

Kern County College of Law

REMEDIES

Professor David Zulfa

Final, Spring 2025

Instructions:

Answer three (3) questions in this examination.

Total Time Allotted: Three (3) hours.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material and immaterial facts and discern the points of law and facts upon which the case turns. Your answer should show you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other. Your answer should evidence your ability to apply the law to the facts and reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show you remember legal principles; instead, try to demonstrate your proficiency in using and applying them. If your answer contains only a statement of your conclusions, you will receive little credit. State the reasons supporting your conclusions and discuss all points thoroughly. Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

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Question One

Ricky, a music producer and guitar collector, owns a vintage guitar collection. Ricky's collection is worth about \$750,000.

The lead guitarist of the Cockroaches—a super band from England—offered Ricky \$1 million for the collection on the condition Ricky could secure a 1969 Spender Radiocaster Thinline, a rare and high dollar guitar. Thinline were never sold to amateurs and the '69 was particularly rare.

Carl found an old guitar in his sister's attic when cleaning it out after she passed away. Carl knew nothing about guitars. The guitar was filthy with missing and broken strings. In its discovered condition it was not clear what make and model it was.

Carl knew Ricky collected guitars. Carl called Ricky to see if he was interested in the old guitar. When Ricky saw the old guitar he immediately recognized it as a 1969 Spender Radiocaster Thinline. It also seemed someone signed it but the signature was obscured by the dirt. Ricky believed the signature was important, but he did not tell Carl anything about the guitar.

Ricky showed Carl a page on Ebay with various electric guitars ranging from \$200 to \$14,000. He explained that the difference in price was based on condition and that because Carl's guitar was in such poor condition, it was worth little. Ricky offered \$5,000. Carl accepted immediately and promised to deliver the guitar the next day. Ricky called the Cockroaches' lead guitarist that same day and made the deal to sell his collection, including the rare 1969 Radiocaster Thinline, for \$1 million.

Carl wondered why Ricky offered \$5000 for the beat up instrument. He decided he would take the guitar to a music store and see if someone there could clean it up tell him a bit more about it. The shop owner cleaned the guitar, restrung it and commented that the guitar was in excellent condition. The owner explained the guitar was a 1969 Spender Radiocaster Thinline made from rosewood with a maple fret board—one of the most unique guitars ever made. The music shop owner also pointed out that the guitar seemed to have been signed by Dobb Bylan.

Carl called Ricky and said, "I learned the guitar I sold you is signed by Dobb Bylan and is made of rosewood and maple. It is worth \$50,000 if it is worth a dollar. I am going to sell the guitar to someone more honest than you."

Ricky sues Carl for breach of contract.

What remedies should Ricky seek?

What are Carl's claims and defenses?

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Question Two

Smith is the owner of a tree trimming service. Smith often works six days a week due to his good reputation. Smith also has equipment that allows him to trim and remove trees others are cannot due to their size. On average he earns \$75.00 per hour – but will charge a premium of \$125.00 per hour for work on oversized trees. Recently, Smith entered into negotiations to purchase two additional rigs that he would own and rent to other tree trimmers for a flat fee per job.

Last week, while trimming trees at a Flying Heart truck stop, Smith was struck by Jones. Jones was distracted by signage at the truck stop. This is the third collision involving drivers claiming the signage distracted them while operating their vehicles. Flying Heart refuses to remove the signage because they are paid by the beer company to maintain the signage.

The collision damaged Smith's equipment that allowed him to work on large trees. Smith also sustained injuries that make it difficult for him work for more than one hour without severe pain. It takes physical therapy sessions three times a week to address his injuries. Smith skips several of the therapy sessions and works smaller jobs – charging \$50 per hour. He no longer works six days a week due to the pain from the injuries. As a result of the collision, Smith stopped trying to purchase the additional rigs.

Smith sues Jones and Flying Heart as a result of the collision. A jury finds both Jones and Flying Heart liable to Smith for the damages caused by the collision. In the second phase of the trial, Smith seeks to monetize these damages. What damages should the jury award as to both defendants? Are there damages available against one defendant that would be unavailable against the other defendant? Discuss the defenses Jones and Flying Heart may assert.

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Question 3:

The board of directors of Pinkerton, Inc. enters into a contract with David for David to become the new Chief Executive Officer of the organization. During negotiations, David agrees to work for Pinkerton, Inc. for \$3.2 million/year plus health insurance and a lifetime pension based on his highest year salary so long as he stayed the 5 years that the contract called for. David leaves his role of Chief Financial Officer of Horizon, Inc. In his role at Horizon, David was making \$2.5 million per year and by leaving prior to the end of the year, was forfeiting a lifetime pension in the amount of his highest year's salary. Pinkerton knew this during the negotiations.

The negotiations included a liquidated damages clause of \$100 million should Pinkerton let David go without cause during the contract. At age 35, it was likely that David had a useful work life of 30 more years. Another provision of the contract stated that if David chose to stop working for Pinkerton, he could not work for any other company similar to Pinkerton's for the following 10 years.

During his first week on the job, at David's direction, Pinkerton contracts with EngCorp. Pinkerton manufactures computer power switches, and EngCorp agrees to use Pinkerton's switches exclusively. During negotiations, EngCorps tells David that delivery of the switches in one month is critical because it is the starting point for the manufacturing of their computers and that if the switches come in late, EngCorp will lose approximately \$5 million in revenue for the year, due to tight deadlines from its end users. David says that it will be no problem to supply them and they finalize the deal.

David then learns that Pinkerton's switch making machine is being repaired, and they won't be able to supply EngCorp with the switches in time. At the time David made the deal, the switch making machine was working properly.

As a result, Pinkerton missed EngCorp's deadline. Pinkerton's Board of Directors fired David, even though it was without cause. He promptly went back to Horizon, Inc. and was hired as its CEO.

What remedies can David seek from Pinkerton, Inc.?

What remedies can EngCorp seek from Pinkerton, inc.?

Will Pinkerton succeed on its suit to enforce the non compete clause?

David requests a jury trial. Will that be granted for all causes of action?

	KCCL-REMEDIES-SPR25-JUDGE ZULFA-QUESTION 1 ANSWER OUTLINE
TRO?	
2	<i>What (granted in equity to preserve the status quo until hearing)</i>
2	<i>When (emergency situations)</i>
5	<i>Elements: 1. Irrep. Harm; 2. Balance the hardships; 3. Likely to prevail on the merits</i>
2	<i>Can be ex parte but good faith effort to attempt service, or strong showing why not</i>
2	<i>Short duration, 10 to 14 days depending on jx</i>
1	<i>Inadequate damages may be required</i>
5	<i>Notice: facts (agitated seller)</i>
4	<i>Inadequate dams: unique, but damages are calculable</i>
5	<i>Irrep harm: possible sale could occur before prelim hearing; few others, all in private hands</i>
5	<i>Balance of hardships: no other offer pending, short wait can't hurt Carl</i>
5	<i>Likely to prevail on the merits: valid K, defenses aren't considered in TRO, so satisfied.</i>
Preliminary Injunction?	
2	<i>Preserve status quo, like TRO</i>
5	<i>Elements: 1. Irrep. Harm; 2. Balance the hardships; 3. Likely to prevail on the merits</i>
3	<i>Bond required</i>
3	<i>Notice required</i>
3	<i>Defenses matter</i>
2	<i>Unclean hands</i>
2	<i>Fraud/misrep: value</i>
Specific Perf.?	
1	<i>UCC is governing law for the K</i>
5	<i>Anticipatory repudiation: Carl called/not selling to Ricky/stop perf and sue for dams or spec perf.</i>
4	<i>Spec Perf only for Unique goods and certain real estate transactions</i>
5	<i>Elements: valid K with clear def terms, inadequate legal remedy, feas enforcement, mutuality of perf, and no defenses.</i>
5	<i>Valid K? assent and consideration: UCC: valid K on its face: offer, acceptance, and consideration</i>
5	<i>SOF: goods? \$500? But is either a merchant? Or pers property? \$5000? Defenses to SOF? Admission of K or Promissory estoppel? Offer? Reliance? Significant loss in reliance on promise?</i>
5	<i>Inadequate dams: price of collection, but only with the disputed item</i>
5	<i>Misrep: misrep of material fact; intent to induce reliance; actual/justifiable reliance: misrep re value, silent as to true nature of the guitar</i>
2	<i>Unilateral mistake</i>
2	<i>Unclean hands</i>
2	<i>Good faith and fair dealing</i>

Question 2 -Outline of Answer

As to Both Defendants:

- I. *General and Special Damages*
 - a. *Physical Injuries*
 - b. *Property Damage*
 - c. *Lost income*
 - d. *Costs to Mitigate*

- II. *Future Damages*
 - a. *Lost/reduced income*
 - b. *Lost opportunity*
 - i. *Increased rates for large tree services*
 - ii. *Opportunity for the New Trucks*

- III. *Punitive Damages as to Flying Heart*

- IV. *Defenses*
 - a. *Certainty*
 - b. *Discounting*
 - c. *Failure to Mitigate*
 - d. *Intent (as to Flying Heart and Punitive Damages)*

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Question 3 Answer outline:

David v. Pinkerton

- *Liquidated damages*
 - *A clause that provides a reasonable estimate of the loss is liquidated damages. A clause that provides an unreasonably large recovery is a penalty and penalty clauses are void because they violate public policy.*
 - *Possibly okay – gave up a lucrative job with a lifetime pension.*
 - *Still has 30 years left to work*
 - *Pinkerton is sophisticated and these are sophisticated parties.*
 -

EngCorp v. Pinkerton

- *Consequential damages*
 - *In contracts, they do not flow directly from the breach and are recoverable only upon a showing that they 1) were not too speculative and 2) foreseeable at the time the contract was made.*
 - *EngCorp was clear they needed the switches in time or else their production would go down.*

Pinkerton v David – non compete

- *May or may not be allowed*
- *Equity – restraining order*

David's request for jury trial on all causes of action

- *Yes to Liquidated damages (legal)*
- *No to non compete issue (equitable)*

Contempt by lawyer

- *Criminal*
- *Direct or Indirect*
 - *If direct, can be summarily found in contempt*
 - *If indirect, afforded due process considerations.*
- *In front of clerk, so considered direct.*

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1)

Ricky's Remedies

Ricky's remedies would be equitable claims which means that he is not going to pursue legal remedies which would allow him the opportunity to exercise his 7th Amendment Constitutional right to a jury trial. The judge would decide the case and the judge could use the powers of contempt should a party not follow a court order.

Issue: Injunction

Rule: an order or decree of the court preventing or compelling an action

Analysis: Here, Ricky can request an injunction because he is trying to prevent Carl from not following through with the sale of the guitar and would be requesting assistance by the court for an injunction to help Ricky ensure that Carl performs his side of the contract.

Conclusion: Here, Carl may be granted an injunction so the court can hear both sides and make a final decision.

Issue: Injunction Requirements

Rule: In order for a court to grant an injunction, the P would have to show propensity, irreparable damage, and a legal remedy is not good enough.

Analysis: Here, Ricky would have to show the court that he is trying to prevent Carl from selling the guitar (propensity), Ricky's legal damage is that he was relying on that purchase price for the guitar because he sold it to a third party without Carl's knowledge and is relying on the sale to take place between himself and Carl; the guitar is a unique piece of property and a legal remedy is not good enough to help them come to a resolution.

Conclusion: Here, Ricky meets two of the elements only such as the propensity and that a legal remedy is not good enough to resolve this matter. He does not meet all of the elements to obtain an injunction.

Issue: Specific Performance

Rule: Is an injunction ordering a breaching party to perform as promised and the breaching party needs to be in a position to perform or fully perform.

Analysis: Here, Ricky can seek an injunction so that Carl can perform his end of verbal agreement for the sale of the 1969 Spender Radiocaster Thinline guitar for purchase price of 5K. Ricky helped Carl figure out a guestimate regarding the value of the guitar and they both agreed to the purchase price of 5k and Ricky expects Carl to perform. Carl is in a position to perform his promise because he is in possession of the guitar.

Conclusion: Here, Ricky expects Carl to perform his end of the verbal agreement for the sale of the guitar fot 5k.

Issue: Freeze Order

Rule: A freeze order prevents one party from selling personal or real property until there is a court resolution.

Analysis: Here, Ricky can request a freeze order preventing Carl from selling the guitar. It would be beneficial for Ricky to obtain a freeze order to prevent the sale of the guitar until the court makes a decision as to the contract/terms/price.

Conclusion: Here, the court may grant a freeze order to prevent Carl from selling the guitar.

Issue: Constructive Trust

Rule: Constructive trust is not a real trust at all, instead the treats constructive trust as if the defendant is holding property and is making decisions about the property with the intent to benefit the plaintiff.

Analysis: Here, Ricky can argue that Carl has his guitar because they both agreed to the sale and purchase price of the guitar. While Carl and Ricky waited for the one day to pass Carl decided to have the guitar appraised by someone else who informed Carl that the actual worth of the guitar was 50K instead of the 5K that he decided to sell it to Ricky. Ricky can claim that Carl agreed to sell him the guitar before Carl knew the true worth and it does not matter because their agreement was before Carl decided to investigate the actual worth of the guitar.

Conclusion: Although, this seems like a good defense it is unlikely that the court would side with Carl.

Issue: Replevin

Rule: remedy to rescove personal property

Analysis:

Conclusion:

Carl's claims and defenses

Issue: Statue of Frauds

Rule: There are certain contracts that have to be in writing to be enforceable.

Analysis: Here, Carl can claim that he and Ricky had a verbal agreement for the sale of the 1969 Spender Radiocaaster Thinline guitar. The verbal agreement is not enforceable because it was only verbal and Ricky was being dishonest about the actual worth of the guitar. Ricky is supposed to be a guitar collector that has expertise knowledge about the actual value of the guitar.

Conclusion: Here, Carl will not have to fulfill his end of the verbal contract with Ricky because Ricky lied about the actual value of the guitar.

Issue: Unfairness

Rule: situation where a contract term is so oppressive or one sided it would violate the principles of fairness and equity in enforcing it.

Analysis: Here, Carl will argue that his friend Ricky who is an expert guitar collector wanted to purchase his guitar for 5K and its actual worth is 50K. Carl can tell the court that Ricky's dishonesty should be taken into consideration because he lied for his own personal gain. Selling a guitar worth 5K dollars is unfair and one sided that Carl should not have to sell the guitar to Ricky.

Conclusion: Thus Carl, should not have to sell his guitar to Ricky because it would be unfair.

Issue: Unjust enrichment

Rule: where one party benefits at the expense of another

Analysis: Here, Carl can claim that Ricky is trying to benefit at Carl's expense because Carl does not have expert knowledge regarding the worth of the guitar and he relied on Ricky and his knowledge.

Ricky was offering Carl a low purchase price and he was trying to cheat Carl out of 45K or more because Ricky was trying to sell the guitar to the Cockroaches superband for \$1 million.

Conclusion: Here, Ricky was trying to benefit at Carl's expense.

Issue: Rescission

Rule: an equitable remedy giving the P the right to cancel a contract

Analysis: Here, Carl would ask the court for rescission so that he can cancel his contract with Ricky for the sale of the guitar because Ricky was being dishonest regarding the actual value of the guitar.

Conclusion: Here, Carl should be able to cancel the contract because Ricky was being dishonest and wanted to be unjustly enriched at Carl's expense.

Issue: Rescind

Rule: formally canceling a contract as if it never happened

Analysis: Here, Carl will likely want to rescind his verbal contract with Ricky because Ricky is taking advantage of Carl's lack of knowledge regarding the worth/value of the guitar. Carl will likely prevail because the contract is one sided and it does not benefit both parties equally.

Conclusion: Thus, Carl will likely prevail if asks the court to rescind the verbal agreement.

Issue: Unconscionability

Rule: a contract or a clause within a contract that is deemed so unfair and oppressive that it is unenforceable by a court.

Analysis: Here, again, Carl can state that the terms of the guitar sale verbal agreement only benefitted Ricky and not Carl. Carl would lose out on 45 thousand dollars because he agreed to sell the guitar for 5 thousand dollars. Carl would only be making 5 thousand dollars as opposed to 50 thousand dollars from another buyer. The contract is one sided and only benefits Ricky. The court should grant Carl's request and cancel the one sided contract so that Ricky is not benefitted.

Conclusion: Thus, the contract does not benefit Carl equal to Ricky.

2)

The remedy for a tort like negligence is almost always damages.

Monetary damages are a remedy available to the plaintiff and is almost always the proper remedy in tort cases involving negligence. Equitable remedies can arise in the context of torts, but are generally only appropriate when the tort concerns real or personal property (like trespass, conversion, and nuisance.) In cases of negligence, monetary damages are usually the only remedy sought.

Monetary damages are available in two forms: compensatory damages and punitive damages. Compensatory damages are awarded to compensate a plaintiff and put him, as closely as possible, in the position he would have been prior to the tort (*status quo ante*.) Punitive damages are intended to punish the tortfeasor for bad behavior.

Compensatory damages are divided into three broad categories: general damages, special damages, and nominal damages. General damages are damages for harms that cannot be easily calculated and are based on the judgment of the jury. Pain and suffering and loss of consortium are two types of general damages. Someone experiencing pain and suffering as a result of the defendant's negligence will be awarded a figure that the jury (or judge, if a jury has been waived) believes are fair compensation. Special damages are damages that are calculable with reasonable certainty and are designed to compensate for direct financial losses. Past and future medical expenses and lost wages are the most common types of special damages. Nominal damages are a special category of damages awarded in cases where damages are presumed, but the plaintiff has suffered no significant financial loss. A nominal sum (typically, one dollar) will be awarded to vindicate the plaintiff's rights, but no other damages are awarded because the plaintiff did not suffer any specific harm apart from being the victim of a tort. An example where nominal damages are awarded would be in the case of a brief trespass: if someone walks across the plaintiff's field without the right to do so, but causes no damage to the plaintiff or his land, the plaintiff has been the victim of a trespass and is entitled to nominal damages.

Jones and Flying Heart are liable for damages, and damages are adequate to compensate Smith for his loss.

Here, Smith sued Flying Heart and Jones jointly and severally for their negligence and prevailed in the liability phase of the trial. Joint tortfeasors are jointly and severally liable for their torts. Here,

both Flying Heart and Jones were negligent, so they will be jointly and severally liable for each of the awards below except as noted.

Finally, all damages must have been foreseeable: that is, the damages awarded must have been the reasonably foreseeable consequence of the tort committed. Generally, property damage, injury, lost wages, and the possibility of future disability are all reasonably foreseeable in cases like this. Damages are not awarded for things that are not reasonably foreseeable. Further, damages are not awarded where they are speculative or uncertain.

Smith is entitled to general damages for his pain and suffering.

Smith experienced pain and suffering associated with his injuries. Depending on the severity of his injuries, the pain and suffering damages may be substantial. But these damages cannot be calculated with any type of certainty in an exam setting. The trier of fact must assess the amount of pain and suffering Smith endured and will award those damages according to proof at trial. He may be entitled to as little as \$1, or several million dollars. Suffice it to say, Smith will be awarded *some* amount for pain and suffering. A pain and suffering award is not judicially reviewable for excessiveness (discussed *infra*.)

Smith is entitled to special damages for the damage to his property.

Smith employs specialized machinery to trim very large trees that others are not able to trim due to their size. Some of this equipment was damaged in the collision. Smith is entitled to special damages for the property damage. The facts do not say that the property was completely destroyed. When property is damaged but not destroyed, the owner of the property is entitled to the lesser of the amount to repair the property to its condition prior to the tort, or the replacement value of the property. Replacement value is the fair market value of the property at the time of the tort. If the equipment costs more to repair than it does to replace, then Smith will be awarded replacement value, even if he has paid to repair the property. The facts are silent on this issue.

Smith is entitled to special damages for his past and future medical expenses.

Smith is also entitled to all monies paid for past medical expenses. This is true even if Smith had medical or other insurance which paid for all or a part of his injuries. This is the collateral source rule: the defendant does not get the benefit of the plaintiff's own insurance. The defendant is still responsible for his torts. Smith's insurance, if he had any, may pursue its own remedies against Smith to prevent Smith's double recovery, but this is not something the trial court in this case will

concern itself with. Neither defendant is entitled to an offset for any insurance payments made by Smith's own insurance.

The facts do not specify whether Smith was hospitalized, took an ambulance, needed surgery, or in-home supportive care during his recovery. Nevertheless, if Smith has to pay for any or all of these additional items, Smith will be entitled to those items as special damages as part of the judgment against Jones and Flying Heart.

Smith is also entitled to his future medical expenses. The facts state that Smith must go to physical therapy three times per week to address his injuries. All the physical therapy attended to date, plus the physical therapy attended in the future, will be part of the special damages in this case.

However, future medical expenses are subject to a discount: the total value of medical services expected to be necessary in the future will be discounted to a present-day value. This is because cash today is worth more than it will be in the future. This concept is complicated and deserves some additional explanation.

Future expenses are subject to discount to present value.

If one assumes that physical therapy costs \$100 per session today, it is likely that physical therapy will cost more than \$100 per session in the future. It is not unreasonable to expect the cost of physical therapy to rise a few percent per year. If Smith still needs physical therapy in 10 years, it is not unreasonable to assume that physical therapy will be \$150 per session 10 years from now. It would be impractical and undesirable to require Smith to come back to court every time the cost of physical therapy changes to recalculate how much money Jones and Flying Heart will need to pay him to attend his therapy appointments for the next year.

To prevent this outcome, the entire anticipated future cost of Smith's medical care is included in the judgment entered at the time of trial. Expert testimony is generally required to calculate with any reasonable certainty the expected total of future medical bills that will become due over Smith's lifetime. Once that is ascertained (for simplicity, assume for a moment that the total cost of Smith's future medical care will be \$1,000,000), that amount is discounted to a present value. That discount is applied to reduce the entire future award to a value in today's money that is expected to grow over time, keeping pace with inflation, to allow Smith to pay his bills for as long as he needs to. Assume a discount rate of 70% - the \$1,000,000 future medical expenses will be discounted to a present-value of \$700,000. The defendants will be ordered to pay Smith \$700,000 today for his future medical expenses, with the expectation that the \$700,000 will be invested in a way that it will remain sufficient to cover all of Smith's future bills, for a total of \$1,000,000.

A certain amount of uncertainty when calculating tort damages is tolerated by the court.

There is, of course, uncertainty when dealing with future medical expenses and discount rates. It is likely that the plaintiff will be undercompensated if his future medical expenses are more expensive than thought at the time of trial or if inflation rises more quickly than anticipated by the expert. It is also likely that the plaintiff will be overcompensated if he responds to medical treatment better than expected, or if he dies after judgment but before expending a significant amount of the future medical expense judgment. This is a feature, not a bug though: the courts are more inclined to overcompensate a plaintiff by allowing future medicals despite the uncertainty, because the plaintiff is a victim and the entire goal of money damages is to put the plaintiff, as nearly as possible, in the position he would have been in before the tort occurred--the status quo *ante*.

Smith's medical damages may be reduced because he failed to mitigate his harm.

Smith may be subject to a reduction in his medical special damages because he has not been fully engaged in physical therapy. Smith is supposed to attend therapy three times a week, and the goal of therapy is to rehabilitate him. This rehabilitation would tend to reduce his overall suffering and the amount of medical care he needs in the future. Smith has a duty to mitigate his damages. Part of that duty is the duty to attend his physical therapy and do everything he can to make sure his damages are not worse. He has skipped some sessions of physical therapy, and that may exacerbate his medical condition in the future. Smith will not be entitled to additional damages if his medical condition is exacerbated by his own failure to mitigate.

Smith is entitled to special damages for his lost earnings.

Smith has missed, and will miss in the future, a substantial amount of work and a great deal of income as a result of his injuries. Before his injury, Smith was earning \$75 per hour for most jobs, and \$125 per hour for some jobs on oversized trees. While he was recovering from his injuries, he did not work at all. Smith is entitled to the wages he lost as a result of missed work. Further, Smith is no longer able to work in his normal occupation at his normal rate of pay. Smith has had to reduce his total number of hours worked to accommodate his physical therapy appointments, and has also had to reduce his hourly rate because he is working smaller jobs.

Smith is entitled to his normal rate of pay for all the work he missed, and the difference between his new wages and his old wages. Smith has a duty to mitigate his damages and is complying with this duty as relates to his employment. Smith has not stopped working completely. He has taken a

reduced workload at a reduced hourly rate, which is reasonable when taken together with his new physical limitations caused by the injuries he suffered.

Smith's future earnings are not speculative.

Jones and Flying Heart may argue that Smith's future earnings capacity was speculative and that he is not entitled to any lost wages since he is still able to work. This argument is not persuasive, though. Smith is still able to work, but not at the same earning capacity that he did in the past. His past wages were steady and consistent for many years, and he often worked six days a week. Smith will argue that his future wages would have continued at the same level they did prior to the injury, and that he is entitled to the difference between his new wage and his old wage for the rest of his expected working life. Again, that figure will be discounted in the same way as the future medical expenses, and expert testimony will be required to establish how much he was likely to have earned over his lifetime if he was uninjured, and how much he can expect to earn now that he has been injured.

Smith is entitled to punitive damages against Flying Heart, but not against Jones.

Punitive damages are not compensatory damages. They are not intended to compensate the plaintiff; instead, they are intended to punish the defendant. Simple negligence does not give rise to punitive damages. For liability for punitive damages to attach, the plaintiff must show that the defendant's conduct was malicious: that the defendant acted intentionally with the intent to harm the plaintiff (as in the case of many intentional torts) or, in the case of negligence, that the defendant acted recklessly.

Recklessness is a higher level of culpability than negligence. Negligence simply requires that the defendant owe a duty of care to the plaintiff, that the defendant breach the duty, that the plaintiff was harmed, and that the defendant's breach was the proximate cause of plaintiff's harm. Recklessness requires that the defendant consciously disregards a high risk to life or property. Here, Flying Heart has acted recklessly by refusing to take down the sign that caused the accident. Had this been the first accident involving this sign, Flying Heart would not be subject to punitive damages. But this type of accident has now recurred three times: after the first accident, and certainly after the second, Flying Heart was aware that their sign posed an unreasonable risk of danger to the public. Flying Heart consciously disregarded that risk for a financial benefit (since the beer company was paying them to keep the sign up.)

Smith is therefore entitled to a punitive damage award from Flying Heart. That award must be rationally related to Smith's other damages. Punitive damages are subject to judicial review and may be reduced if they are excessive. If the jury awarded more than 3 or 4 times Smith's total damages in punitive damages, there is a strong possibility that this award would be reduced after judicial review as an excessive verdict.

Jones is not liable for punitive damages. There is no evidence here that Jones has ever been involved in an accident like this, nor that he was aware of the special danger the sign posed. Jones acted with simple negligence, and simple negligence is not enough to create liability for punitive damages.

3)

David and Pinkerton contracted for employment.

David and Pinkerton signed an employment contract. The contract provided that David would be employed by Pinkerton for at least five years, that David would receive \$3.2M per year for each of those five years, that David would receive health insurance, that David would receive a lifetime pension if he worked at least five years, and that if David left Pinkerton's employ, he would not work for any other similar company for 10 years.

There was a liquidated damages clause of \$100M which applied if Pinkerton breached the contract by terminating David's employment within the five years of the contract.

Pinkerton breached the contract by terminating David's employment within the five year period without cause.

A non-breaching party is entitled to a remedy when they successfully prove a breach of contract which resulted in harm. Here, David was fired without cause by Pinkerton within the five year contract period. This was a breach by Pinkerton, which has harmed David. David is entitled to some form of remedy for the breach.

Damages are the usual remedy for cases involving breaches of contract. Equitable remedies, like specific performance, are available to enforce some contracts. Specific performance is a court order that a contract be performed by the parties. Specific performance is not available for most contracts. Ordinarily, money damages are adequate to compensate a non-breaching party.

Specific performance is available when there is a valid contract whose terms are certain, performance is possible, the court is able to supervise the performance to enforce its order, and the non-breaching party has either already performed or is ready, willing, and able to perform.

David *could* seek specific performance of this contract by seeking an order from the court that Pinkerton rehire David under the terms of their agreement, but he would lose on this claim. Damages are fully adequate to compensate David for the breach, which will be discussed further *infra*. Additionally, David may not be ready, willing, and able to perform: he has already accepted a job with Horizon, Inc. as their CEO. It is unlikely that David would be willing to return to his old employment with Pinkerton, so he will not be able to seek specific performance.

David will seek liquidated damages a legal remedy in this case.

David can make a strong case for very significant damages in this case. Contract damages are intended to put a parties in the position they would have been in had the contract been fully performed by both sides. In some cases, this is easy. In other cases, like this, it is quite difficult.

Courts will attempt to compensate non-breaching parties by awarding damages. Damages must be reasonably foreseeable at the time the contract is formed, and must be calculable with reasonable certainty. A helpful starting point is to see where the parties would have ended up had the contract been fully performed.

David's actual damages are nearly impossible to calculate.

The contract here was for five years of employment at \$3.2M per year. This is a total cash value of \$16M. David would have received \$16M in cash, and Pinkerton would have received five years of David's employment. But there were additional benefits to this contract, which are not readily reducible to a firm dollar amount. David would have also received five years worth of health insurance. It would be possible for the court to calculate the dollar value of five years worth of health premiums at their fair market value at the time of the breach. This is not especially problematic. The biggest problem in calculating David's damages is the provision for the lifetime pension: David would receive a lifetime pension based on his highest year salary, so long as he completed the full five years of his employment.

It is therefore extremely difficult to calculate the true value of the contract to David. If David had worked all five years and dropped dead on day one of his sixth year of employment, David would have earned about \$16M and not a penny in his pension. If David retired after his fifth year and collected his lifetime pension at \$3.2M per year (which would have been his highest salary) for the balance of his useful working life of 30 additional years, David would have received \$16M in salary for the first five years, plus \$96M in pension payments over 30 years for a total of \$112M. If David worked for 10 years, achieving a salary of more than \$3.2M per year, retired for 10 years to ride out the non-compete clause, and began working for another employer at the 15 year mark making \$5M per year but still collecting his pension, the total value to David would be nearly incalculable.

The liquidated damages clause in this contract is valid and not a penalty clause.

Anticipating the difficulties in calculating the damages which would result if Pinkerton breached the contract, the parties negotiated a \$100M liquidated damages clause. A liquidated damages clause is permitted when it is negotiated into the contract, that the parties understand and agree that actual damages would be difficult or impossible to calculate in the event of a breach, and that when the

contract was formed, the amount of liquidated damages was a reasonable calculation of the likely damages that would occur in the event of a breach. If the liquidated damages clause does not meet these elements, then it will be deemed unenforceable as a penalty clause and stricken from the agreement. Penalty clauses are deemed to be punishment for a breach, more akin to punitive damages, than a true measure of the damages caused by a breach. For this reason, penalty clauses are against public policy.

Although high, the \$100M liquidated damages clause is a reasonable estimate of the damages likely to occur if the contract were breached.

Here, at first blush the \$100M figure is startlingly high. But it is apparent that David could easily have made well in excess of \$100M by working for Pinkerton, even if he worked the bare minimum five years and never worked again in his life. The \$100M is therefore reasonable and a practical alternative to sorting out the actual damages available in this case. David's best option would be to seek enforcement of the \$100M liquidated damages clause in this case.

David may attempt to calculate his actual damages and accept an award calculated on proof at trial.

If David opted instead to attempt to calculate his damages, he has a few options. David can simply accept the low figure of \$16M, which would have been the cash he was to receive for 5 years of work and forego the pension completely. David could also attempt to claim the full salary for 5 years, as well as some or all of the pension payments which would have been due. However, the further into the future David went on those expectation damages, the more speculative they become. It is difficult to say with any certainty whether David would still be employed by Pinkerton in 10 or 20 years, and even less certain how long David would have collected his lifetime pension. It would be necessary in any event for David to call expert witnesses to testify about his life expectancy and expected future earnings.

David may also claim reliance damages based on the pension he forfeited when he left Horizon.

Finally, David has a valid claim of reliance damages. Reliance damages are available when the non-breaching party expends money or gives up some benefit in preparation and anticipation of the full performance of a contract. David will claim that his reliance damages were the lifetime pension from Horizon that he had already earned. When David negotiated his contract with Pinkerton, Pinkerton was fully aware that David had already earned the pension with Horizon and was forfeiting it to

come work for Pinkerton. Pinkerton was on notice and assumed the risk of this breach when they agreed to contract with David, so David would be entitled to collect the present value of the Horizon pension from Pinkerton. That pension was not speculative as David had already earned it. David's reliance damages alone may meet or exceed the liquidated damages amount.

EngCorp and Pinkerton contracted for the sale of computer switches.

EngCorp and Pinkerton contracted for the sale of computer switches. The parties agreed during negotiations that time was of the essence (delivery in one month was critical because a late delivery would cause EngCorp to miss their own deadlines.) Therefore, any late performance of the contract by Pinkerton was a material breach.

Further, during negotiations, EngCorp and Pinkerton both understood and accepted the risk that a missed delivery by Pinkerton would cost EngCorp \$5M in yearly revenue.

Specific performance is an inappropriate remedy between EngCorp and Pinkerton.

As stated above, specific performance is available to enforce the performance of some contracts. But specific performance is not appropriate in this case: Pinkerton has already missed the delivery, and EngCorp has already missed their attendant deadlines. There would be little utility to EngCorp if the court ordered Pinkerton to deliver the switches at this late juncture. One of the elements necessary to equitable relief is that the plaintiff would suffer irreparable harm if the equitable relief were not ordered. EngCorp has already been harmed. If any remedy is adequate, it would be the legal remedy of damages, not the equitable remedy of specific performance. EngCorp would not be able to seek specific performance for this contract.

EngCorp is entitled to lost profits for Pinkerton's breach.

EngCorp may seek lost profits from Pinkerton. Lost profits are an acceptable measure of contract damages as long as the lost profits were reasonable foreseeable and the lost profits are calculable with reasonable certainty at the time of contract formation. Pinkerton and EngCorp negotiated their agreement in good faith. EngCorp and Pinkerton were mutually aware that if Pinkerton missed their deadline, EngCorp would suffer a loss of \$5M in revenue for the year. Both parties accepted the risk when they executed the contract at issue here. If EngCorp chooses damages as a remedy, the damages will be measured in lost profits and EngCorp will be awarded \$5M.

The non-compete clause is unenforceable between David and Pinkerton.

A non-compete clause is a contract provision which prohibits one party to the contract from performing a certain action, usually seeking employment with a competitor in the same space. The enforcement of a non-compete clause is always a question of specific performance. If the non-compete clause is enforceable, the only way to enforce it is via a court order for specific performance.

However, this provision is unenforceable on its face under the facts of this case. The contract states "if David *chose* to stop working for Pinkerton, he could not work for any other company similar to Pinkerton's for the following 10 years." The facts here make it clear that David did not *choose* to stop working for Pinkerton. Pinkerton fired David without cause. The conditions precedent for the enforcement of the non-compete clause have not occurred, because David did not voluntarily leave his employment with Pinkerton. The non-compete clause does not attach if Pinkerton fires David.

There does not appear to be a triable issue of fact as to the non-compete clause. David should move for summary adjudication of this issue.

There is no right to a jury trial on equitable claims.

However, if the court denied that motion and ordered this issue to be tried, that trial would be to the court without a jury. The right to a jury trial only extends to legal claims. The claim to enforce the non-compete clause is not a legal claim. As stated above, the Court would order specific performance if Pinkerton were to prevail. Because specific performance is an equitable remedy and not a legal remedy, David would not be entitled to a jury on this claim. All other contract claims between David and Pinkerton would be submitted to the jury, because the remedies sought are legal.

In a case where both equitable and legal claims are tried in the same suit, the legal claims will be tried to the jury first, and equitable claims will be tried to the court last.

END OF EXAM
