

ANSWER

VALIDITY of the TRO

A temporary Restraining Order is a stop-gap measure to maintain the status quo until a preliminary hearing can be held. The court issued the TRO to maintain the last peaceable status quo until the issues could be sorted out at trial. The issue is whether the TRO was valid three weeks after it was issued. If so, the Pub owners will ask the court to hold Ms. Darling in contempt. The court's contempt power is broad: the court can jail Ms. Darling, order her to pay a fine, or issue other coercive orders to compel her to comply.

TROs without notice last ten days. Here, there was notice, so it is not clear if this ten-day limitation applies. Ms. Darling could have returned to court seeking a modification of the order or a clear expiration date. She didn't do this. Instead, she resumed her activities after the ten-day period. The question is whether the order was still valid and the court can hold her in contempt, or if it expired.

In Sampson the court expressly extended the order that defendant's could not discharge the plaintiff after the defendant refused to present a witness to the preliminary hearing within the allotted time period. The Supreme Court found that the TRO morphed into a preliminary injunction even though no hearing was held and no finding of facts or law were made.

On the other hand, in Granny Goose the Court ordered the union to desist their protests and the order was silent as to an expiration date. Months later the union resumed its activities. The Supreme Court found that the order was expired and the union was not in contempt.

Lower courts have interpreted these cases to mean that if the order is expressly extended then the defendant's can be found in contempt even if the order wasn't valid. If the order is silent, then the court's generally find that the order expired. Here, like Granny Goose, the court issued the order for longer than ten days without expressly stating its intention that the order is extended beyond this time period. Here, the court will most likely decide that the order expired and Ms. Darling was not in contempt.

PERMANENT INJUNCTION

The Pub is asking the court to permanently enjoin Ms. Darling from making defamatory statements about the Pub and harassing their employees. A permanent injunction compels a defendant from either ceasing an activity or to act. This is considered an extreme remedy because it can give rise to the court's contempt powers and can result in the court supervising the parties. Courts are particularly reluctant to issue injunctions that interfere with a defendant's First Amendment rights. This is an equitable remedy and there is no right a jury. Courts prefer to order damages. The main issue is whether the Pub will suffer irreparable harm if the court does not issue an injunction or whether damages are adequate and serve the public interest. This issue is ripe because Ms. Darling has shown a propensity to continue to defame the Pub. There is a four part test. The Pub must show that 1) they suffered irreparable injury, 2) legal damages are inadequate, 3) considering the balance of hardships an equitable remedy would be appropriate, and 4) public policy would not be dis-served by issuing an injunction. The first two parts are mirror images of each other: an injury is irreparable because damages are not adequate.

1)The Pub suffered irreparable harm and 2) The legal remedy is inadequate.

In *Willing* an attorney sought an injunction against a former client who was stationed outside the courthouse carrying a big sign and shouting defamatory statements that the attorney stole from her. The defendant was entrenched in her false belief that the attorney unlawfully took \$25 out of her settlement. No actual amount of damages could be ascertained. Besides, the defendant was indigent and the attorney would never be able to collect a judgment against her. Consequently, a damage judgment would do little to discourage the defendant from engaging in her campaign. In addition, damages are a one-time remedy. So, the attorney would have to file a new case after each instance that the defendant defames him. None-the-less the U.S. Supreme Court found that damages were an adequate remedy. The Court found that the defendant's financial status is irrelevant to the equation.

These facts were taken from a case called *Balboa* where a neighbor to a restaurant was a vocal critic of that establishment. She harassed the staff and customers and shouted that the food "sucks" that the owner is a "whore" and that prostitution activities occurred inside. She circulated a

petition among her neighbors and made slanderous statements. The restaurant lost 20% of their business since the defendant began to engage in these activities. The California Supreme Court did not discuss the adequacy of a damage remedy, but found that a narrowly tailored injunction was appropriate.

Here, unlike Willing defendant did not take her campaign to the town square and shout randomly to any passersby. Instead, Ms. Darling defamed the Pub and frightened their customers away by yelling defamatory claims at them and by making false statements directly to the people in the community while circulating a petition. Unlike Willing, the Pub established that it has lost money over the three months that Ms. Darling has been on her crusade. If Ms. Darling is permitted to continue her campaign against them, the Pub most likely would continue to lose business. The harm would be irreparable because it would continue. It would be impracticable for the Pub to take Ms. Darling to court on a recurring basis suing for damages. As in Willing, Ms. Darling is probably judgment proof, so the damage awards would not compensate the Pub nor provide an incentive for her to change her behavior. While the court may not make its finding only on the basis of defendant's financial standing, it is still a factor that the court can consider. Here the harm is irreparable because the legal remedy is inadequate.

3. Considering the balance of hardships an equitable remedy is appropriate:

The hardship that Ms. Darling will suffer is the infringement on her First Amendment rights, which are held very sacred in our jurisprudence. Some of her comments, like the food "sucks" may just be a matter of opinion, whereas her comments about prostitution and the health department violations are made in reckless disregard from the truth. The hardship the Pub suffers is concrete and not speculative. Ms. Darling is interfering with the Pub's ability to conduct their business in a positive and convivial atmosphere when she accosts their customers. She is also harming their reputation in the community. Considering the balance of hardships an equitable remedy is appropriate, if it is a narrowly tailored one.

4. The public interest would not be dis-served by a permanent injunction:

Public policy strongly disfavors restraint on the exercise of free speech. Because a trial was held, this is not a prior restraint, but any infringement on speech should not be done lightly. The public interests at stake would not be dis-served by a narrowly tailored injunction that only prevents the unprotected willfully false remarks that Ms. Darling utters. The court could enjoin Ms. Darling from making specific defamatory remarks that are recklessly false when gathering signatures. The court could order Ms. Darling to cease from harassing the Pub's customers and to direct her complaints and opinions to the owners only and not to the staff.

CONCLUSION

Courts handling similar claims have found that reckless false statements defaming a person or business are not protected by the First Amendment and that narrowly tailored injunctions are an appropriate remedy. Balancing the factors in the four-part test a narrowly tailored injunction would be appropriate in this case.

ANSWER

BREACH OF CONTRACT DAMAGES

Contract law recognizes and protects the injured party's expectancy interests in the bargain. The goal of contract damages is to put the plaintiff in the position he would have been in had the defendant performed. A buyer may rightfully revoke acceptance of non-conforming tender and receive damages. Expectancy remedies available to non-breaching buyers are: 1) contract-market differential damages, 2) incidental losses incurred as a result of the breach, and 3) consequential losses that are reasonably foreseeable.

One of the primary remedies available to the non-breaching buyer is "cover" damages for purchasing goods in the market to replace those due under the contract. The measure of damages is the difference between the cost to cover and the contract price plus incidental or consequential damages, less expenses saved. In order to receive this remedy, the buyer must 1) act in good faith, 2) without unreasonable delay, and 3) make a reasonable purchase of substitute goods.

Here, Wiley Co. breached the contract when it sent Chopper Inc. the non-conforming clutches. Chopper Inc. rightfully revoked acceptance of the non-conforming clutches after they learned of the defect. The non-conforming clutches had no market value because all helicopter manufacturers had the same required specifications. Chopper Inc. properly covered by purchasing the replacement clutches from Wiley. Because Chopper Inc. covered by purchasing conforming clutches from Wiley Co at the same price as the contract price it did not incur any additional expenses, nor did it save any.

Chopper Inc. is entitled to the consequential damages in the amount of \$1M they spent to replace the clutches. In addition, Chopper Inc. is entitled to the incidental costs for the man-hours spent to identify the non-conforming clutches. This expense was foreseeable to Wiley Co., especially after Chopper Inc. requested the serial numbers from Wiley Co. and they refused to provide them. These damage awards will put

Chopper Inc. back in the position they would have been in had Wiley Co. performed under the contract.

TORT DAMAGES

Chopper Inc. argues that it should be able to recover tort damages because its claims for fraud and deceit were based on a duty independent from the contract obligations that Wiley Co. breached.

Conduct amounting to a breach of contract becomes tortious only when it also violates a duty independent of the contract arising from principles of tort law. Tort damages have been permitted in cases where the duty that gives rise to tort liability is either completely independent of the contract or arises from conduct which is both intentional and intended to harm.

A tortious breach of contract may be found when (1) the breach is accompanied by a traditional common law tort, such as fraud or conversion; (2) the means used to breach the contract are tortious, involving deceit or undue coercion; or (3) one party intentionally breaches the contract intending or knowing that such a breach will cause severe, unmitigable harm in the form of mental anguish, personal hardship, or substantial consequential damages. Focusing on intentional conduct gives substance to the proposition that a breach of contract is tortious only when some independent duty arising from tort law is violated.

Chopper Inc.'s misrepresentation and fraud claims were based on Wiley Co.'s provision of false certificates of conformance, and Wiley Co.'s failure to provide the serial numbers of affected clutches. Based on the evidence presented at trial, the jury could have found that Wiley Co. had (1) made false representations of material fact, (2) knowingly misrepresented or concealed material facts with intent to defraud, and (3) was guilty of oppression, fraud, or malice in its intentional misrepresentations and concealments.

By issuing false certificates of conformance Wiley Co. made affirmative representations that Chopper Inc. justifiably relied on to its detriment. But for Wiley Co.'s affirmative misrepresentations by supplying the false certificates of conformance, Chopper Inc. would not have accepted delivery and used the nonconforming clutches over the course of several months, nor would it have incurred the cost of investigating the cause of the faulty clutches. Accordingly, Wiley Co.'s tortious conduct was separate from the breach itself, which involved Wiley Co.'s provision of the nonconforming clutches. In addition, Wiley Co.'s provision of faulty clutches exposed Chopper Inc. to liability for personal damages if a helicopter crashed and to disciplinary action by the FAA. Thus, Wiley Co.'s fraud is a tort independent of the breach.

Public policy also strongly favors this finding. In a valid fraud action, a plaintiff advances the public interest in punishing intentional misrepresentations and in deterring such misrepresentations in the future. Allowing Chopper Inc.'s tort claim for Wiley Co.'s affirmative misrepresentation discourages such practices in the future while encouraging a business climate free of fraud and deceptive practices.

PUNITIVE DS

Here, because Wiley Co. committed the separate intentional tort of fraud and deception Chopper Inc. is entitled to punitive damages. The point of punitive damages is to punish and deter. Punitive damage awards are decided by the jury. The US Supreme Court has roughly determined that a punitive damage award should not exceed ten times the amount given as a compensatory award.

EMOTIONAL DISTRESS

Emotional distress is generally not compensable in contract. However, emotional distress is recoverable in intentional tort. Most courts treat

bad-faith breach of an insurance contract as a tort and will allow for recovery for the resulting emotional distress. Courts typically will require more than the plaintiff's testimony regarding the mental anguish that they suffered as a result of the defendant's conduct. The plaintiff must present corroborating testimony, such as medical or psychological treatment.

Here, Chopper Inc.'s CEO will argue that because the breach of the contract was intentional and in bad-faith it amounts to a separate tort. The CEO will assert that Wiley's refusal to provide the serial numbers demonstrates their bad faith and that it should have been foreseeable that fear of having defective helicopters flying would cause him great stress. In addition, the CEO's emotional distress was manifested in a diagnosable disease that he received medical treatment for. While courts generally are reluctant to allow for recovery of mental distress damages where no physical injury was inflicted, the court may allow it here based on the fraudulent and intentional conduct Wiley Co.