

MONTEREY COLLEGE OF LAW

**REMEDIES**

Final Examination

Spring 2016

Professors J. Martin & R. Patterson

INSTRUCTIONS:

There are three (3) questions in this examination.

You will be given three (3) hours to complete the examination.

Question 1

Basta Pasta Co. (Basta), the largest single buyer of Tomatoes in the area, manufactured several varieties of tomato-based pasta sauces. Baster entered into a written contract with Farmer to supply Basta its requirements of the Plum, the only type of tomato Basta uses in its pasta sauces. The Plum tomato is known for its distinctive flavor and color and it is particularly desirable.

The contract which was on Basta's standard form, specified that Farmer was to deliver to Basta at end of the growing season in September all Plum tomatoes that Basta might require at \$200 per ton. The contract also prohibited Farmer from selling any excess tomatoes to a third party without Basta's consent. At the time the contract was executed, Farmer objected to that provision. A Basta representative assured Farmer that although the provision was standard in Basta contracts with its growers, Basta had never attempted to enforce the provision. In fact, however, Basta routinely sought to prevent sellers from selling their surplus crop to third parties. The contract also stated that Basta could reject Farmer's tomatoes for any reason, even if they conformed to the contract.

On September 1, Basta told Farmer that it would need 60 tons of Plum tomatoes at the end of September. Farmers anticipated that he would harvest 80 tons of Plum tomatoes beginning in September 30. Because of the poor growing season Plum tomatoes were in short supply. Another sauce manufacturer, Sauce Co. offered Farmer \$350 per ton for his entire crop of Plum tomatoes. On September 15 Farmer accepted the Sauce Co. offer and informed Basta that he was repudiating the Basta/Farmer contract.

After Farmer's repudiation, Basta was able to contract for only 10 tons of Plum tomatoes on the spot market at \$300 per ton, but has been unable to procure any more. Other varieties of tomatoes are readily available at prices of \$200 per ton on the open market, but Basta is reluctant to switch to these other varieties because Basta believes that Plum tomatoes give its sauces a unique color, texture and flavor. It is now September 20. Basta demands that Farmer fulfill their contract in all respects.

1. What equitable remedies are available to Basta to enforce the terms of its contract with Farmer, what defenses might Farmer reasonable assert, and what is the likely outcome on each remedy sought by Basta? Discuss.
2. IF Basta elects to sue for damages, what defenses might Farmer reasonably assert, and what damages, if any is Basta likely to recover? Discuss.

Remedies Final Exam

Spring 2016

Answer Outline – Question 1

1. (a) Specific Performance

(b) Negative Injunction

(c) Declaratory Judgement

△ unclean hands (misrep)

Unconscionable clauses

Not feasible for \_\_\_\_\_?

2. Misrep

Unconscionability

Duty to mitigate with other tomatoes?

Damages - Cover

Or cover ~~\_\_\_\_\_~~ price market price

**REMEDIES FINAL EXAM  
MODEL ANSWER FOR QUESTION \_\_\_\_\_**

PETE vs. DAN (Remedies)

1. **Compensatory Damages**

A. The value rule for Conversion Damages is **Value at Time & Place of Conversion**. The facts state that value was between \$20K and \$22K.

a. Issue re **Certainty**: Are the damages "speculative" or "conjectural"?

With any valuable item, there are varying estimates of value. The market price seems to still be certain, despite a range of \$2K.

b. Therefore, PETE could get a judgment for "market value". The \$20K would be more certain as it is validated by a publication that is presumed to be legitimate, rather than an "offer" which is not as certain.

2. **Punitive Damages**

A. Punitives may be appropriate as DAN was convicted of a crime and an intentional Tort. The doctrine is that Punitives are available to punish/deter when is **willful**, wanton, malicious behavior and that would apply here. The Punitive Dams must be proportional to the actual damages.

3. **Replevin**

A. PETE may want to recover the "Golden Gluteus" but Replevin would **not** be available as the remedy seeks return of a **specific chattel** and DAN no longer has possession.

4. **Equitable Restitution (Constructive Trust & Equitable Lien)**

A. PETE may seek to recover the property that remains in DAN's hands, as a result of the Conversion. CT would seek to recover property that PETE owns and claims title to, while an EL would be a lien on property that PETE doesn't own.

a. PETE might claim "ownership" of both the savings account and the modern gold coins by claiming to hold either a CT or EL. As they are examples of equitable restitution, PETE would need to follow equitable requirements and:

1. Claim that the **legal remedies are inadequate**, and

2. **Trace** the \$18K into the property (modern gold coins) that DAN now holds and the bank account that DAN used.

b. Issue re falling/rising savings account: PETE would claim that DAN spent his money first and replenished the deficiency to repay PETE's money.

c. Issue re appreciated value of modern gold coins: only a CT will allow the appreciated amount to be recovered.

d. If PETE's goal is to acquire the **highest money damages**, he would pursue \$19K as the appreciated value of the modern gold coins and \$4K that is presently available in the savings account, for a total of \$23K, an amount higher than the highest offer for the stolen coin.

PETE vs. THOR (Remedies)

1. **Constructive Trust**

A. As holder of a CT or EL, PETE would seek to recover from THOR.

- a. The doctrine re stolen property/item is that the purchaser is liable to the true owner as a thief cannot deliver true title.
  - b. An **exception** to that doctrine is if the purchaser is a **bona fide purchaser for value without notice (BFP)**.
    - 1. The facts recite that "value" of \$18K was paid by THOR.
    - 2. Issue: Did THOR have "**notice**"?
      - a. The exception is that a purchaser can claim legal title as a BFP and legal title will defeat the equitable title held by the holder of a CT or EL.
      - b. The legal title of a BFP will also defeat Replevin.
      - c. Here, the problem is THOR may be seen to have "constructive notice".
        - 1. The property (coin) is described as a "unique" item that seems to have a reputation for value.
        - 2. THOR is described as "another coin collector" who would presumably have an understanding of the coin and its true value.
        - 3. DAN's story to THOR that he "found the coin on the street" may not be plausible as antique Roman coins do not circulate as modern currency.
- B. Without status as a BFP, THOR would have to return the property/item via Replevin or CT, under the theory that he was acting as a "Trustee" for PETE.
  - a. If PETE desires **the return of the "Golden Gluteus"**, this may be his preferred remedy.

**REMEDIES FINAL EXAM**  
**MODEL ANSWER FOR QUESTION \_\_\_\_\_**

**PETE vs. DAVE -- Will PETE receive an Injunction against DAVE?**

1. Ripeness: DAVE's monthly publication is an ongoing action that DAVE contends is hurtful to his business. PETE will allege an injury and accrued damages. A Complaint has been filed and litigation has begun. The matter is ripe.
2. Inadequacy of Law & Irreparable Harm: PETE will allege that damages are inadequate because DAVE publishes monthly, so harm is ongoing and there would be a multiplicity of suits if he has to sue each month. PETE will allege that his sandwich shop is barely surviving and going out of business would be irreparable harm.
3. Feasible: All parties have a physical presence in Seaside and would be under the court's personal jurisdiction. As Equity acts in personam, it could enforce any injunction with contempt.
4. Property Right: The basis of the lawsuit is trade libel so property issues are at the core of PETE's lawsuit. Also, this requirement for equity is rarely problematic.
5. Speech: Because PETE wants to stop DAVE's political speech, he is attempting to interfere with a fundamental First Amendment right and most courts are reluctant to intrude in that way and "chill" speech. DAVE would reply that his newsletters educate the public and that his political speech is historically highly protected. If PETE attempts to say that the contents of the newsletters are defamatory -- a type of unprotected speech -- DAVE will reply that equity will not enjoin a libel.
6. Balancing of Hardships: PETE will argue that DAVE's newsletters may put him out of business and make four others unemployed. DAVE will argue that denying his speech would also deny his readers of a valuable viewpoint.
7. Clean Hands: PETE uses strong language when calling DAVE a "godless communist" but the courts will likely overlook that behavior. There is no indication that PETE engaged in unfair dealing with respect to his shop operation.

**PETE vs. DOUG -- Will PETE receive an injunction against DOUG?**

1. Ripeness: As stated, litigation has begun. The allegation about DOUG using cat meat brings up a matter public safety. The matter is beyond speculation and is ripe.
2. Inadequacy of Law & Irreparable Harm: PETE will argue that, if the injunction is not granted, he will be faced with regularly ongoing competition and the trade libel on DOUG's truck may put him out of business, hence an irreparable harm.
3. Feasible: As stated, all parties are within the court's jurisdiction and any equitable relief may be enforced by contempt.
4. Property Right: There are competing property rights in the PETE vs. DOUG controversy and equity's tradition is to protect property rights.
5. Speech: A limit to equity's power is that it will not enjoin a libel and PETE is contending that the slogan on DOUG's truck is a trade libel -- a type of speech that has little protection.

6. Balancing of Hardships: PETE will argue that he has an ongoing business that is in jeopardy because of a presumably illegal enterprise -- selling cat meat. DOUG would deny the cat meat allegation and state that he also has an ongoing business.
7. Unclean Hands: It is said that the party seeking equitable relief must not be guilty of "unfair dealing" in the transaction sued upon. If PETE is making up facts and is falsely accusing DOUG of using cat meat, he would be seen as dealing unfairly and equity would refuse any request.
8. Criminal Acts: It is said that equity will not enjoin a crime. If DOUG uses cat meat in violation of the criminal law, equity will allow another agency to investigate and punish. An exception is that equity will stop a Nuisance. If the serving of cat meat is seen as a public nuisance, equity may act to enjoin.

1)

===== Start of Answer #1 (2503 words) =====

### 1. Equitable remedies and defenses

Instead of seeking damages resulting from Farmer's (F) breach of the contract, Basta (B) may seek to enforce the contract at equity, in which the court has greater leeway to determine what is the fairest result based on the facts. In seeking to enforce the contract in equity, B has the following options.

#### Quasi-contract

A quasi-contract is a contract that is implied by law without regard to the parties' intent, and sometimes even with their express dissent. Quasi-contracts are used to determine the rights and obligations of the parties, and are enforced either through quantum meruit (reasonable value of services rendered) or quantum valebant (reasonable value of goods rendered).

In this case, the court could find that there is a quasi-contract between F and B for 50 tons of tomatoes B indicated it would need at the end of September (although B originally indicated he needed 60, he has already bought 10 tons and only needs 50 more). F can supply this, because he is estimating a harvest of 80 tons. Even though F did not intend to enter into this contract, as demonstrated by his sale to Sauce Co., the court could find that in the interest of fairness, F should be obligated to supply B with the 60 tons of tomatoes F needed for this season. This quasi-contract would replace the ongoing requirements contract that B and F originally had, and would most likely require F to sell B the 60 tons of tomatoes for \$200/ton, leaving F to sell the remaining 20 tons of the harvest to Sauce Co. or to someone else if he wishes. Since the immediate issue is whether B can gain the benefit of his bargain and fulfill sauce manufacturing for the season, it is unlikely the court would include the provision in the originally contemplated contract prohibiting sales to third parties. However, since B has



bought 10 tons already at a price that is \$100/ton higher than that which he originally negotiated with F, the court may find that F must assume responsibility for this \$100/ton increase caused by F's repudiation.

*Conclusion:* The court may find a quasi-contract between F and B, requiring F to sell B 50 tons of tomatoes at \$200, and reimburse B for the extra \$1000 he spent buying 10 tons of tomatoes at a higher price. Consequently, B would be required to pay F \$9000 for the reasonable value of goods that F must render (quantum valebant)

### Specific performance

Instead of forming a quasi-contract modifying the terms of the original contract, B could seek specific performance to enforce the terms of the original requirements contract itself. In order to successfully seek specific performance, B must show: (1) that the contract had certain and definite terms, (2) that legal damages are inadequate, (3) it is feasible for the court to order specific performance, and (4) there is mutuality of performance between B and F.

*Certain and definite terms:* Because specific performance would require a breaching party to comply with a contract the party does not want to comply with, it is very important that the terms of the contract certainly and definitely specify the rights and obligations of the parties. B would argue that all of the terms of the contract have been clearly spelled out: this is a requirements contract indicating that F will supply B with all of its requirement for the Plum tomato, to be delivered in September at \$200/ton. F, on the other hand, would argue that two provisions of the contract were uncertain, thus rendering the contract unsuitable for specific performance: the third party provision, and the rejection provision. F would assert that the clause prevented sale of excess tomatoes to a third party without B's consent is unclear, because F objected to the provision and was informed that B does not enforce the provision, even though B has routinely used this provision against other growers. Based on the discrepancy between

B's communications to F and its conduct, it is very unclear whether this provision is enforceable as between B and F. Second, the provision that allows B to reject F's tomatoes for any reason, even if they conformed to the contract, is unclear and inconsistent with B's desire to buy as many tomatoes as it needs from F. Based on these two provisions, it is likely the court would find the certain and definite terms element has not been satisfied.

*Inadequacy of legal damages:* The inadequacy element is often met where there is a unique item that cannot be easily recovered elsewhere, particularly when a requirements contract is involved since it is very unlikely the nonbreaching party will be able to find a suitable cover contract with similar terms. B will argue that the goods involved are unique, because only the Plum tomatoes are suitable and they have been very hard to find elsewhere on the market, as evidenced by the fact he was only able to find 10 pounds of Plum tomatoes on the market. This also supports the argument that the requirements contract itself is unique and irreplaceable, because if B was so unsuccessful finding a large supply of tomatoes on the market it is likely there are no harvesters willing to supply him with all of the Plums they produce. Additionally, it is already at the end of the growing season and most Plums have likely already been sold. The court will likely find that this element has been met.

*Feasible:* feasibility examines both the court's ability to order the relief sought and the feasibility of performance by the breaching party. The court may order F to adhere to the terms of the original contract, because doing so would not constitute forced servitude and would still result in benefit to F by being paid for 60 tons of tomatoes this season. However, the fact that F has already accepted Sauce's offer to purchase the entire crop may make specific performance unfeasible. If Sauce Co is a bona fide purchaser without notice of F's previously existing contract with B, then the court may not be willing to force F to breach his contract with Sauce Co, particularly if the tomatoes have already been delivered. The court will likely find that this element has not been met.

*Mutuality of performance:* The nonbreaching party must be ready and willing to perform his end of the contract, which B has demonstrated he is.

*Conclusion:* Due to the uncertain and indefinite contract terms and lack of feasibility in ordering specific performance, the court will likely not rule in B's favor to require enforcement of the original contract between B and F.

### Injunction

B could seek to enforce his original contract with F by seeking an injunction preventing B from satisfying his contract with S. To receive an injunction, B must show: (1) inadequacy of legal damages, (2) feasibility, (3) identifiable parties, (4) irreparable injury, and (5) balancing of interests.

For analysis of inadequacy of legal damages and feasibility and likely conclusions under these elements, see above under specific performance.

*Identifiable parties:* F and B are both identified as parties to the original contract, and Sauce Co and F are identified as parties to the contract B is seeking to enjoin, thus this element is met.

*Irreparable injury:* Since B has been unsuccessful in securing an adequate cover supply of tomatoes to mitigate the effect of F's repudiation, B will most likely be unable to meet its own requirements for producing its pasta sauces. It is not willing to switch to other varieties, because the quality of its sauce depends on securing the Plum tomato. If F is able to sell the tomatoes to Sauce Co rather than to B, B will be irreparably damaged by not being able to produce sauce this season, to the likely detriment of its business model.

*Balancing of interests:* The interests that B has in securing his requirements contract with F have been discussed above under irreparable injury. Contrasting this interest is F's interest in receiving the highest value possible for his crops, in this case receiving an additional \$150/ton -- almost twice the value of his contract with B. However, subsequently receiving a better offer does not allow a party to breach an already existing contract, and since B only needs 50 more tons of tomatoes for this season, it is likely B will authorize F to sell its remaining 30 pounds of tomatoes to Sauce Co. On these facts, it does not appear that F's interests outweigh B's.

*Conclusion:* Subject to the issue of feasibility, B may be successful in proving the remaining elements of an injunction. If F has not already delivered the tomatoes to Sauce Co, it is likely the court will order at least a preliminary injunction preventing F from performing his contract with Sauce Co.

### Defenses

*Sale to BFP:* F may assert that he has already sold the tomatoes to Sauce Co, and is therefore unable to comply with the terms of its contract with B, even if B is otherwise able to enforce the contract. The facts do not indicate whether Sauce Co entered into the contract with F knowing that F already had a contract with B, or whether the tomatoes have actually been delivered. If they have, and if Sauce Co did not have notice of the prior contract, then this will likely be a valid defense (particularly regarding the elements of feasibility discussed above)

*Unconscionability:* F could assert that the third party and rejection provisions of the contract are unconscionable, because they oppressively limit F's ability to act freely with regards to goods that B is not going to use. Additionally, there is lopsided consideration giving B a disproportionate benefit by being able to control F's sale of goods that B does not need, and by having the right to reject any tomatoes for any reason even if they otherwise satisfy F's obligations. The court is likely to find these terms

unconscionable, and may blue-pencil them from the contract while retaining the other provisions.

*Equitable estoppel*

F would argue that he was induced to enter the contract with B due to the misrepresentation by B's representative that the third party provision would be enforced. F would have to show that B intended for F to rely on this provision, which is likely due to the fact that F expressed hesitation about entering the contract due to this provision. F did not know that B in fact routinely enforces this provision, contrary to the statement by B's representative. F did rely on this statement, because he entered the contract and did not make further objections to the provision believing that it was a standard clause that would not be enforced. F could argue that allowing B to sue on this contract would not be equitable, since F would not have been able to contract with Sauce Co to sell extra tomatoes at a higher price without seeking B's approval. This would have been a much more valid defense if F had not already entered into another contract with Sauce co. However, F could argue that on the basis of B's misrepresentation, the contract should be rescinded entirely.

*Unclean hands:* F could argue that B's misrepresentation about the third party provision constitutes misconduct that does not entitle B to equitable relief. However, the misconduct must relate to the specific activity implicated in the lawsuit, and although the misrepresentation relates to the contract as a whole, the third party provision has not been directly implicated since F has chosen to repudiate the entire contract. B did not engage in any misconduct related to the provision of Plum tomatoes, thus F will likely not succeed in asserting this defense.

Conclusion: B's best argument at equity is to seek a quasi-contract requiring F to provide the remaining 50 tons at \$200, less the extra \$1000 that B had to spend buying 10 tons of market tomatoes at a higher price.

Question 2

PETE is an avid collector of gold coins and his collection favorite is a unique, antique Roman coin that bears the profile of Emperor Gluteus. A coin pricing publication lists the "Golden Gluteus" being worth \$20,000 and PETE has been offered as much as \$22,000 for it. PETE keeps the coin in a safe inside his house.

DAN is PETE's neighbor and DAN understands that the coin is valuable. After PETE leaves for a long vacation in May, DAN breaks into PETE's house and easily opens the safe because PETE left the secret combination written on a Post-It stuck on the computer screen. DAN quickly sells the gold coin to THOR, another coin collector, for \$18,000 after telling THOR that he found the coin on the street.

DAN deposits \$4,000 of the proceeds in a savings account that already contains \$3,000 of his own money. The balance of that account had dropped to a low of \$2,000 during June, but is now \$5,000.

With the other \$14,000 of the proceeds, DAN purchases modern gold coins. The price of gold goes up dramatically in June and they are now worth \$19,000.

PETE returns from his vacation in July and discovers that the "Golden Gluteus" is missing. Surveillance tapes show that DAN is the thief and DAN confesses to the police that he sold the rare coin to THOR. DAN is convicted criminally and PETE succeeds in a civil action against DAN in Conversion.

What are PETE's remedies against DAN and THOR?

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## 2. Damages and defenses

### General requirements

In order to recover any damages, B must prove that the damages are foreseeable, unavoidable, and certain.

*Foreseeable:* In proving general damages, B does not need to prove any special knowledge on the part of F. It is foreseeable that B would have to find other Plum tomatoes if F breached, and that B's business would suffer by not having the tomatoes. B could therefore recover expectancy damages in the form of lost profits, calculated by the difference between what B was able to make selling sauce from only 10 tons of tomatoes, and what he would have made had he received the full 60 tons as contemplated by the contract. In addition, B can recover special damages by proving that F had special knowledge of circumstances that caused B to suffer damages other than expectancy damages. Due to the nature of the requirements contract, F knows that B is relying exclusively on F for all of the tomatoes it needs for the season, and F mostly likely also knows that B only uses Plum tomatoes for its pasta sauces, as demonstrated by the fact that the Plum is known for its distinctive flavor and color. B could therefore also recover special damages resulting from F's breach.

*Unavoidable:* F would have the burden of proving that B did not satisfy his duty to mitigate damages by avoiding additional loss resulting from the breach. B can meet this by showing that he searched on the market for Plums and was willing to pay a higher price for them, but could only secure 10 tons. B's attempt to purchase the tomatoes elsewhere indicates that losses from the remaining 50 tons were unavoidable.

*Certain:* B cannot receive damages that are speculative. In this case, B can calculate both the exact number of tons of tomatoes he is missing, the difference in price he paid for market tomatoes, and should be able to calculate expectancy damages from lost





2)

===== **Start of Answer #2 (1869 words)** =====

**Remedies against Dan**

**Damages**

Pete may choose to seek legal damages from Dan (D) in the form of money resulting from the loss of his gold coin collection. Recovery of damages is subject to the requirements discussed below.

*Foreseeable* ✓

P must show that damages resulting from D's conversion were foreseeable as a result of D's tortious act. At the time that D stole the coins, it was foreseeable that P would suffer damages in the amount of the lost value of the coins. In this case, the market value of the coins is worth \$20,000. Although P has received an offer for \$22,000, he would likely have to show that D had special knowledge of this value in order to seek the \$22,000. Most likely, the value of \$20,000 will be determined a foreseeable loss resulting from D's conversion.

*Unavoidable* ✓

The coins are unique antiques bearing a special profile. Although P has a duty to mitigate damages, the entire value of his coin collection is based on him having possession of the coins. Since the coins have been stolen and subsequently sold to Thor (T), there is very little P can do to mitigate his damages. The full lost value of \$20,000 therefore is unavoidable.

*Certain* ★

The circumstances of the \$22,000 offer are unknown, and it is likely that this value is speculative. However, a pricing publication lists the value of the coins at \$20,000, which is not a speculative price and satisfies the requirement of certainty.

OK

*Causation*

Damages must have been caused by the tortious act. In this case, D's tortious act of conversion caused P to be deprived of his coin collection, resulting in the lost value of \$20,000. D's act therefore proximately caused P's loss and satisfies the causation element.

ISNT THIS SAYING THAT THE DAMAGES CAN BE MEASURED W/ CERTAINTY?

Calculation

Since the value of the coins is currently at \$20,000 and does not represent the sum of a value that should have been awarded over time (such as lost wages), there are no additional calculations or discounts that need to be made to determine the damages owed to P.

*Conclusion:* Should P seek damages, he will most likely be entitled to \$20,000 representing the value of the stolen coins. These damages are actionable against D, because D has been convicted of conversion

Restitution

Instead of seeking damages against D, P may seek restitution, which applies where there is unjust enrichment (in this case resulting from D's theft and conversion of P's coins), and is calculated according to the benefit D received, including ill-gotten gains.

P must elect between damages and restitution -- he cannot receive both. The value of the benefit to D is the \$18,000 he received from selling the coins to T, including any gains made by D on this \$18,000, as further discussed below.

**Constructive trust:** Since D acquired P's coins unlawfully, the money that D received from selling the coins to T in fact belongs to P, and by holding the money, D has been an unjust "trustee" holding P's money in constructive trust. This restitutionary remedy is based on an analogy to traditional trust formation, in which a trustee may manage money or property held in a trust but is not the true owner of the trust corpus and must take all actions for the benefit of the trust beneficiary. Since P was the rightful owner of the coins, he is the beneficiary of the money D received from selling the coin to T. P is therefore entitled to the money from the sale itself (the \$18,000), plus any resulting gains that D has been made by using this money while it was in a constructive trust and rightfully belonged to P.

very over

In order to recover these gains, P must show that D has been unjustly enriched by wrongfully acquired property, and that legal remedies are inadequate. In order to determine unjust enrichment, P MUST trace D's gains to property that was rightfully owned by P. Accordingly, in addition to the \$18,000 D received upfront from selling the coins, P is entitled to the proceeds from D's use of the money. D did two things with the \$18,000: he put \$4,000 in a savings account, and used \$14,000 to purchase additional coins. P's entitlement to both uses of money under a constructive trust theory are discussed below.

easy score way to answer this

1. Savings account: P can trace the \$4,000 D deposited in his savings account to the money that D received from T by selling T the gold coin. D's receipt of this money was the direct result of selling property (the coin) that belonged to P, therefore the \$4,000 can be traced to P. This fund already contained money that was rightfully owned by D, in the amount of \$3,000. The total value of the savings account was therefore originally \$7,000 of commingled funds representing \$4,000 owned by P and \$3,000 owned by D. This value dropped to \$2,000, but has now increased to \$5,000. According to tracing presumptions used to determine whether D has been unjustly enriched (specifically, the Jessel's Bag Rule), expenses and losses are presumed to have been paid first with money that is rightfully owned by the person accused of unjust enrichment. Therefore, the overall loss of \$2,000 that D experienced is presumed to have first affected the

\$3,000 amount that rightfully belonged to D. This still leaves an amount of \$1,000, which together with the original \$4,000 owned by P equals the \$5,000 currently in the account. Because \$1,000 of this can still presumably be linked to money rightfully owned by D, the only remaining amount that P is entitled to is the \$4,000 that has already been contemplated in the \$18,000 restitution figure resulting from D's sale of P's coin. P is therefore not entitled to any other gains from this savings account, and cannot prove that D has been unjustly enriched by use of the \$4,000. Consequently, legal damages are a more adequate option and P cannot recover additional gains on a constructive trust theory as to the money in D's savings account.

2. Purchase of additional coins: P can trace the \$14,000 D used to purchase additional gold coins to the money that D received from T by selling T the gold coin. D's receipt of this money was the direct result of selling property (the coin) that belonged to P, therefore the \$14,000 can be traced to P. D used this money to purchase more coins, which have gone up in price to \$19,000. Since this increase in value resulted solely from money that should belong to P, D has been unjustly enriched in the amount of \$5,000. Since P would not be entitled to this additional \$5,000 on a legal damages theory (because the increase in value is too speculative and not foreseeable), P can recover the additional \$5,000 in constructive trust.

*Defenses:* The only available defense to D is that he has already sold the coins to a bona fide third party. However, since P is not seeking to recover the coins themselves from D, and is only seeking the money and gains resulting from D's sale of the coins (which money D still has in his possession), this defense does not apply.

*Conclusion:* Should P choose to seek restitutionary remedies on a constructive trust theory INSTEAD of damages, P will be entitled to the \$18,000 benefit D received from selling P's coins to T, in addition to the \$5,000 gain D made on using a portions of those proceeds to buy more coins. P can therefore recover \$23,000 total on a restitution theory. P will likely choose the restitutionary rather than damages remedy against D, because under restitution P receives more money. P must elect between

damages and restitution -- he cannot recover both.

### Remedies against Thor

#### Replevin

P may seek to recover specific personal property (ie. the coin that D sold to T) from T under replevin by showing that P is the rightful owner of the coin, and that T's retention of the coin would result in unjust enrichment. P has already established that he was the original legal owner of the coin, as evidenced by successfully prosecuting D for theft and suing him for conversion. However, since T did not steal the coin from P, but instead purchased it lawfully from D, T will argue that he has become the rightful owner of the coin (see below for discussion of the defense of sale to BFP). P can demonstrate that T's retention of the coin results in unjust enrichment, because T is now in possession of a coin that he never would have had but for D's unlawful act. Since P would still have retained both ownership and possession of the coin if D had not broken into P's house, T would not have had the opportunity to purchase the coin except from P himself. T has therefore been unjustly enriched by possessing a coin with a value of at least \$20,000 for which he only paid \$18,000 and that should continue to belong to P.

Should P be successful in seeking replevin against T, he may also be entitled to any damages from T resulting from loss of use of the coin. Since P has just returned from his vacation and would not have been using the coin anyways even if it had remained inside his safe, it is unlikely that he suffered any additional damages and will mostly likely only be able to receive the coin itself from T.

#### Sale to BFP

Sale to a bona fide purchaser for value (BFP) is an equitable defense to replevin. T

can show that he purchased the coin from D for a value of \$18,000, and will argue that this makes him the rightful owner of the coin such that P is not entitled to replevin. P will argue that in order to be a BFP, T must show that he didn't have notice of the unlawful means by which D acquired the coin that T bought. To show this, T will argue D told him the coin was found on the street, and that because of this statement, T had no indication that the coin in fact belonged to someone else and was not D's to sell. However, P will counter by saying that T obviously knew of the value of the coin by being willing to pay \$18,000 for it, and that it is highly unlikely a coin of such value would be found in the street. These suspicious circumstances should have at least put T on inquiry notice that the coin was not acquired lawfully, creating a duty in T to request further documentation or proof from D as to the coin's true origins. Both the amount T paid for the coin and the unlikelihood that the coin was in fact found on the street indicate that T should have known D did not rightfully own the coin -- which knowledge defeats his BFP defense.

yes!

Conclusion: Due to the suspicious circumstances surrounding D's sale of the coin to T, T is most likely not a BFP. P is therefore the rightful owner of the coin, and can recover the coin itself from T by seeking replevin.

=====  
End of Answer #2  
=====

THIS PAPER WAS THE BEST RESPONSE OF THE CLASS!

well done

Question 3

PETE owns and operates a sandwich shop near Seaside Law School. The sandwich shop has been in business for three years, employs two full-time and two part-time employees. Monthly profits are marginal and, during some months, there is no profit from the business.

DAVE is a left-wing radical who attends the Seaside Law School. He publishes a monthly newsletter that he sends electronically to several friends, urging them to revolt against the "American ruling class"-- a group that consists of bankers, businesspersons, and politicians. DAVE names PETE as one of the undesirable businessmen, calling him a "capitalist crook".

DOUG operates a burrito truck and he parks it near PETE's sandwich shop. The burritos are made with fresh ingredients and are eagerly purchased by the law school students. DOUG has the slogan, "A Burrito Beats a Sandwich", painted on the side of his truck.

PETE sues both DAVE and DOUG in trade libel, seeking damages and injunctive relief in each action. Against DAVE, PETE states that he is a "godless communist" whose newsletters are hurting his business. Against DOUG, PETE states that his burritos are made with feral cat meat, and that his burrito business should be investigated.

- Discuss: 1. Is PETE entitled to an injunction against DAVE?  
2. Is PETE entitled to an injunction against DOUG?

(Discuss injunctive relief only. Do not discuss Trade Libel.)

\* \* \* \* \*

3)

=====**Start of Answer #3 (904 words)**=====

Injunctions

The process to obtain an injunction involves three steps:

*NOT THE QUESTION!*

1. Temporary injunction



A temporary injunction is used to maintain status quo for a short period of time until a preliminary injunction hearing can be held. A temporary injunction is an ex parte proceeding (D would not need to be present). P will have to convince the judge (no jury trials in equity) that there is a danger of irreparable harm here and that he has a good likelihood of successfully obtaining a permanent injunction at trial on the merits of his case. The court will also balance the hardships of P and D here to determine if the hardship of P if the injunction is not granted outweighs the hardship of D if it is.

2. Preliminary injunction



A preliminary injunction is also used to maintain status quo until the full trial can be heard for the permanent injunction. However, it is an inter partes proceeding where D is required to have notice and an opportunity to be heard (due process). The same elements apply here. The court will first determine if there is an inadequate remedy at law (damages, see below), and if money damages will not suffice for P, then the court will look for irreparable harm, balancing of interests, and likelihood of success at trial.

3. Permanent injunction

A permanent injunction requires that P show:

- a. Inadequate remedy at law *IRREPARABLE HARM*
- b. A property interest
- c. Feasibility: The court must determine if they can supervise and execute the injunction if granted.
- d. Balancing of interests

?



ID: [redacted] (Remedies-SPR16)

*OK THIS PAGE IS MUCH BETTER.*

e. Defenses

1. Injunctive relief, P v DV

This is a defamation cause of action. P will seek to enjoin (via injunction) DV from continuing to libel him in his newsletter.

Is there a danger of irreparable harm?

*← GOOD*

The facts state that DV writes this newsletter that he sends to "several of his friends". How many friend are these and since it is sent electronically, does it get posted elsewhere or is it otherwise redistributed? How many people actually read his newsletter on a monthly basis? It would not appear that there are many readers, thus the harm may be very small. Can P show that he is losing customers because of what DV is writing about him? This is probably unlikely. In fact, if "all press is good press", DV may argue that he actually benefitted P in terms of sales. Customers may want to know what a "Capitalist Crook Sandwich" tastes like. There is a good argument here that the harm is small and not irreparable.

*OK!*

Balance of hardships

When the court balances the hardship of the parties here, the damage to P appears to be small. However, the damage to DV is also small. Restricting him from writing anything further about P may not be a hardship at all, but the courts are loathe to enjoin speech, see below. Therefore, the court is not likely to grant this injunction.

*↑*

Permanent injunction

Assuming P made it to full trial, he would need to show all the elements necessary to be granted a permanent injunction.

Inadequate remedy at law:

P doesn't want to be paid for the damage that he claims DV has caused. He just wants him to stop. Furthermore, even if he did want to be paid damages, they are likely very uncertain, and possibly very small.

A property interest (known parties):

The parties here are clearly P and DV. The property interest is the newsletter as it pertains to P's reputation.

Feasibility:

The court could likely supervise an injunction against DV. If DV violated the injunction, he could be charged with contempt to enforce the judgment.

Balancing of hardships:

As stated above, the hardships for both parties are small, but the interest of DV pertains to 1st amendment rights, which may carry the argument.

Defenses

DV will claim 1st amendment violations here in that his freedom of speech has been restricted. However, defamation is not protected speech, therefore if the court finds that calling P a "capitalist crook" publishing that to 3rd parties, damaged P, P can recover.

body

DV may also claim unclean hands because of the statements that P made about DV being a "godless communist".

2. Injunctive relief, P v DG

P claims that DG's burritos are made with "feral cat meat" and that he should be investigated. He seeks to enjoin DG from doing business from his burrito truck until such an investigation can be completed.

Following the same analysis, P will have to show in the initial ex parte proceeding that there is a danger of irreparable harm. If it were true that DG was using feral cat meat in his burritos, that could be cause for irreparable harm, and thus the granting of the temporary injunction. Even if the court were to agree that this constituted a public health issue and that a temporary injunction was required, at the preliminary hearing, DG would bring ample evidence (such as proof of his ingredient suppliers) that he does not use cat meat and therefore at that point, the injunction would be denied. DG could then



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**END OF EXAM**