

1)

Q1 100!

Pip's Pre-Judgment Remedies

It is anticipated that Pip's litigation will take years. Dan not only has several other potential plaintiffs after him, but he is also behind in payments to his creditors. Dan had his secretary/mistress hide the watch, which he obtained with the fraudulently obtained funds, in her safe deposit box. He has also looked into selling the Giggle stock (which fluctuates rapidly in value), also purchased with the fraudulently obtained funds. He only has \$5k in his bank account and likes "living high". Pip should have a very real concern that even if he is eventually successful on the merits of the case, Dan will have nothing left that Pip can recover. He will need to avail himself of any pre-judgment remedies that are available to him.

35 ✓

Attachment or Freeze Order

Attachment is a pre-judgment remedy that can be used to preserve specific assets pending litigation. It is an order from the court that prevents the defendant from using or transferring the asset and instead orders that the asset be surrendered to the control of the court. It also places a lien against the asset on behalf of the plaintiff. The plaintiff must obtain a bond to protect the defendant from any harm caused by the attachment in the event that plaintiff is unsuccessful in the litigation.

In order to get an attachment from the court a plaintiff must show 1) that the defendant intends to fraudulently dispose of or conceal the asset and 2) that the plaintiff is likely to be successful on the merits of the case. Here, Dan's fraudulent intent can be established by the fact that immediately following the filing of the suit he hid the watch with a third party and started looking into selling the Giggle stock. This is a textbook example of the first element. Dan hears about the lawsuit and immediately acts to conceal the watch and convert the stock into cash. If successful, this would be to Pip's detriment. It is clear that Dan will have limited assets with which to satisfy any judgment that Pip gets. Unless the assets are preserved immediately Pip may end up with nothing more than a remedy on paper. As to the second element, the facts set out a strong case in Pip's favor. Dan set up a phony charity, Pip was fraudulently induced into contributing, and Dan used the proceeds for his own benefit. This is a strong case for an attachment on the watch and the stock.

As to the money in the account, there is no indication that Dan has the required fraudulent intent for an attachment. Also, the money came from a source other than the initial fraud, so Pip cannot claim a specific interest in that asset. This is not a winning scenario for an attachment. However, he could pursue a freeze order on the account. This has the effect of stopping Dan from depleting the account but does not create a lien against it. The standard for granting a freeze order is more relaxed than for an attachment. Pip can argue that Dan's actions with respect to the other assets is evidence of a general intent to fraudulently protect assets from a future judgment and that Pip will have no recourse if Dan has nothing left by the time the court issues judgment. Again, Pip seems likely to be successful on the merits of the case. Dan can argue undue hardship if a freeze order is issued against his account. Normally, undue hardship requires a balancing of hardship between plaintiff and defendant. Dan's position may be that if his account is frozen he will be unable to provide for his necessities. However, many jurisdictions do not allow a balancing of hardships when the defendant "brought it on himself", as Dan certainly did here with his fraud.

he can

5 ✓

Pip will have to provide a bond to protect Dan in the event Pip is unsuccessful in the suit. The amount is set by the judge and typically can only be waived in the public interest. The plaintiff's liability if unsuccessful is normally limited to the amount of the bond.

Pip's Remedies

not

Legal Remedies

Pip has a cause of action in tort, namely fraud. He was induced to give Dan \$50k on false pretenses. This is a legal action and Pip is entitled to seek compensatory damages. Compensatory damages serve to restore the plaintiff to his position prior to the tort. Where appropriate, a plaintiff can also recover consequential damages. These are damages that naturally flow from the harm. Finally, punitive damages are also available in tort. Punitive damages focus not on the plaintiff, but on the defendant. They serve as a punishment and a deterrent for future bad acts, both by the defendant and the world at large.

Here, the compensatory damages would simply be the \$50k. There is no evidence of any other harm suffered because of the fraud. There also does not appear to be any additional harm that flowed from the fraud. Pip is entitled to seek a judgment from the court in the amount of \$50k, plus pre- and post-judgment interest. This judgment would not be an order to Dan to pay Pip, but it would entitle him to seek post-judgment remedies to satisfy his judgment. Once he was identified what assets Dan has, he can ask the court for execution or garnishment. Execution allows for the seizure of assets by the Sheriff, sale of the asset, and distribution of the proceeds to the plaintiff. There is the possibility that other creditors will have priority interest in the assets and this will reduce any distribution to Pip. Garnishment allows a plaintiff to satisfy judgment from debts owing to the defendant. Commonly, garnishment is applied to bank accounts and to employment income. There are statutory limits on what percentage of wages can be garnished.

Pip can also ask for punitive damages. Malice, or some form of wrongful intent, must be shown to get punitive damages. Here, Dan intentionally misled his victims into believing they were contributing to a charity in order to obtain money to use for himself. As an aside, he was targeting people who believed a charity for UFO abductees was necessary and the argument could be made that he was intentionally targeting vulnerable people. Once malice has been established the question is how much is an appropriate amount. In CA, factors that are considered in calculating punitive damages include 1) the reprehensibility of the defendant's conduct, 2) the amount of the compensatory damages, 3) the wealth of the defendant, 4) the amount needed to serve as a deterrence to future behavior, 5) and civil and criminal penalties for similar behavior. The USSC has held that on appellate review, Due Process concerns limit the factors a court can consider in determining if a punitive award is appropriate. The court held that the factors are 1) the defendant's behavior, 2) the ratio between punitive and compensatory damages (with a general cap of 9:1), and 3) analogous criminal and civil penalties. Another point of distinction between CA and the USSC is that the USSC believes high penalties justify high punitives and CA holds that low penalties justify high punitive awards. Finally, courts can consider the defendant's bad acts toward non-parties, but only those in the same jurisdiction and only to evaluate the reprehensibility (no punishing defendant in this case for wrongs to non-parties).

The facts here do not supply much for determining the appropriate amount. We know the nature of Dan's bad act and a general estimate of the amount of compensatory. However, seeing how the goal of punitive damages is to punish and deter, this seems like an appropriate case.

Finally, as discussed above, these legal remedies are limited to a judgment and may not lead to any recovery by Pip. Equitable remedies may be more useful.

Equitable Remedies

Constructive Trust

Constructive trusts are a form of restitutionary remedies. Restitutional remedies focus on unjust enrichment of the defendant - a person should not be allowed to keep a benefit they obtained without compensation and where fairness dictates that they should return the benefit. Constructive trusts are an especially helpful remedy because they establish a plaintiff's interest in specific asset. This means that the asset is protected from other creditors also seeking satisfaction from the same asset. A constructive trust is appropriate where the unjust enrichment results from a mistake, fraud, or misappropriation. A constructive trust must be established by clear and convincing evidence and

through tracing. Tracing is the process by which a wrongfully or mistakenly transferred asset is traced from the plaintiff to the defendant (or a third party), even if the asset has changed form. ✓

The Giggie stock was purchased with the money from Pip's donation. The tracing here is clear. Constructive trusts have additional benefits. Because it established ownership over the asset, and not a lien, plaintiff gets the benefit of any appreciation in value. As to the stock, this means that Pip gets the stock even though it now exceeds in value the amount of his money that was used to purchase it. ✓ 10

The watch was also purchased directly with the funds. The only issue that might be raised is that the watch is now in the possession of a third party. But only bona fide purchasers are protected and this requires that they purchase the item for value. This is not the case here and Pip can recover the watch if he wishes to. ✓ 10

The balance of the funds was used on "high living" and is not likely traceable at this point. But, Pip is still entitled to his legal remedy for any amount not recovered in equity. ✓

A final benefit to a constructive trust is that it relates back in time. This means that the asset is not a part of the defendant's estate and cannot be brought in to bankruptcy or otherwise used to satisfy other creditors. ✓

Equitable Lien

An equitable lien would be appropriate for the amount that was invested in remodeling the office space. Because the money was used to improve, and not to purchase, an asset a constructive trust is not permitted. But Pip is entitled to a lien against the building that was improved. He can trace his money directly to the office space remodeling. But the lien will be for a specific dollar amount, the amount traced into it and any interest. This is also no guaranteed protection from other creditors that may have liens that predate the remodeling. ✓ 10

Court's Remedies

Failure to comply with orders of the court are contempt. Contempt can be either criminal or civil. Civil contempt can be either compensatory or coercive. The difference is not in the nature of the act, but in the nature of the proceeding. Criminal contempt is a prosecution for past acts and affords the accused of all the Due Process protections of a criminal prosecution. Criminal contempt must be willful. ✓

Here, Dan repeatedly failed to comply with the court's discovery orders. The court threatened him with a daily fine for each day he continued to refuse. He continued to refuse for another 10 days.

These facts establish a case for coercive contempt. Dan is interfering with the court's ability to manage the proceedings. The main reason this would not be a case for criminal contempt is that the "key to the jail" is in Dan's hands. He has the power to avoid any penalty by complying with the order. The court even has the power to jail him until he complies. So long as Dan has the power to stop get himself out of contempt by complying, it has not crossed over into criminal contempt. ✓ 15

Only where compliance has become impossible or unrealistic does coercive contempt turn into criminal contempt.

Additionally, if Pip has incurred additional attorney's fees as a result of Dan's non-compliance he can ask the court to order compensatory damages (although in CA he would not be entitled to them under contempt and would have to plead them separately). ✓

), MODEL-A Q2
ID:

Q2 95

2)

Betty's Remedies and Defenses

Liquidated Damages

Liquidated damages are a contract remedy where the amount of damages is fixed in the contract prior to any breach. This gives the parties to a contract some predictability regarding the possible damages they will incur. For a liquidated damages clause in a contract to be valid it must be a fair approximation of the likely damages, it cannot be speculative--it must have a rational basis, and it cannot be designed to punish.

Here, the liquidated damages is for \$500,000. This is an outrageous sum, particularly given that it is close to the full asking price of \$650,000. It does not appear to be based on any factors known to the parties when they entered into the contract. (Neither knew, or could have anticipated, the market would crash.) It was not negotiated; this was a contract of adhesion, meaning that Betty signed a contract that left no room for her to negotiate for better terms. This amount of liquidated damages appears

200

designed to punish and not to represent the true damages that would be incurred by either party because of a breach (at the time of entering into the contract, the parties must have assumed that Sam would be able to get a comparable price and would be able to successfully mitigate his damages, if any.) The court would likely refuse to enforce this clause, making it void. ✓

Rescission

Reliance damages attempt to put the parties back to where they were as if they had never entered into a contract. Rescission is an equitable remedy that allows the court to cancel the contract, allowing the breaching party avoidance of the contract. It is usually granted in cases of fraud or mutual mistake, where there was no meeting of the minds or the contract otherwise failed to be adequately formed. Betty could argue impossibility, frustration of purpose, or impracticability of performance because of the sudden, unforeseeable market crash. She was only in contract for one day. The contract is executory, it would appear that the parties are in escrow. Betty would argue that she wanted to buy the property in order to live and work in One Company Town, but now must leave the town in order to find work.

She could also argue that the liquidated damages clause makes the contract unconscionable. This particular clause could certainly be considered unconscionable. The clause is outrageous, we are told the contract is one of adhesion--meaning she has no ability to change the terms, the court may not look favorably on the drafter of the contract when the term is so one sided (only Betty will pay the liquidated damages, not Sam). Sam would argue that under the doctrine of severability, the liquidated damages clause could be stricken from the contract and the rest would still hold. In that case, Sam would only get his true damages, consequential and incidental (possibly a fee for the preliminary title report, opening escrow, etc., but not the \$500,000 liquidated damages).

Reformation

Reformation is an equitable remedy where the court will reform the contract to meet the actual expectations of the parties entering into it. It is usually used for a mutual mistake or scrivener's error where the parties did have a meeting of the minds but the contract fails to adequately represent their intentions. It may be possible for Betty to request that the court reform the clause regarding liquidated damages, allowing her to pay a reasonable amount for her breach. Although this really isn't the purpose of this remedy, the court has discretion, in its powers in equity,

to rewrite a contract, or portions of a contract, to properly reflect fairness. This particular clause could be considered unconscionable for reasons stated above. The court could change its terms, and Betty would not be forced to pay \$500,000 in liquidated damages for a contract she entered into for a single day before her breach. Rescission is certainly a better remedy for her.

Sam's remedies and defenses against Betty

Sam will sue for breach of contract and seek to enforce the contract. He can do this through legal remedies and seek monetary damages to compensate him for Betty's breach or he could seek the equitable remedy of specific performance. Sam must attempt to mitigate his damages and sell the property to another buyer or show that to do so would be pointless. Since he will likely not find another buyer for years, he would not be able to mitigate.

Expectancy damages

In a contract case, the measure of damages is generally expectancy-- where the plaintiff would have been had the defendant fully performed on the contract. Here, Sam would have \$650,000 in his pocket and would have turned over the deed to the property to Betty. This is what he wants to effect by suing Betty. It appears that they are in executory contract (one that has yet to be completely fulfilled) as it is unlikely that a day after signing the contract all of the contingencies normal to buying a house have been fulfilled. But Sam could argue under the theory of equitable conversion that Betty is the true legal owner of the property while it is in escrow and she is responsible for any unexpected problems regarding the value of the home.

Specific Performance

Specific performance is available as a remedy if there is a valid contract, the conditions of the contract have been met, there is no adequate remedy at law, the court can effectively and efficiently order the performance, and there are no equitable defenses available (such as unclean hands or laches). This is a remedy that would generally come up in a real property purchase agreement from the side who wants to buy the property and is not able to. Real property is unique and lends itself to this equitable remedy since there would be no adequate remedy at law to replace the real property. But this is not a situation of a buyer wanting the property and demanding specific performance from the seller in order to

get a unique piece of property. Here, Sam has an adequate legal remedy; he can sue for the liquidated damages.

Art Agent's remedies and defenses

Art can argue that Sam voluntarily entered into a contract not knowing the full extent of the contract and that this was a form of acquiescence that would keep him from later claiming any damages resulting from his own intentional ignorance.

Incidental Damages

Regardless of whether the written contract contained the exact methods that Art would use to market Sam's home and his actual commission, it is foreseeable that Art would incur these incidental damages as a result of performing on the contract. He will argue that it was entirely foreseeable that he would incur the costs of multi-media ads and elaborate open houses with champagne and expensive hors d'oeuvres. Art would have to show that these costs were necessarily incurred given the market and the expectations of the buyers and other agents bringing their clients to the open house.

Sam will want to put on evidence that these costs were excessive, impossible to foresee, not in the contract, and not bargained for. He will not want parol evidence (evidence external to the contract) to come into evidence at trial.

Equitable Estoppel or Waiver

Waiver is the intentional failure to assert a known right. Equitable estoppel is acquiescence to a course of conduct such that the party claiming equitable estoppel justifiably relied on this acquiescence and changed his position in accordance, causing damages.

Sam both failed to assert his rights regarding the terms of the contract and acquiesced to Art's elaborate marketing ploys. Art changed his position in justifiable reliance; he would not have incurred significant expenses if he thought Sam objected to his services. Art was injured as a result and should be reimbursed his expenses and his commission.

Sam's remedies and defenses against Art

Sam could argue that the extravagant multi-media ads and the open houses that were really house parties for Art and his Realtor friends were

damages that were not reasonable, and not foreseeable because there were entirely unnecessary. Sam and Art would turn to experts in the field to testify regarding standards in the industry. If Sam could show that these damages were self-inflicted by Art and were of no, or little, benefit to Sam, he may be able to avoid paying these damages. The real problem is the commission. He must have expected to pay a real estate agent some kind of commission. Art brought him a ready, willing, and able buyer. He performed on the contract and will most likely get a money judgment against Sam for his commission. If the commission is not explained in the contract, then a reasonable amount of commission can be determined by looking at the commissions of other real estate agents in the area. 10

END OF EXAM