is to award a plaintiff for the loss of the use of money from the time the cause of action accrued to the time of judgment. In those jurisdictions that permit prejudgment interest, not all civil cases are granted the interest award - wrongful death and personal injury, for example - though some jurisdictions do permit award of prejudgment interest for all civil cases. Generally, this form of interest is granted on damages that are liquidated at the time of judgment. Here, it's not likely that the parties will receive any interest because they aren't liquid at the time of judgement.

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