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**Apple**

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Removal Rule:

Under the Removal Rule, a party cannot bring an action in federal court challenging the constitutionality of an ordinance while a state case, for violating the order, is pending. If the state action is filed prior to any significant appearance in the federal case, the action will be dismissed.

Here, Apple has already been arrested. He has yet to be criminally charged though. The question is whether or not it is likely the criminal case will be filed against him prior a significant action in the federal case. A significant action means that a material appearance has been made. Assuming that that the criminal case will be filed in due time, it is unlikely that Apple will be able to get the federal case filed and appear before the court in time for the case not to be removed. He may, however, bring up the unconstitutionality of the ordinance in as a defense in the state case against him. In this case he will likely be successful as the ordinance will likely be considered a prior restraint, or prohibition and the fee exercise of speech, in violation of the first amendment. The ordinance will not withstand judicial scrutiny as the ordinance there is only a minor vegan population, and there is not evidence that they are violent in their protests. All the protests have been peaceful.

In the state case Apple will likely be successful in this defense. After that point, he may bring the federal case for an declaratory relief or an injunction. See Cherry below.

**BALANCE**

Contempt Defense:

Criminal Contempt is the violation of a Court Order. Criminal Contempt covers past violations, allows for a jury trial, and a finding beyond a reasonable doubt.

To analyze Banana's defense, we must first look at the reach of the contempt power of the court. Does the TRO cover the actions of Banana.

Validity of TRO

Banana may first try to argue that the TRO was unlawfully issued and is therefore not valid.

A TRO is an ex parte order which will last for 10 days unless extended by the court, until there can be a hearing for a preliminary injunction. If no hearing is held, and the court does not extend the order, the order will expire. There is a body of caselaw that holds a TRO may morph into a preliminary injunction if the court shows some intent for that to occur, however, there are no facts to support such a finding here and the order will expire in ten days. The facts don't state when Banana made his peaceful protest, but if more than 10 days after the order was issued, he will likely be acquitted as the order was not in existence at the time of his violation.

If within the 10 days, Banana may argue the TRO was still invalid because no Notice was provided prior to its issuance (at least the facts don't say anything about notice

being given to the parties). Typically Notice is required, unless the plaintiff can show a substantial reason why the order should be issued without notice, such as the possible destruction of property. There is no reason stated here as to why the Notice provision should have been waived, therefore, the TRO was unlawfully issued.

Furthermore, the reach of a court order generally only extends to the parties, their agents, and anyone acting in concert with them. Here, Banana will argue that he is not an agent, or acting in concert with Apple. He will argue he is acting on his own accord. As there is no evidence that he and Apple discussed his protest together, the fact that he sympathized with Apple is likely not enough. Especially considering he is not even a part of the Animal Rights to Life group. 15

However, defendant may not argue the validity of the order in a criminal proceeding, and may only argue validity on appeal under the Collateral Bar rule. Therefore, Banana will not be successful in this defense.

### Vagueness

However, Banana has already been charged with the violation, he is barred from arguing against the validity of the order. He may however, still argue vagueness, and the willfulness of the violation, both of which can be defenses to criminal contempt. This goes to whether or not he willfully violated the order. 10

Here, the ordinance states that the parties covered are "anyone else who knows of the order". It is not specific in how much the person needs to know of the order, or what connection they must have to the parties named in the order. Furthermore, the terms only state "the slaughterhouse." Based on these terms it could cover any slaughterhouse, that anyone hears about the order ever. The terms are too broad and vague for a court to uphold. This defense will be successful.

### Unconstitutional Ordinance:

As Banana is not being criminally charged for violation of the ordinance, so long as he isn't charged prior to a significant action in the criminal case, he will not be barred from proceeding. See Cherry arguments below.

## **CHERRY**

Cherry has not been arrested on either violation, so he is free to attack the constitutionality of the ordinance in state court. fed

### Declaratory Relief:

Declaratory relief is an order by the court stating the rights of the parties, the only element required is that Cherry show ripeness.

For ripeness to be demonstrated, Cherry need only show an active case or controversy. Here, people are currently being arrested under the ordinance (Apple). The case is ripe. 20

Cherry will likely be successful in the declaratory relief action, as previously stated, the ordinance is a prior restraint and therefore unconstitutional. However, the city can continue to enforce the ordinance without consequence as declaratory relief does not specifically prohibit the city from acting. If the city continues to arrest people under the

ordinance, Cherry will want to move for an injunction, then the city will be subject to contempt if it does not comply.

### Injunction

An injunction is an order from the court ordering a party to refrain or perform certain actions. In this case Cherry would be asking for an injunction prohibiting the city from enforcing the ordinance. The idea is to prevent damages before they occur.

Cherry must demonstrate:

- Ripeness: In that there is a current case in controversy
- Irreparable harm: YOung Dilemma
- Inadequate legal remedy
- balance of hardships
- Public interest

#### Ripeness:

Here, Apple has been arrested under the ordinance. As previously stated, the city is actively enforcing it, applying it to the specific protest for which Cherry wants to participate, against Slaughterhouse, Inc. The case is ripe.

Irreparable injury: Under the Young case, the courts have found that the dilemma of a plaintiff, having to choose between violating the ordinance, and chancing arrest, and not being able to exercise their constitutional rights is irreparable injury.

Inadequate legal remedy: Here, the violation of a constitutional right will likely cause little in legal damages.

Balance of Hardships: There is no showing that the city or Slaughterhouse is being damaged at all by these protests, there would be little hardship incurred by not allowing them to continue arresting people in violation of the ordinance. However, Cherry is substantially burdened by his inability to exercise his first amendment rights and peacefully protest the slaughterhouse.

Public Interest: The city might argue that there is substantial public interest in keeping Slaughterhouse happy, especially if they stimulate the economy in a significant way. However, the courts will not likely find this to be enough when compared to the hinderance of the freedom of speech, especially when considering the protests have all been peaceful, and the vegan population is only a minority in the city. It is not likely the ordinance is protecting anyone, other than Slaughterhouse, and then only from the annoyance of peaceful protestors.

Cherry will be successful in his request for an injunction.

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**BETTY'S REMEDIES**

A contract is a promise or set of promises for the breach of which the law provides a remedy. Sally has breached the purchase and sale contract for real property to Betty. Sally has also committed the torts (and maybe even crimes!) of fraudulent

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misrepresentation, and fraudulent inducement. At trial, Betty prevailed on the merits and Sally is an adjudicated wrongdoer. The court, in seeking appropriate remedies, will seek to compensate Betty for the harm (tort), protect Betty's expectancy or reliance interest (under the contract), and/or disgorge any benefits Betty has obtained from her hideous conduct. Although Betty is not necessarily "entitled to" them, a jury may award her attorney's fees and punitive damages.

### Legal Damages

The law seeks to put plaintiff in the position she would have enjoyed but for the tortious conduct, substituting money for the harm caused. An award of \$700k would compensate for the cost needed to now rebuild the house. 10

In a contract matter, the law seeks to protect plaintiff's expectancy interest, putting her in the position she would be in had the defendant delivered what she contracted for. B spent \$1M for a property that is now valued at \$200k. An award of \$800k would compensate for the diminution in value and give B the value she expected. 10

### Equitable Remedies

In order to obtain equitable remedies, if these are preferred over money damages (as is likely in this case), B will need to show the inadequacy of legal remedies. Here, money damages might cover certain costs or make up value in whole or in part, but it does not deliver the house B wanted or the freedom from repairs that was a condition of the contract for which she negotiated. In addition, money judgments are difficult to enforce and may be impossible to enforce against someone with a gambling problem, taste for fine wine and dining, and who has already shown has no shame in her actions - who could quickly waste her assets and become insolvent. Further, land is considered inherently unique, and B should be compensated for the deficiencies in the real estate that was delivered versus what she contracted for.

### Restitutionary Remedies:

#### **Unjust Enrichment/Disgorgement**

The law will not abide a wrongdoer or retains a benefit conferred upon it, to which it is not legally entitled. Thus, any benefit that S obtained as a result of her actions will be disgorged to prevent unjust enrichment, and will be awarded to B. This includes any expenses that may be paid by third parties, such as an insurance company, for expenses that are a result of S's conduct. Although B's insurance is paying her rent during the pendency of this action, that cost is a direct result of S's breach and tortious conduct - since the Collateral Source Rule does not bar B from recovering it, she should get that amount from S. S should also be disgorged of the profit she gained from the use of the contract money, including the appreciation in value of the townhouse and perhaps even her gambling winnings (discussed below). 5

#### **Constructive Trust**

A constructive trust is available when fraudulently acquired funds are used for, and traceable to, the purchase of real property. A constructive trust is used to disgorge any benefit to the defrauder, teaching them that crime doesn't pay. A constructive trust transfers ownership of the property to the plaintiff, along with any appreciation in the value of the property. This is a highly favorable remedy for B because the house S bought with the fraudulently obtained money has doubled in value. 15

#### **Equitable Lien**

An equitable lien can be placed on real property improvements, or personalty (assets such as an investment account or marketable personal property), which would allow a partial recovery to B of the \$250k that S deposited in her bank account after the fraud. Using tracing and the **Lowest Intermediate Balance Rule**, which assumes that S spent her own money first (although there wasn't any) and that any money deposited back into the account is her own, B can recover only \$150k of the \$250k that wasn't used to purchase a new townhouse. However, that accounting method is tracing funds that have been commingled. Based on the facts, that account only had B's money in it, and no money of S's. Therefore, B may be able to argue that the \$25k deposit was not of S's own money, but was indicative of her intent to reimburse the account that she was just keeping stewardship over until B discovered the fraud and came for her money. If that argument succeeds, B can recover up to the full \$175k account balance at trial. 10

#### Other Equitable Remedies:

##### **Specific Performance**

Technically, the house has not yet been delivered to Betty, as she had not yet moved in when this occurred. The facts don't tell us whether the deed was recorded and title passed. The court could order specific performance requiring S to deliver the house as warranted for the purchase price B already paid (performance of plaintiff complete). However, given the lack of integrity already demonstrated by S, neither the court nor B is likely to favor a remedy that leaves S in charge of the house rebuild, at her own expense. Also, that would be unwieldy for a court to enforce, and would take time that B may not have.

##### **Rescission**

S and B did have a valid contract, and fraud/fraudulent inducement certainly provide grounds for rescission. Despite the potential financial upside if B were awarded all the damages available to her (except those that are mutually exclusive), B may prefer to rescind so that she can then contract for a home that will be free from repairs and not have to wait the year to rebuild. This would probably require the use of both a constructive trust and equitable lien anyway, since the \$1M has been used for other things now. 10

#### Ancillary Remedies:

##### **Attorney's Fees**

The American rule is standard, and dictates that both parties will bear their own legal expenses. However, many contracts specify that any dispute arising out of the contract will include an award of attorney's fees to the prevailing party (either in whole or proportional/substantially if they prevail on most but not all of the issues). In addition, where one party's conduct is quite nefarious, reasonable attorney fees may be granted upon request and will be calculated using the lodestar - reasonable time spent at a reasonable rate.

##### **Punitive Damages**

The facts don't specify on what grounds the jury found S liable to B. If they found her liable on a tort theory for the fraud in addition to the breach of contract, then they could award punitive damages if they found S's conduct to be egregious and deplorable. 5

##### **Judgment Interest**

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The awards granted to B are only theoretical until they are enforced. This requires final judgment, a writ of execution, seizure, and collection. The jury may award prejudgment interest from the time of the breach or tortious conduct through the date of the final judgment. Judgments are automatically subject to postjudgment interest if not readily collectible, usually at the rate of 10% per year, accruing daily.

### **SALLY'S DEFENSES**

Fraudulent inducement acts as equitable estoppel that prevents S from raising any substantive defenses, or claiming prejudice or hardship. However, she can assert that she is not the only conscious wrongdoer.

#### Unclean Hands

Sally's only defense lies in the fact that B's purpose in buying the home was also unlawful, assuming it is illegal to hide money from the IRS. However, this would likely be considered irrelevant because the defense of unclean hands must assert that B's wrongful conduct or self-dealing was relative to S, not relative to a third party such as the IRS.

#### Crime

Sally could defend on the basis that her acts were criminal and not suited to civil remedies. However, this would not only fail because criminal action does not preclude civil liability arising out of the same events or transaction, it would also open the door to criminal charges against which it would then be very difficult to defend herself.

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### Paula's Remedies

Assuming that P can bring the claim, despite the statute of limitations, she has a claim for legal/money damages, as well as claims in restitution and injunction. Please see below for the discussion of statute of limitations.

#### Damages

Legal damages are a substitutionary remedy. They are designed to put the plaintiff in her rightful position, by looking backwards, and seeing where she would be, but for the harm. Substitutionary damages are not always perfect, especially when someone has to go through life in a great deal of pain, like Paula will. However, they may be adequate, and the best the law can do.

Here Paula will claim Compensatory damages which are the actual damages caused by the tort (and potential crime). These are direct damages and presumed. The damages that she is claiming are divided into two board categories: Economic and Non-Economic.

#### Economic Damages

Economic damages are out-of-pocket expenses. These are readily calculable and include expenses like medical bills and rehab receipts. Economic damages are further divided into past and future. Here, P's past damages are \$100k. They are certain because she has the hospital bills to demonstrate them. She will be entitled to these damages, which will NOT be reduced, because they have already been paid. Paula's doctor has estimated that her future medical expenses will be about \$500k. She will be able to present this testimony at trial and support and defend it. Since she has an expert testifying about this, it is safe to say that she can prove that she is more likely than not to incur these expenses. So, the "all or nothing" rule will weigh in her favor and she can claim these future medical expenses. However, they will be reduced to present value, since she will need the money now. These future economic damages will be paid in a lump sum and inflation will not be calculated. Future Medical & Rehab - 5 years = \$500k; and Lost Wages will be based on how long she would have worked at Legal Aid, perhaps how well she did law school and her career trajectory.

#### Non-Economic Damages

Non-Economic Damages are not out of pocket expenses. Here the economic harm rule is satisfied because she was physically injured in the accident. Non-Economic damages are not as readily determinable. But, they do not require the same degree of certainty as past economic damages. These include her Emotional Trauma, Pain & Suffering - for life. Again, if these are more likely than not to occur, then she can



pursue these damages. They will not be reduced to a present value and will also be paid in a lump sum, like future economic damages.

#### Tort Reform

California, and other jurisdictions as in this case, have limited tort recovery for non-economic damages. Paula will be advised to couch her non-economic damages in the form of economic damages, to increase her recovery for those expenses. For instance, if pain and suffering or emotional suffering can be quantified and qualified as a

#### Collateral Source Rule

Collateral Source Rule states that defendant cannot be unjustly enriched by not having to pay the damage award just because someone else has paid it already. The rule also states that the plaintiff can, in some jurisdiction, keep both the judgment amount and the funds from a collateral source, unless they have a subrogated that amount.

(That is typical in insurance policies, which is nonexistent here.) Here, her friend's have paid the hospital bill for Paula, through the Fund Paula fund. The defendant will be unjustly enriched by that amount if not required to pay for Paula's hospitalization.

There is a tangential issue of whether Paula must repay any debt to her friends. This is unlikely, because her friends appear from the facts to be voluntarily conferring this benefit on Paula. This is something that Paula and her friends can negotiate on their own terms

#### Punitive

Paula may be able to seek punitive damages for the tort, as the facts suggest that Truck Co. routinely, likely intentionally demanded their drivers to work long hours for the selfish gain of increasing company profits. Punitive may very likely be an option, especially if the 'regulations' violated happen to be vehicle code violations or violations of statute. Punitive damages are designed to punish and deter the defendant and others likely to engage in the same reprehensible conduct - like demanding dangerous behavior for a purely pecuniary interest.

#### Restitution

Alternatively, Paula may have a claim in restitution because the Truck Co. did receive a benefit from their conduct. If it is found that they derived a benefit from demanding their drivers to work outrageous, dangerously unreasonable hours; and that benefit conferred is greater than any legal damage award Paula could win, then Truck Co. may be required to disgorge those profits, and perhaps pay punitive damages as well, based on the reprehensibility.

#### Injunction

Paula probably does not have a claim for injunction, because the tort was a one time occurrence for her. However, enjoining that sort of conduct would benefit society.

#### Truck's Defenses & Limitations of Liability

##### Failure to Mitigate

Truck co. will definitely raise the limitation of liability based on P's failure to return to work. Plaintiffs have an affirmative duty to mitigate their damages. P is physically capable of going back to work, but she has not. Truck will argue that she is merely

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racking up the lost wages damages. The facts state that she is physically capable of working, but they say nothing about her mental and emotional ability to work. P will likely argue that she is suffering from PTSD and is emotionally unprepared to resume work.

#### SOL

Truck site the SOL - the statutorily created time limit which bars a cause of action.

Once a SOL has run, the suit is barred. However, there are several exceptions to the harshness of the SOL.

Paula's rebuttal to Defense-

#### Equitable Estoppel

Paula's best argument will be Detrimental Reliance on Trucks assurance that they would settle. Apparently, they did not settle. Truck induced her throughout the year (presumably the entire length of the SOL) not to bring the action. This argument may be the best that Paula has, but it will not likely work. Paula knew or should have known that there was a time limit in which to bring an action, this is common knowledge for an attorney. She should have brought the action in time. This would have preserved the claim and given her more leverage in bringing about a settlement - or a final judgment on the merits.

Continuing Violation

**END OF EXAM**