

Remedies Final, Issue Outline, Question #1 Spring 2014

Contract: A contract is a promise or set of promises for the breach of which the law provides a remedy. A valid contract requires an offer, acceptance, and consideration. Here the facts provide that Sally and Bea entered into a valid written contract on May 1. Consideration is met because Bea promised to pay money and Sally agreed to transfer the car. The fact that Bea promised \$8,000 when the car was later sold for \$500,000 will not invalidate the consideration element. The court will not inquire as to the adequacy of consideration. Statute of frauds (movable goods greater than \$500) is satisfied.

Anticipatory Repudiation: Anticipatory Repudiation is a definite and certain expression of intent not to perform a contract before the time for performance is due. Here the car was to be delivered on May 10 and on May 5, Sally indicates she sold the car to someone else.

Wrongful Prevention: A party may also breach a contract by conduct that wrongfully prevents the occurrence of a condition. By selling the car to someone else, Sally wrongfully prevented the occurrence of the condition that she actually transfers title to Bea.

Effect of Anticipatory Repudiation/Wrongful Prevention : When a party anticipatorily repudiates or prevents the occurrence of a condition, the aggrieved party may 1) encourage performance 2) treat the repudiation as final and sue for breach or 3) await performance and sue for breach. The repudiating party may also retract her repudiation unless the aggrieved party has indicated that he considers the repudiation final or detrimentally relied. Sally already accepted \$500K from another buyer and has arranged to transport it out of the country. Bea can communicate her intent to treat the repudiation as final and sue for breach prior to May 10.

Provisional Remedies

Injunction: An injunction can be used by one party to stop another party from acting or force another party to act in a certain way.

Inadequate Legal Remedy: Because an injunction is an equitable remedy, the court must first determine that the legal remedies available to the plaintiff are inadequate. The parties bargained for a unique car that Bea intended to use to win the car show and increase revenues with her website and magazine. While Bea might find a similar car which could win it is unlikely. No amount of damages would prevent the car from being shipped overseas, and it appears the legal remedy is inadequate.

Property Right: Historically courts would only grant injunctions as to real property rights. Modernly, personal rights and personal property are included.

Feasibility of Enforcement: The court must issue an enforceable decree. Court can use contempt powers to enforce the injunction-either civil or criminal. Civil contempt coerces a defendant to act while criminal contempt punishes a defendant from failing to act. Feasibility is met.

Balancing the hardships: Depends on the type of injunction that court might issue.

Temporary Restraining Order (TRO): TRO is issued to preserve the status quo for the period of time leading up to a possible preliminary injunction. Here, Bea wants a TRO to stop the shipping of the car overseas.

Preliminary Injunction: Preliminary Injunction would last during the pendency of the underlying action. Court will look at the following factors: 1) Likelihood of Plaintiff's success 2) Balance the hardships-the harm to plaintiff if the injunction is wrongfully denied versus harm to defendant if wrongfully granted 3) The plaintiff must post a bond if she has not done so under the TRO and 4) issuance is necessary to preserve the status quo.

Likelihood of Success: Sally has breached a valid contract. Bea enjoys a strong likelihood of success on the merits.

Balancing the Hardships: If the injunction is not issued, Bea will be denied the opportunity to own a unique car. If the injunction is wrongfully issued, Sally may lose the opportunity to sell the car for \$500K. However, if the car really has a value up to \$1 million, then she should be able to find a buyer at half that price.

The balance of the hardships tips in favor of Bea.

Post a Bond

Necessary to Preserve the Status Quo: The court will not want to lose jurisdiction over this unique car if it is shipped overseas.

Permanent Injunction: A permanent injunction will issue only after a trial on the merits. Bea wants preliminary injunction relief and then would pursue specific performance (most likely).

Specific Performance/Replevin: Specific performance is an equitable remedy the court may utilize to enforce the terms of a valid contract. Bea must show:

Inadequate Legal Remedy: The legal remedy is inadequate when the parties are contracting for unique or specially manufactured goods. Here the Shelby car will probably qualify. Damages will be inadequate if Bea cannot recover in Replevin.

Definite and Certain Terms: Terms are set forth in the contract. The court could easily enforce by having Sally deliver the car by May 10.

Mutuality and Feasibility of Enforcement: Apparent under the facts.

Replevin: In the contract sense, Replevin is the recovery of contracted for goods by the plaintiff. Replevin is a legal remedy in that the sheriff will seize the property; the defendant is not ordered to do anything. Plaintiff must show 1) the goods are specifically identified in the contract and 2) plaintiff is unable to cover despite reasonable efforts to do so. Here the car was specifically identified and based on the limited facts presented assume it is an item that cannot be easily covered.

Damages for Breach of Contract: All damages must be causal, foreseeable, definite and certain and unavoidable. Plaintiff has a duty to mitigate.

Damages for Nondelivery: Contract is for the sale of good so the UCC applies. When the seller breaches under the UCC, Bea is entitled to cover or market damages. Here Bea would be entitled to damages in the difference between the \$8,000 contract price and the price of a comparable Shelby Pony AMC.
Issue: Could Bea collect the difference between contract and \$500K?

Loss of Revenue to the website and online magazine: Bea may also be entitled to consequential damages when their possibility is known at the time of the contract or communicated to Sally. If Sally knew about the auto show and the effect winning "Best of Show" would have on the business, then the damages may be foreseeable. Bea had the website and magazine and had made other entries so it appears speculative at this point to award damages.

Loss of the \$10,000 entry fee: Under certain circumstances, a plaintiff may recover reliance damages. Here Bea paid the \$10K entry fee after entering into the contract with Sally. He could not foresee her breach so her reliance is foreseeable and she could recover.

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This fact pattern is loosely based on *Sheldon v. MGM*, 106 F.2d 45 (1939), found cited at page 672 of the casebook.

Uncle Johnny seeks profits from the book: A constructive trust would disgorge all of the profits from Guy's fraudulent use of his Uncle Johnny Garlic's recipes. A constructive trust is available when the plaintiff (Johnny) originally owned the property at issue and the defendant (Guy) commits a wrong involving fraud or breach of a confidence. Under the fact pattern, both elements are met.

GIN recovery of lost profits: Statute of frauds does not appear to apply. Query: Is there a tort remedy available? Facts are insufficient to know exactly what promises/obligations were orally agreed to by the parties. Can GIN really recover expectancy damages when Guy sought more lucrative opportunities with the book and movie? Discuss issues of contract implied in law and implied in fact. Quantum meruit/assumpsit.

Joe Obama seeks restitution for use of script: Beyond the Copyright Act damages, which could be nearly \$50,000.00 if the evidence of their negotiation shows the reasonable royalty figure) Obama is going to want as much of the \$20 million in restitution as possible.

- A. First, the court must identify revenues from misappropriated/mixed items. Under the facts presented, Guy's royalties were \$20 million.
- B. Deduct variable costs, but in some jurisdictions, not costs associated with the infringer's own labor. From the \$20 million, Guy should be able to subtract a good portion, if not all, of the \$250,000.00 in costs. It appears that all of these costs for the one year to make the movie can be attributable to the movie. Guy will not be allowed to subtract the value of his own labor. His labor produced a very valuable product that earned \$20 million.
- C. Deduct an appropriate portion of fixed costs if the court allows. Generally, following an evidentiary hearing, a deduction might be made. The method of allocation may depend upon the culpability of the infringer (Guy). Under the facts, Guy's best case is a deduction of the \$250,000.00 in costs.
- D. Apportion profits attributable to misappropriated item in mixed item cases using some reasonable method of apportionment. Some courts will refuse to apportion and award all profits to the plaintiff and some courts that will allocate do not give the infringer any credit for profit attributable to the infringer's reputation. In this step, Guy may stand to lose most of the royalties in courts that allow no deductions for willful infringers. (See pages 676-678 of casebook). The finder of fact is going to have to decide what portion of Guy's profit is attributable to the stolen pages from Obama and what portion is attributable to everything else in the movie. It is most likely that the few pages of script contributed very little to the overall profit of the movie. People more than likely went to the movie because of Guy or because of the star, George Looney.