

Monterey College of Law  
FINAL EXAMINATION  
REMEDIES  
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This exam consists of 2 essay questions AND 18 Multi-choice questions. You will have 3 hours to complete your answers.

You must answer the 18 Multi-choice questions in Exemplify. To select the answer which you believe is correct, click on that answer. Use the 'Next' and 'Previous' buttons to navigate between questions. Read each question carefully and choose the best answer.

Your essay should demonstrate your ability to analyze the facts in the question, to tell the difference between material and immaterial facts, and to discern and understand the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationship to each other.

Your answer should demonstrate your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them. Consider the IRAC method of formulating your answer.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

## **PART A: ESSAY QUESTION 1**

A homeowner entered a valid written contract to sell his home to a buyer for \$800,000. The buyer was a first-time home buyer who was not represented by an attorney or real estate agent and knew nothing about real estate. The homeowner had sold and purchased many homes in the past and was very familiar with the real estate processes and customs.

The homeowner and buyer's contract stated that "if the buyer canceled the agreement, then the buyer must pay, as liquidated damages and not a penalty, 10 percent of the purchase price to the homeowner (i.e., \$80,000)." Most land sale contracts require the buyer to pay an earnest money deposit. If the buyer cancels the contract, then the buyer would forfeit this deposit to the seller as compensation for the seller taking the home off the market and incurring costs related to preparing the house for the sale. However, the deposit is usually 2 to 3 percent of the purchase price.

During the home inspection, the parties discovered that there was dry rot on the roof. The homeowner entered a valid written contract with a pest company to fix the dry rot for \$1,000. After agreeing to fix the homeowner's dry rot, the pest company received a job request worth \$2,000 from another client. The pest company denied the job because it had already agreed to fix the homeowner's roof and it could not complete both jobs due to short-staffing.

The buyer decided not to purchase the home. The homeowner immediately called his friend who mentioned that she may have purchased the home for \$1 million dollars if the homeowner had not accepted the buyer's offer. Unfortunately, by then, the friend had agreed to purchase a similar home from a third party for \$1 million dollars. The homeowner relisted the property and incurred the normal costs associated with showing the home. It has been two months and the homeowner's house is still for sale, which means he is still paying the mortgage and taxes on the home.

The homeowner also called the pest company to cancel his work order. The pest company could have called the other client and accepted the alternative job for \$2,000, but instead, the pest company insisted on fixing the homeowner's dry rot because it had already expended \$100 in labor and materials. When the pest company arrived at the homeowner's home, the homeowner refused to open the door.

The homeowner sued the buyer for breach of contract and the court ruled in the homeowner's favor. The pest company sued the homeowner for breach of contract and the court ruled in the pest company's favor.

- (1) The homeowner requests \$80,000 in liquidated damages. The buyer argues that the liquidated damages clause is invalid and unconscionable. How should the court rule?
- (2) Assume the court determined that the liquidated damages clause was invalid. What compensatory damages are available to the homeowner, and do any limitations apply?
- (3) What compensatory damages are available to the pest company, and do any limitations apply?

## **PART B: ESSAY QUESTION 2**

A plaintiff hired a moving company to transport her personal belongings. One of the boxes included a special hat and bracelet that the plaintiff's mother gave her just before she passed away. The moving company negligently destroyed both items. The hat cannot be replaced because it was hand-knitted by her mother and her mother has passed away. The plaintiff could order a similar hat for \$50 but the plaintiff feels it would not be the same. The plaintiff thinks the hat is worth \$8,000. An identical bracelet is available for purchase at a local store for \$100.

When the plaintiff found out the items were destroyed, she fainted and hit her head on the floor, which caused her to enter a coma. The paramedics took her to the hospital where she was unconscious for two weeks. When the plaintiff woke up, she did not remember hitting her head, but she did remember that the bracelet and hat were destroyed, which made her very upset.

After the plaintiff was discharged from the hospital, she had difficulty sleeping and began therapy to help her deal with her mother's death and the loss of the two items. Sadly, a month after the move, the plaintiff died in a car accident on the way to her 40th birthday party. The plaintiff suffered from a seizure that caused her to swerve and hit a wall. She died instantly. The seizure was caused by the head injury that she incurred after she fainted during the move.

After the plaintiff's death, the husband was upset because they had been together for 15 years. The husband did struggle to pay his bills and stay healthy because the plaintiff was their main source of income and she handled all the cooking. Eventually, the husband received \$150,000 as the beneficiary under the life insurance policy that the plaintiff placed on herself.

The plaintiff's estate sued the moving company for negligence and the husband sued the moving company for wrongful death. The court found the moving company liable to both the plaintiff's estate and the husband.

- (1) Discuss whether the jury's award of compensatory damages below was correct. Do not discuss limitations on damages.

The jury awarded the plaintiff's estate:

- (a) \$15,000 for past and future therapy and medical bills,
  - (b) \$8,100 for the hat and bracelet, and
  - (c) \$200,000 for the past and future pain and suffering that the plaintiff experienced while in a coma, because of the destruction of the hat and bracelet, and during the seizure and car accident.
- (2) The moving company appealed the jury's award of damages specifically stating that none of the damages were foreseeable. Discuss the merits of the moving company's argument.
  - (3) (a) What compensatory damages are available to the husband? Do not discuss limitations on damages or pain and suffering.  
(b) Would the life insurance pay out impact the husband's award of damages? Discuss.

**Part C: MULTIPLE-CHOICE QUESTIONS**

Question 1

A seller entered into an agreement to sell a machine to a buyer for \$5,000. At the time of the order, the buyer gave the seller a down payment of \$1,000. The buyer then built a foundation for the machine at a cost of \$250. The seller failed to deliver the machine. The buyer made reasonable efforts to find a similar machine and bought one for \$5,500 that did not fit the foundation. The buyer sued the seller for breach of contract.

Which of these amounts claimed by the buyer, if any, could be best described as restitution?

- (A) \$5,000, the contract price.
- (B) \$1,000, the down payment.
- (C) \$500, the difference in price.
- (D) \$250, the cost of the foundation.

Question 2

A state-run university currently has a coed student population. However, to promote more women in higher education and foster a unique learning environment, the university is considering creating courses exclusively for women. The university's dean is wondering whether creating these courses would violate the Equal Protection Clause of the U.S. Constitution because these courses would exclude men. On behalf of the university, the dean files an action seeking declaration that the college would not be violating the Equal Protection Clause if it offers female-only courses.

Is the university entitled to declaratory relief?

- (A) Yes, because the controversy is ripe.
- (B) Yes, because it would terminate the uncertainty.
- (C) No, because the controversy is hypothetical and not adverse.
- (D) No, because the university is not seeking compensatory damages.

Question 3

On March 1, a mechanic contracted to repair a textile company's knitting machine by March 6. On March 2, the textile company contracted to manufacture and deliver cloth to a customer on March 15. The textile company knew that it would have to use the machine then under repair to perform this contract. Because the customer's order was for a rush job, the customer and textile company included a liquidated damages clause, providing that the textile company would pay \$5,000 for each day's delay in delivery after March 15.

The mechanic was inexcusably five days late in repairing the machine, and, as a result, the textile company was five days late in delivering the cloth to the customer. The textile company paid \$25,000 to the customer as liquidated damages and then sued the mechanic for \$25,000. When making their contract on March 1, both the mechanic and the textile company knew that under ordinary circumstances the textile company would sustain few or no damages if there was a five-day delay in repairing the machine.

Assuming that the \$5,000-per-day liquidated damages clause in the contract between the textile company and the customer is valid, which of the following arguments will serve as the mechanic's best defense to the textile company's action?

- (A) The liquidated damages paid by the textile company to the customer are not the same amount as the actual damages sustained by the customer.
- (B) By entering into the contract with the customer while knowing that its knitting machine was being repaired, the textile company assumed the risk of any delay or loss to the customer.
- (C) The mechanic had no reason to foresee on March 1 that the customer would suffer consequential damages in the amount of \$25,000.
- (D) Time was not of the essence in the contract between the mechanic and the textile company.

Question 4

A musician entered a contract with a retailer to purchase a rare, expensive grand piano that was sold in only 10 of the 50 states in America. The musician paid the retailer in full for the piano, but the retailer refused to deliver the piano and sold the piano to another customer for a higher price. However, the retailer offered to put the musician in contact with another store that sold the same piano. The musician refused the offer and sued the retailer for breach of contract. The musician requested the court to specifically enforce the contract he had with the retailer for the sale of the grand piano.

Should the court grant the musician specific performance?

- (A) Yes, because the musician would suffer irreparable harm.
- (B) Yes, because it would be difficult for the musician to obtain a similar piano.
- (C) No, because the grand piano is not unique.
- (D) No, because the retailer offered to help obtain the same piano from a different source.

Question 5

The plaintiff, who is confined to a wheelchair, attempted to view a movie at the defendant's theatre. The plaintiff was denied access because the theatre was not wheelchair accessible. The plaintiff sued the defendant, alleging that the defendant violated the federal Americans with Disabilities Act (ADA), which provides for an award of reasonable attorney fees to a prevailing party. The plaintiff sought an order requiring the defendant to make all of its theatres wheelchair accessible. Because the plaintiff's likelihood of success on the merits was high, while the litigation was pending, the defendant voluntarily made all its theatres wheelchair accessible. The defendant filed a motion to dismiss the claim as moot and the motion was granted by the court.

The plaintiff later filed a motion to recover attorney fees from the defendant. Assuming this jurisdiction did not recognize the catalyst theory, the court should rule in favor of the

- (A) plaintiff, if the fees charged by the attorney were reasonable.
- (B) plaintiff, because she suffered an irreparable harm.
- (C) defendant, because the plaintiff was not the prevailing party.
- (D) defendant, because the court's order violated the defendant's constitutional rights, which made it void.



Question 6

A retailer agreed to sell, from its inventory, a particular ICB computer to a law firm for \$3,000, and the law firm agreed to pay for the computer. Without notifying the law firm, the retailer subsequently sold that same ICB computer to a bank, who paid the same price (\$3,000). When the law firm found out, it refused to purchase the ICB computer from the retailer. The ICB computer model in question is a popular product. The retailer has more ICB units in its inventory than the retailer can sell. The retailer would have made a profit of \$2,000 from the sale to the law firm.

If retailer sues the law firm for breach of contract, the retailer will probably recover

- (A) nothing, because the retailer failed to give the law firm proper notice of the retailer's intention to resell.
- (B) nothing, because it received a price on resale equal to the contract price the law firm had agreed to pay.
- (C) \$3,000, because that was the contract price, and the law firm intentionally breached the contract.
- (D) \$2,000, because that was the retailer's anticipated profit on the sale to the law firm, plus incidental damages.

Question 7

When a tire of a motorist's car suffered a blowout, the car rolled over. Vehicles made by the manufacturer of the motorist's car have been found to be negligently designed making them dangerously prone to rolling over when they suffer blowouts. The motorist sustained an injury to his knee. On the day of the accident, a truck driver stopped to help the motorist, which was common in the neighborhood where the accident occurred. When the truck driver was walking along the side of the road towards the motorist, he was struck and injured by a speeding car. The motorist witnessed the accident and fainted due to shock. The motorist hit his head on the ground and suffered a serious concussion.

The truck driver sued the manufacturer of the injured motorist's car. Is the truck driver likely to prevail in a suit against the manufacturer?

- (A) No, because it is not foreseeable that a reasonable person would faint under these circumstances.
- (B) No, because the car manufacturer did not know the truck driver would help the motorist.
- (C) Yes, because it is foreseeable that injuries can result from rollovers.
- (D) Yes, because the car manufacturer's negligence resulted in a dangerous situation that invited the rescue by the truck driver.

Question 8

A waitress entered into a valid agreement with a pet store to open and operate a hotel for dogs. Under the terms of the agreement, the pet store permitted the waitress to use a portion of its building to run the dog hotel for the next five years. In exchange, the waitress agreed to use reasonable efforts to recruit customers and agreed to pay the store 20% of the dog hotel's profits. The waitress spent \$5,000 on start-up costs and \$2,000 on advertising the grand opening of the dog hotel. Although the waitress had never operated a business in the past, the day after the grand opening, the dog hotel was at full capacity and fully booked for the next week. The success of the dog hotel increased the noise levels at the pet store because the dogs barked all day. As a result, the pet store's customers started complaining and decided to shop elsewhere. The pet store told the waitress that it could no longer allow her to operate the dog hotel on its property.

The waitress sued the pet store for breach of contract. What will be the likely measure of the waitress's recovery?

- (A) \$7,000, because the waitress incurred these costs to fully perform her duties under the contract.
- (B) Lost profits, because the hotel's initial success demonstrates that the waitress will make a profit in the future.
- (C) \$7,000 plus lost profits, because it was foreseeable that the waitress would spend money on start-up costs and advertising.
- (D) Nothing, because the dog hotel is a new business and losses cannot be provided with reasonable certainty.

Question 9

A homeowner agreed to pay a contractor \$300,000 to build a home. The contractor was to earn a profit of \$10,000 for the job. A month into the job, the contractor had already spent \$40,000 on labor and purchased \$5,000 worth of oak flooring. Before the contractor could install the oak flooring, the homeowner informed the contractor that he would not pay for any services. The homeowner told the contractor to stop working immediately. The reasonable market value of the services provided by the contractor at that point was \$40,000. Because the homeowner breached, the contractor was able to use the \$5,000 worth of oak flooring on another job.

In an action by the contractor against the homeowner for damages, which of the following would be the largest amount of damages recoverable by the contractor?

- (A) \$55,000, the contractor's construction costs of \$45,000 plus the \$10,000 profit.
- (B) \$50,000, the contractor's construction costs of \$45,000 plus the \$10,000 profit minus the \$5,000 saved by reusing the oak flooring on another job.
- (C) \$40,000, the reasonable value of the services the contractor had provided.
- (D) \$10,000, the contractor's lost profits.

Question 10

A defendant lost control of his car and collided with a car driven by the plaintiff. Although the plaintiff was unharmed, the plaintiff's car was deemed a total loss by his insurance. The car was commonly sold on the market, but the plaintiff had a special attachment to this car because he spent many years saving money to purchase it. The market value of the car prior to the accident was \$30,000, but the plaintiff believes the car is worth \$40,000. The cost to repair the car to its pre-accident status would be \$45,000 and the market value of the car after the accident is \$10,000. The plaintiff could purchase the same model of the car for \$35,000.

In an action by the plaintiff against the defendant, what is the likely measure of the plaintiff's recovery?

- (A) \$45,000, the cost to repair the car, because the plaintiff's car is irreplaceable.
- (B) \$40,000, the intrinsic value of the car, plus any damages for the loss of use of the car during the time reasonably necessary to get a replacement car.
- (C) \$35,000, the cost to purchase a new car, because awarding anything higher would give the plaintiff a windfall.
- (D) \$20,000, the diminution of value, plus any damages for the loss of use of the car during the time reasonably necessary to get a replacement car.

Question 11

Traveler was riding on a commercial bus that was owned and operated by Bus Company. The bus crashed into a building. On impact, Traveler suffered a severe head injury that made him unconscious. Traveler spent several weeks in a coma before dying as a result of the injury. Traveler's wife and Traveler's legal representative brought a wrongful death and negligence action against Bus Company. Assume this jurisdiction requires the plaintiff to suffer physical harm and consciously endure suffering to recover for pain and suffering. The court determined Bus Company was at fault.

The court should order Bus Company to pay

- (A) Traveler's medical expenses incurred before death, and damages for loss of consortium and loss of financial support.
- (B) Traveler's medical expenses incurred before death, the wages that Traveler would've earned over the course of his natural life, and damages for loss of consortium.
- (C) Traveler's medical expenses and pain and suffering incurred before death, the wages that Traveler would've earned over the course of his natural life, and damages for loss of consortium.
- (D) Traveler's medical expenses and pain and suffering incurred before death, the wages that Traveler would've earned over the course of his natural life, and damages for loss of consortium and loss of financial support.

Question 12

A law school graduate contracted with a tutor for a bar exam preparation course. When discussing the terms of the contract, the law school graduate told the tutor that a law firm had promised to hire him at a salary of \$55,000 per year if he passed the bar exam. The tutor agreed to do the work for \$5000, even though the fair market rate for similar services was \$6,000. In addition, the parties agreed that all disputes related to the tutor's services would be submitted to arbitration. Before the instruction was to begin, the tutor repudiated the contract. Although the law school graduate could have reasonably employed an equally qualified instructor to replace the tutor for \$6,000, the law school graduate decided to study for the bar exam without any help. The law school graduate failed the bar exam and the law firm refused to employ him. It can be proven that the law school graduate would have passed the bar exam if he received the instruction from the tutor or another instructor.

If the law school graduate submits the dispute to arbitration, how much, if anything, is he entitled to recover?

- (A) \$55,000, because the tutor knew the graduate had an employment opportunity at the time the contract was executed.
- (B) \$1,000, because all other damages could have been reasonably avoided by employing another equally qualified instructor.
- (C) Nominal damages only, because the tutor made no promise that the law school graduate would pass the bar exam.
- (D) Nothing, because the provision for arbitration was unconscionable and the dispute must be heard by a judge.

Question 13

A landlord leased a commercial property to a private childcare center. To comply with the child safety laws, the center built a chain-link fence around the playground. The landlord drove by the property and noticed the fence did not comply with the zoning code, which would subject the landlord to civil penalties. The landlord talked with the center directors and said he understood the center's need for the fence. The landlord said to not to worry about taking it down. Based on this conversation, the center took no action to remove the fence. Four weeks later, the landlord filed a breach of contract claim against the childcare center because the non-conforming fence violated the terms of the lease. The landlord requested that the court order the childcare center to remove the chain-link fence or vacate the premises.

Is the landlord entitled to injunctive relief?

- (A) No, because the center detrimentally relied on the landlord's statement.
- (B) No, because the landlord has an inadequate remedy at law.
- (C) Yes, because the landlord only waited four weeks to file the cause of action.
- (D) Yes, because judicial supervision would not be required.



Question 14

A manager, age 63, had worked for a company for 20 years as an employee-at-will. Even though the company had no regularized retirement plan for at-will employees, the manager had a post-retirement goal of traveling the world. In a conversation with the company's president, the manager shared that he wanted to travel when he retired but didn't have enough money saved to retire. A month later, the president handed the manager a written, signed document that stated if the manager should decide to retire, at his option, the company would pay him a \$2,000-per-month lifetime pension. Shortly thereafter, the manager retired for his planned travels. After receiving the promised \$2,000 monthly pension from the company for six months, the manager, now unemployable elsewhere, received a letter from the company advising him that the pension would cease immediately because the company was near bankruptcy.

In a lawsuit against the company for breach of contract, the manager will probably

- (A) win, because there is an inadequate remedy at law.
- (B) win, because he timed his decision to retire in reasonable reliance on the company's promise to him of a lifetime pension.
- (C) lose, because it would be unfair for the manager to get a lifetime pension when other at-will employees have no retirement plan.
- (D) lose, because it was not foreseeable that the manager would retire.

Question 15

A company illegally fired a worker. While seeking substitute employment, the worker collected a total of \$3,000 in unemployment compensation. After five weeks of job hunting, the worker finally found a job that paid \$2,900 a week, which was \$100 a week less than the wage he received while employed with the company. During that five-week period of unemployment, if the worker was still employed by the company, the worker would've earned a total of \$15,000 in wages. After 10 weeks at his new job, the worker got a raise to \$3,000 a week.

How much may the worker recover?

- (A) \$16,000, because the company is still liable for damages even if the worker receives unemployment compensation.
- (B) \$15,000, because the company illegally fired the worker.
- (C) \$1,000, the difference between what the worker would've earned and what the worker actually earned after being fired.
- (D) Nothing, because the worker already collected unemployment compensation.

Question 16

A teenager stole a car that was worth \$20,000. The teenager sold the car to his cousin for \$20,000. The cousin did not know the car was stolen. The teenager used the money to purchase hundreds of rare trading cards. The owner of the car sued the teenager for equitable restitution. At the time of the trial, the trading cards depreciated in value to \$15,000.

If the court imposed an equitable lien on the trading cards, the car owner would receive

- (A) nothing because the car was sold to a bona fide purchaser.
- (B) the proceeds of the car sale.
- (C) title to the trading cards plus any future appreciated value.
- (D) a security interest in the trading cards and a deficiency judgment for the remaining \$5,000.

Question 17

An attorney represented one of ten defendants in a multiple defendant gambling conspiracy trial. The judge stressed the need for regular attendance because of the complexity of the case. On March 2, the attorney failed to appear in court and did not send any co-counsel on his behalf. The attorney never notified the judge. The judge did not immediately issue a citation for contempt. Instead, the judge sent a notice to the attorney to appear on March 6 to explain his absence. At the hearing, the attorney refused to explain why he did not appear on March 2.

The judge ordered the attorney to pay a \$5,000 fine for disrespecting the court's authority or face up to six months in jail. The court's order constitutes:

- (A) Valid criminal contempt because the attorney refused to give an explanation for his absence.
- (B) Valid civil contempt because the court held a hearing before issuing the contempt order and gave the attorney an option to pay the fine or go to jail.
- (C) Invalid criminal contempt because the court's goal was to punish the attorney for past conduct and it did not utilize the required criminal procedural safeguards.
- (D) Invalid civil contempt because the fine is not avoidable.

Question 18

In a bicycle race with a \$5,000 prize for the winner, a famous cyclist was leading by a significant margin. A spectator at the race was married to the second-place rider. Sensing that her husband would not win unless she took action, the spectator drove to a point two miles ahead on the course, scattered several nails in the middle of the course, and then left the area. Soon thereafter, the cyclist approached the area and noticed the nails. He attempted to swerve around the obstruction, but a nail punctured his tire. He fell off his bike and was unable to complete the race. Even though the cyclist was not physically harmed, the incident left him depressed and he refused to ride his bike.

In a suit against the spectator for battery is the cyclist entitled to punitive damages?

- (A) No, because the cyclist suffered no bodily injury.
- (B) No, because the cyclist does not need the money.
- (C) Yes, because punitive damages are necessary to punish the spectator's behavior.
- (D) Yes, if the court finds the spectator liable for battery.

## **PART A: ESSAY 1: SAMPLE OUTLINE**

### **(1) LIQUIDATED DAMAGES**

#### **(a) Liquidated Damages**

**RULE:** A liquidated damages clause is valid if:

- (1) The parties **intended** to provide for a liquidated damages clause;
- (2) It would be **difficult to ascertain** the actual damages if the K was breached;
- (3) The agreed-upon amount is **not a penalty** (does not make breach of the agreement more profitable than performance);
- (4) The agreed-upon amount is a **reasonable prediction of the damages that would flow from the breach** (amount cannot be more than damages reasonably expected)

\* Based on the circumstances and expectations of parties at the time of execution

\* If valid, no proof of actual damages are required to enforce a liquidated damages clause.

#### **ANALYSIS:**

(1) **Intent:** Yes, the facts state “the buyer must pay, as liquidated damages and not a penalty...”.

(2) **Uncertainty:**

- Yes, because it is difficult to determine how much the homeowner would lose from pulling the home off the market. The homeowner might have been able to sell the home for a higher price, which was the case with the homeowner’s friend. The real estate market is always changing and quite rapidly.
- No, the homeowner would be able to quantify the money lost in terms of expenses paid to prepare for closing and could use comparable sales in the area to determine what the homeowner would’ve received if the buyer didn’t cancel the sale.

(3) **Not a Penalty:**

- Yes, because the facts state the parties intended it to NOT be a penalty. It is also normal for land sale contracts to require an earnest money deposit. Thus, it is compensation for the harm caused not a penalty.
- No, it is a penalty because most earnest money deposits are 2-3 percent, not 10 percent. 10 percent seems like it is more like a penalty because it is more than 3 times the normal custom rate in the real estate market.

(4) **Reasonable Prediction of Damages/Flow from Breach:**

- Yes, because the market is always changing so the homeowner could easily lose \$80,000 by taking the home off the market. Again, as seen here, he might have made \$200,000 if it was still on the market and he could've sold it to his friend.
- No, because it is customary to only deposit 2-3 percent and not 10 percent.

**(b) Unconscionable**

**RULE:** Contracting parties can limit their liability in damages to a specified amount as long as the clause is not unconscionable. For a contract or term to be invalid there must be both (a) procedural unconscionability and (b) substantive unconscionability. Courts use a sliding-scale approach that allows for a greater degree of one type of unconscionability and a lesser degree of the other.

**ANALYSIS:**

- (a) **Procedural unconscionability** exists when there is a gross inequality of bargaining power; a mere disparity is not enough. (Use of overreaching or sharp practices; ignorance of inexperience).

A: This exists because the buyer knew nothing about real estate and was a first-time home buyer who was unrepresented by an attorney or real estate agent. Thus, it is unlikely the buyer would know that 10 percent for a deposit was too high. On the other hand, the homeowner had sold and purchased many homes and was very familiar with the real estate processes and customs. Thus, the homeowner should've been more transparent and told the buyer that a fair agreement would be 2-3 percent, not 10 percent.

Counter: Buyer had the choice to get presentation and it is mere disparity because all the information is available online. Thus, the buyer should've done more due diligence to get to the homeowner's level of understanding.

- (b) **Substantive unconscionability** exists when the contract terms are unreasonably favorable to one party; imbalance in values is not enough. (No honest and fair person would accept a contract on such terms).

A: Yes, 10 percent is 3 times higher than normal (2-3 percent is normal). Thus, it really favors the homeowner.

Counter: 10 percent might seem high compared to the custom in the industry, but if you compare it to the purchase price, which was \$800,000, it is not unconscionable to force the buyer to pay \$80,000 in damages, especially if the homeowner might have sold the property for a higher price to his friend.

Courts also consider other factors, such as:

- (1) The entire atmosphere in which the agreement was made;
- (2) The alternatives, if any, available to the parties at the time the contract was made;

- (3) The non-bargaining ability of one party;
- (4) Whether the contract was illegal or against public policy; and
- (5) Whether the contract was oppressive or unreasonable.

## (2) HOMEOWNER VS. BUYER

### (a) Compensatory Damages

**RULE:** The goal of tort and contract law is that of **compensation**. The ultimate purpose is to put the injured party in as **good a position as he would have been if no wrong had been committed**. However, the plaintiff's damages are limited to its **actual loss** to ensure the plaintiff does not get a windfall.

**ANALYSIS (STEP 1: Entitled to remedies? If yes, what type?):**

- Yes, homeowner is entitled to some damages because the buyer cancelled the agreement and was found liable for breach of contract.

The types of remedies available are listed below.

- Expectancy Damages: Gives party the benefit of the bargain, as if the K had been performed.
- Reliance Damages: Restores party to the status quo, as if the K had never existed.
- Incidental Damages: Costs to minimize other losses (direct/consequential).
- Consequential Damages: Losses incurred due to the breach because of the injured party's particular circumstances.
- Lost Opportunity: A plaintiff is awarded loss of opportunity damages if the defendant's breach of contract/wrongful act has deprived the plaintiff of an opportunity to either avoid a particular loss or to obtain a particular benefit.

**ANALYSIS (STEP 2: How do you measure each available damage?):**

- Expectancy Damages: loss in value + incidental + consequential loss – any cost avoided
  - \$800,000, the sale price minus any costs the homeowner expected to pay.
- Reliance Damages: expenditures made – any cost avoided
  - Any costs the homeowner incurred preparing for the sale after they executed the valid contract.
- Incidental Damages: Costs to relist the property and show the home; other costs to resell the house after the breach.



- Consequential Damages:
  - \$200,000 that the homeowner could've made if the buyer had never entered the agreement and forced the homeowner to pull the home off the market. The homeowner could've sold it for \$1M to his friend.
  - Mortgage and taxes that the homeowner must pay on the home because the home is still for sale.
- Lost Opportunity Damages: measured as the amount which would place the person in the position he would occupy if the wrong had not occurred.
  - Same analysis as consequential damages.

(b) Limitations - Certainty

**ANALYSIS** (STEP 3: Do any limitations apply?):

**RULE:** If a plaintiff could've have reduced the size of a loss by reasonable conduct, the court will not compel a defendant to pay for those avoidable losses. But plaintiff can recover for any expenses reasonably incurred in an effort to avoid further loss (Incidental damages).

**A:** The friend said she "MIGHT" have purchased the home for \$1 million dollars if the homeowner had not accepted the buyer's offer. Thus, it is not 100% certain that she would've paid the \$1 million dollars.

**Counter:** The friend did enter an agreement to purchase another home from a third party, which suggests she was serious about buying a home, and she paid \$1 million for that home, which she would've offered to the homeowner.

### (3) PEST COMPANY V. HOMEOWNER

**RULE:** The goal of tort and contract law is that of **compensation**. The ultimate purpose is to put the injured party in as **good a position as he would have been if no wrong had been committed**. However, the plaintiff's damages are limited to its **actual loss** to ensure the plaintiff does not get a windfall.

**ANALYSIS (STEP 1: Entitled to remedies? If yes, what type?):**

- Yes, pest company is entitled to some damages because the homeowner cancelled the agreement.

The types of remedies available are listed below.

- Expectancy Damages: Gives party the benefit of the bargain, as if the K had been performed.
- Reliance Damages: Restores party to the status quo, as if the K had never existed.
- Incidental Damages: Costs to minimize other losses (direct/consequential).
- Consequential Damages: Losses incurred due to the breach because of the injured party's particular circumstances.
- Lost Opportunity: A plaintiff is awarded loss of opportunity damages if the defendant's breach of contract/wrongful act has deprived the plaintiff of an opportunity to either avoid a particular loss or to obtain a particular benefit.
- Lost Profits: To recover lost profits, the plaintiff must show: (1) seller had reason to know at the time of contracting that if he breached the contract, the buyer would be deprived of those profits, (2) the lost profits are reasonably ascertainable, and (3) the lost profits could not have been reasonably prevented.

**ANALYSIS (STEP 2: How do you measure each available damage?):**

- Expectancy Damages: loss in value + incidental + consequential loss – any cost avoided
  - \$1,000, the contract price, minus any costs the pest company expected to pay.
- Reliance Damages: expenditures made – any cost avoided
  - \$100 in labor and materials already expended to prepare to complete the job
- Incidental Damages: Any costs associated with getting the materials back after the breach or using them later on another job
- Consequential Damages: possibly lost opportunity/lost profits – see analysis below.

- Lost Opportunity Damages: measured as the amount which would place the person in the position he would occupy if the wrong had not occurred.
  - Could've made \$2,000 instead of \$1,000 if the pest company never entered the agreement with homeowner and accepted the job from the other client. Thus, might try to get \$2,000 + the \$1,000 in expectancy damages.
  - Counter: Couldn't have done both jobs. Thus, at most, the pest company should recover \$2,000 for lost opportunity damages minus whatever the pest company would expect to pay to complete the job.
- Lost Profits: Loss profits [are] measured by the amount of profit a plaintiff could have generated if the plaintiff not been deprived of the use of the property, less the amount of profit actually generated during the deprivation.
  - Same analysis as lost opportunity.

(b) Limitations - Avoidability

**ANALYSIS** (STEP 3: Do any limitations apply?):

**RULE**: Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty; does not require absolute precision.

**A**: The pest company could've accepted the alternative job for \$2,000, which would've limited the damage caused when the homeowner cancelled the agreement. Thus, the pest company might only recover reliance damage and incidental damages since the expectancy damages of \$1,000 were likely avoidable.

## **PART B: ESSAY 2: SAMPLE OUTLINE**

### **(1) PLAINTIFF'S ESTATE V. MOVING COMPANY – COMPENSATORY DAMAGES**

#### **SURVIVAL ACTS**

**RULE:** Allow the decedent's estate to sue for pre-death injuries suffered by the decedent (allows these claims to survive a person's death; e.g., pre-death lost wages, medical expenses, funeral expenses, pain and suffering, and loss of enjoyment of life/joy).

- Survival acts allow the plaintiff' estate to sue for any remedies for injuries caused BEFORE she died, which is what is happening right now.

#### **COMPENSATORY DAMAGES**

**RULE:** The goal of tort and contract law is that of **compensation**. The ultimate purpose is to put the injured party in as **good a position as he would have been if no wrong had been committed**. However, the plaintiff's damages are limited to its **actual loss** to ensure the plaintiff does not get a windfall.

**ANALYSIS (STEP 1: Entitled to remedies? If yes, what type?):**

- Yes, the estate is entitled to remedies because the court found the moving company liable for negligence. The issue is what type of compensatory damages are available and how they should be measured.
  - Yes, to therapy, medical expenses, and lost items.
  - See below for analysis for P&S.

**ANALYSIS (STEP 2: How do you measure each available damage?):**

**(a) \$15,000 for past/future therapy and medical bills**

- Past: The plaintiff would be entitled to the money she spent on past therapy bills and medical bills (i.e., from going to the hospital and being in a coma for 2 weeks and any therapy because of the 2 items being destroyed).
- Future: The plaintiff would not be able to recover money for future therapy and medical bills because she died.

(b) \$2,100 for the hat and bracelet

**RULE:** There are three ways to measure the value of destroyed property.

- **Market Value:** If the destroyed property has a market value, then use that as the measure of damages.
- **Cost of Replacement or Reproduction:** If the destroyed property has no market value but can be replaced or reproduced, then the measure is the cost of replacement or reproduction
- **Value to the Owner:** If the destroyed property has no market value and cannot be replaced or reproduced, then the intrinsic/actual value to the owner is to be the proper measure of damages. However, damages are not recoverable for sentimental value.
  - Intrinsic Value: value to the owner -- “actual value”
  - Sentimental Value: “governed by feeling, sensibility, or emotional idealism...”

**ANALYSIS:**

- Bracelet:
  - \$100 for the market value would be valid because there is an identical bracelet that is available at a local store. Thus, because the items are identical, you can use the market value.
- Hat:
  - **Market Value:** There is no market value because the hat was knitted by the mother by hand, so it isn't available in stores.
  - **Cost of Replacement:** The plaintiff could purchase a similar item for \$50, but it isn't the exact same hat. Plus, it wouldn't really replace the item itself. The mother gave it to her as a special gift and the mother has passed away. Thus, purchasing a new one wouldn't really make the plaintiff whole again.
  - **Value to Owner:** It is likely the court will award the actual value of the item. However, whether the hat is worth \$8,000 or less is the issue. If a similar item is available for \$50, then awarding \$8,000 for the hat is likely going to be too much and be an actual award of sentimental value and not the actual, intrinsic value. The jury probably gave too much here, and the award should be lowered.

(c) \$200,000 for past/future pain and suffering

**ANALYSIS (STEP 1: Entitled to remedies? If yes, what type?):**

**RULE:** Plaintiff must (1a) consciously endure suffering, or (1b) have “some level of awareness” to recover AND (2a) suffer some physical harm or (2b) show some physical manifestation of the distress.

**ANALYSIS:**

○ Past P&S

▪ (1a)(1b)

- Coma = The plaintiff was unconscious when she was in the hospital. Thus, it is unlikely she would get any P&S for the 2 weeks she was in a coma.
- Loss of items = However, she should probably be able to recover to P&S that she experienced after she woke up and remembered that the items were destroyed and right before she fainted and hit her head.
- Car Accident = She would get some recovery for the P&S she experienced during the seizure and stress/fear she likely experienced just before she hit the wall. But because she died instantly, it is unlikely she'll get physical pain P&S beyond the harm from the seizure. Just mental anguish of about to die in a car accident.

▪ (2a)(2b)

- Coma = Yes, hit her head and was in a coma for 2 weeks.
- Loss of items = She needs therapy and has difficulty sleeping.
- Car Accident = Yes, she died after hitting a wall and experienced a seizure which is physical harm.

- Future P&S = She would not get any P&S for the future P&S because she died, which means she wouldn't suffer any future P&S.

**ANALYSIS (STEP 2: How do you measure each available damage?):**

**RULE:**

- Majority: There are **no fixed or absolute standards** by which an appellate court can measure in monetary terms the extent of damages suffered by plaintiff.
- Dissent: Pain and suffering cannot exceed the part attributable to pecuniary loss. And a per diem formula should not be used because it is an arbitrary measure.

○ Future P&S

- Any award for future P&S would be too much because she died--she wouldn't suffer any future P&S.

- This means that the \$200,000 in P&S would really be 100% for the past P&S she suffered.
- Past P&S = Coma/Loss of Items
  - Coma = She endured 2 weeks in a coma, but likely didn't have any mental anguish P&S because she was unconscious. Maybe she could get some value for physical harm caused to her body during those 2 weeks.
  - Loss Items = The P&S from losing the items are somewhat intertwined with the loss of her mother so it is difficult to separately value her P&S from losing a bracelet and hat vs. P&S from just her mom dying in general.
  - Seizure/Car Accident = This would probably where she would be awarded the most P&S because it is very scary to suffer a seizure and have a car accident, but the valuation would go lower since she died instantly, which means she didn't suffer as much after physically or mentally after she hit the wall.
- DISSENT = pecuniary damages would likely be \$8100 for items + \$15,000 for medical and therapy, which is a total of \$23,100. To award \$200,000 would be much higher than the pecuniary loss.

**ANALYSIS (STEP 3: Was the pain and suffering award excessive?):**

**RULE:** An appellate court can deem a trial court's/jury's award excessive if it shocks the conscience and suggests passion, prejudice, or corruption. An appellate court: (1) cannot weigh the evidence and credibility of the witnesses; and (2) must determine every conflict in the evidence in respondent's favor.

- Lost Items: \$200,000 for past pain and suffering that she endured from losing a bracelet that could be replaced and a hat that her mother gave her would be too much. Value of \$8,1000 in loss.
- Seizure/Car Accident: But if you add the P&S (mental anguish and physical pain) suffered from the car accident/seizure, you might get closer to \$200,000 especially because she likely knew she was going to die.
- Coma: If you also add the physical pain from the coma you get closer to \$200,000, but because she was unconscious, it would be difficult to justify awarding \$200,000 so probably should be reduced a bit via **remittur**.

## (2) PLAINTIFF'S ESTATE V. MOVING COMPANY – LIMITATIONS

### FORESEEABILITY

**RULE:** A defendant is liable for harm that is a reasonably foreseeable result of the defendant's conduct; must reasonably flow from the defendant's act (Negligence -- Proximate Cause Rule). The harm itself must be foreseeable, but the extent of harm does not need to be foreseeable (Thin-Skull Plaintiff Rule).

### **ANALYSIS:**

- (a) \$15,000 for past/future therapy and medical bills
- (b) \$8,100 for the hat and bracelet, and
- (c) \$200,000 for past and future pain and suffering

- \$15K therapy and medical bills – The moving company might argue that it was not foreseeable because it didn't know that she would suffer such a severe reaction from losing a hat and bracelet. Most people don't have such deep attachment to items and if they did, they probably shouldn't put them in the moving truck! They should keep them in their car and transport it.
- \$8.1K for hat and bracelet – This is likely foreseeable because you know you'd need to pay for the loss of someone's items when you are moving their property.
- \$200K P&S – The moving company might argue that it was not foreseeable that the plaintiff would suffer any P&S from a box being destroyed by accident, which happens all the time. It didn't know that the hat and bracelet had such sentimental value to the plaintiff. No facts suggest she told them. Thus, how would they know she would faint and hit her head.
- Counter: If the court does determine that P&S and therapy/medical bills were foreseeable because they reasonably flowed from the act, which was the defendant lost some of the plaintiff's possessions, then the plaintiff would need to pay the full extent of the harm under the thin-skull plaintiff rule.

### (3) HUSBAND V. MOVING COMPANY

#### (a) Wrongful Death

**RULE:** Wrongful death statutes allow surviving spouses and minor children to have standing to sue for injuries suffered by them as a result of the decedent death. Some jurisdictions only allow survivors to recover pecuniary losses (e.g., lost wages and value of services provided by decedent) while other jurisdictions allow the recovery for loss of consortium, loss of society and companionship, or emotional distress.

**ANALYSIS (STEP 1: Entitled to remedies? If yes, what type?):**

- Yes, the husband would be entitled to damages for (1) lost wages and (2) loss of consortium. Probably not P&S because it says he didn't suffer any recoverable P&S.

**ANALYSIS (STEP 2: How do you measure each available damage?):**



(1) Lost Wages

RULE: When determining the proper amount of damages to award, the jury/court must consider each case on its own, but common factors analyzed include: the decedent's age, relationship to the person seeking recovery, earning capacity, and life expectancy and expert testimony.

- Likely get the value of the wages she would've provided for them for the remainder of her lifetime. She was only 40 so she died pretty young.
- He would likely also get whatever value she provided as the person who did all the cooking in the home.

(2) Loss of Consortium

RULE: The loss of consortium can **arise from either the intentional or negligent conduct** of a third party toward the marital relationship. **Types of damages available:** Consortium has been the subject of many different definitions...but it can generally be defined to include the mutual right of the husband and wife to that affection, solace, comfort, companionship, society, assistance, and sexual relations necessary to a successful marriage...emotional or intangible elements of the marital relationship.

- Even though he didn't suffer any recoverable P&S, the husband was upset and did lose his spouse and she was young, only 40 years old, and they had been together for 15 years. Thus, he would get the value of whatever that was to lose his spouse and marriage.

(b) Limitations

**ANALYSIS (STEP 3: Do any limitations apply?):**

BENEFITS RULE

**RULE:** When a defendant's conduct has caused harm, but also conferred a benefit upon the plaintiff to the interest which was harmed, the dollar value of the benefit conferred will be subtracted from the dollar value of the injury, where this is equitable.

**A:** The moving company will argue that whatever damages the husband will recover should be reduced by the \$150K he received under the life insurance policy because it was a benefit that the husband received when the plaintiff died. But unlikely that will occur because of the collateral source rule.

COLLATERAL SOURCE RULE

**RULE:** The collateral source rule is an exception to the rule against double recovery. The classic statement of the collateral source rule is that compensation received from a collateral source does not operate to reduce damages recoverable from a wrongdoer...if a plaintiff is compensated for his or her injuries by any source unaffiliated with the defendant, the defendant must still pay damages, even if it means the plaintiff recovers twice.

**A:** The husband will not have to reduce his recovery because the life insurance policy is a collateral source. This means the plaintiff had been paying premiums on that policy to give the husband the benefit of \$150K. If the moving company is liable, then the moving company will still need to pay the full extent of the damages.

1)

## 1. Homeowner's request for \$80,000 in liquidated damages

### Is the liquidated damages clause valid?

If the liquidated damages clause is valid, then the plaintiff can recover the \$80,000, which is 10 percent of the purchase price and will be deducted from any other compensatory damages that the plaintiff may be entitled to receive. If the liquidated damages clause is not valid, then the plaintiff might be entitled to the amount that would have been an earnest money deposit for escrow.

For liquidated damages clauses to be valid, these five elements must be met: (1) the parties intended to provide for a liquidated damages clause; (2) It would be difficult to ascertain the actual damages if the contract was breached; (3) the agreed upon amount is not a penalty; (4) the agreed upon amount is a reasonable prediction of damages that would flow from the breach; and (5) the agreed upon amount has a reasonable relation to the probable damages that will flow from the breach (causation).

(1) Intent. The defendant would argue that because they were a novice home buyer that they were unaware of what they were agreeing to in the contract. However, it is likely that element is met since the parties intentionally included the clause. (2) Certainty. The value of the clause 80k. It would be hard to calculate what the homeowners loss would be if the buyer did complete the contract. Most likely that this element is met since there would be a way to calculate the fair market rate for a home deposit.

(3) Penalty. Liquidated damages clause will not automatically be found valid just because both parties included it in the contract. Reasonable prediction. It could be that predicted that that the sale of the home would fall through since it is a booming market and nothing is for certain in the market.

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The clause is not valid, however the homeowner might be entitled to legal restitution damages.

## **2. Is the Homeowner entitled to compensatory damages?**

If the liquidated damages clause is invalid, then the plaintiff may receive compensatory damages.

The goal of contract law is of compensation. The ultimate purpose is to put the injured party in as good as a position as he would have been if no wrong had been committed. However, the plaintiff's damages are limited to its actual loss to ensure the plaintiff does not get a windfall.

The facts indicate that the buyers pulled out from their contract and did not purchase the home.

### **Expectancy**

Expectancy damages give the party the benefit of the bargain, as if the contract had been performed. Expectancy is measured as the loss in value added to the incidental and consequential loss, subtracted by any cost avoided.

The seller was expecting to sell his home for \$800,000. He should be entitled to recover a fair value of 2 to 3 percent of the purchase price since the sale did not go through.

### **Reliance**

Reliance damages restores the part to the status quo as if the contract never existed. Reliance is measured by the expenditures made subtracted by any costs avoided.

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The seller should be able to recover any costs or expenditures he made in preparation of selling his house and listing it on the market.

### **Incidental**

Incidental damages are the costs to minimize other losses

The seller may be able to recover any costs associated with re-listing and re-selling the home.

### **Consequential**

Consequential damages are losses incurred due to the breach of contract.

The seller should be able to recover the 2 to 3 percent of the value of his home, in form of a deposit.

### **Loss profits**

The plaintiff must show that (1) buyer had reason to know at the time of contracting that if he breached the contract, the seller would be deprived of another opportunity to sell his home; (2) the lost profits are reasonably ascertainable; and (3) the lost profits could not have been reasonably prevented. Loss of profits are measured by the amount of profit a plaintiff could have generated if the plaintiff not been breach of contract.

**Are compensatory damages appropriate?**

**Limitations?**

**Foreseeability**

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A defendant is liable for harm that a reasonably foreseeable result of the defendant's conduct

The homeowner would argue that it was not foreseeable that the sale of his house would fall through and he would not be able to collect his liquidated damages under the clause in the contract. The buyer would argue that it would be foreseeable because with the housing market the way it is, deals fall through all the time. There are safeguards in place like deposits while in escrow.

The homeowner should be entitled to some compensatory damages, the amount to be determined by the court.

### **3. Is the Pest Control Company entitled to compensatory damages?**

The goal of contract law is that of compensation. The ultimate purpose is to put the injured party in as good a place as if there had been no wrong. However, the damages the plaintiff's damages are limited to its actual loss to ensure the plaintiff does not get a windfall.

Compensatory damages appropriate

The Pest Control Company had a valid written contract with the homeowner to fix the dry rot problem.

### **Is the Pest Control Company entitled to Reliance damages?**

Reliance damages restore the party to the status quo as if the contract never existed.

Reliance is measured by the expenditures made subtracted by any costs avoided.

The Pest Control Company should be entitled to \$100, spent in reliance of the contract.

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## **Consequential**

Consequential damages are losses incurred due to the breach of contract.

The Pest Control Company may be able to recover \$2000 had they taken the other job opportunity. The homeowner will argue that it was not foreseeable that they would have another opportunity.

Therefore, it is unlikely that the Pest Control Company would be able to recover consequential damages.

### **Is the Pest Control Company entitled to lost profits/ Lost opportunity damages?**

Pest Control had a contract with the homeowner to perform the contract of fixing the dry rot problem for \$1,000. This lost contract could be categorized as a lost opportunity because he was not paid to do the work. It could also be categorized as lost wages since the pest control company would have made \$2,000 had he accepted the other job offer.

Lost opportunity is measured as the amount which would place the plaintiff in the position would had been if no harm had occurred.

The facts show that the Pest Control spent \$100 in labor and material. Because the contract was not executed to the end, the Pest control company should be entitled to the amount that he spent on labor and material.

### **Do any limitations apply?**

## **Foreseeability**

A defendant is liable for harm that is reasonably foreseeable result of the defendants conduct.

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Homeowner will argue that it was not foreseeable because the Pest Control company never told him about the other job offer, and he couldn't have been expected to know.

The Pest Control Company would argue that it was foreseeable that he is a sought after company and that there would be other opportunities other than his dry rot problem. Also, it would be foreseeable that after accepting the job that he would need to purchase materials for the job.

The Pest Control Company should recover \$100.



2)

**Threshold question: Did P's claims die with her?**

*Survival acts allow the decedent's estate to recover for pre-death injuries sustained by the decedent.*

The P's claims did not die with her, her estate can recover for pecuniary and non-pecuniary pre-death losses (medical bills and medicine, funeral expenses, lost wages, pain and suffering, etc.)

**1a. \$15,000 for past/future therapy & med bills**

*The goal of contract and tort law is that of compensation. The ultimate purpose is to put the injured party in as good of a position that she would have been if the wrong had not occurred. The plaintiff's damages are limited to actual loss to ensure she does not receive a windfall.*

*Step 1: is the plaintiff entitled to compensatory damages?*

Yes, P succeed on underlying claim. The P is entitled to compensatory damages. Past and future therapy and medical bills are special damages.

*Step 2: How are the damages measured?*

*The Fair Market Value of the past/future therapy & med bills are measured by the price of similar services or expert testimony if the actual amount is unavailable.*

P's medical and therapy bills will likely be measured by similar services or she likely had the exact amount (\$15,000) of how much she paid for them before she died. Survival acts (supra) only allow the estate to recover for pre-death injuries, so the estate would not be able to recover for future medical or therapy bills. The amount of recovery would be limited to the amount of the \$15,000 that was incurred pre-death.

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The jury's award was likely incorrect, if they accounted for future bills.

**1b. \$8,100 for hat and bracelet**

*The goal of contract and tort law is that of compensation. The ultimate purpose is to put the injured party in as good of a position that she would have been if the wrong had not occurred. The plaintiff's damages are limited to actual loss to ensure she does not receive a windfall.*

*Step 1: is the plaintiff entitled to compensatory damages?*

Yes, P succeed on underlying claim. The P is entitled to the actual cost of the hat and bracelet.

*Step 2: How are the damages measured?*

*For damaged property, the measurement is the FMV of the hat and the bracelet. If there is no FMV, then it is measured by the cost to replace or reproduce the hat and the bracelet. If the hat and the bracelet cannot be replaced or reproduced, the P is entitled to the actual/intrinsic value of the hat and the bracelet.*

P should argue that the hat does not have a fair market value and cannot be replaced because it was hand-knitted by her mother who passed away. The actual or intrinsic value will be awarded to the P, however sentimental value is not recoverable. The moving company should argue that even though the hat is irreplaceable, it is not worth \$8,000 because that is far more than the cost to order a similar hat (\$50.) The FMV for the bracelet (\$100) will likely be awarded because it is available at a local store for that price.

The \$100 for the bracelet is correct, but the \$8,000 for the hat is not.

**1c. \$200,000 for the past and future P&S while in coma**

*Step 1: is the plaintiff entitled to P&S damages?*

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*To recover for P&S, the plaintiff must (1) consciously endure the suffering, (2) have some awareness of the pain, (3) suffer physical harm, or (4) show some physical manifestation of distress.*

In this case, P should argue that even though she was in a coma, when she woke up she remembered the destroyed items which made her very upset and caused her to have difficulty sleeping and she suffered seizures. The moving company should argue that she was in a coma instantly after hitting her head which made her unaware of the pain and she was unconscious. When she woke up she didn't have any physical pain or show distress, she was just upset about losing her items.

*Step 2: How to measure P&S?*

*Majority: There are no fixed or absolute standard on how to measure the monetary value of P&S damages.*

*Dissent: The award should be limited to the amount of pecuniary loss.*

P should argue that the monetary value is not measurable and the jury did a fine job when determining how much she suffered because of the severe mental distress and anguish she experienced when she woke up from the coma. The moving company should argue that the amount should be fixed to the pecuniary losses which does not come anywhere near \$200,000.

*Step 3: Was the award excessive?*

*An appellate court can deem an award excessive if it shocks the conscience or tends to show passion, prejudice, or corruption on behalf of the jury. The court can remittitur (lower the award), additur (increase the award), or remand back for another trial.*

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In this case, the award is likely excessive because it is well over the amount that P incurred for medical and therapy expenses and the loss of the items. She also did not consciously endure most of the pain because she was in a coma, which would entitled her to less P&S damages. The \$200,000 is more than 5X the pecuniary losses suffered and tends to show that the jury acted with passion because it is so high. If this jurisdiction followed the dissent, the P would only be entitled to the pecuniary losses which was much less than \$200,000.

The jury's award was likely incorrect and will be lowered.

## 2. Moving company's appeal - foreseeability

*A defendant will not be held liable for damages that were not reasonably foreseeable from the defendant's conduct.*

The moving company should argue that it was not reasonably foreseeable that the P would faint and hit her head and go into a coma after learning that two small items were destroyed in the move. They should also argue that the other issues she suffered like trouble sleeping were not foreseeable from their conduct either. It was too far removed and she could have been solely dealing with the death of her mother. They could argue they did not know that the items were sentimental or special and that they had no way of knowing they were from her deceased mother. Had they known, they could have taken more special care of them.

P should argue that any personal item could be sentimental and special and that moving companies should know that have handled people's personal belongings before. P should argue that hitting her head was reasonably foreseeable from fainting and the after effects of the coma were foreseeable.

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The issues that the P suffered were not likely reasonably foreseeable because the moving company did not have enough information about the items or the P.

### 3a. Husband's compensatory damages

*Wrongful death statutes allow a decedent's surviving spouse and minor children to have standing to sue for injuries suffered as a result of the decedent's death. Some jurisdictions limit the recovery to pecuniary losses, while other allow recovery for loss of consortium, P&S, loss of enjoyment, etc. The factors the court will consider in making a fair decision are: the decedent's age and life expectancy, earning capacity, their relationship with the party who is suing, and expert testimony.*

*Loss of consortium damages will be awarded when a third party negligently or intentionally interferes with the marital relationship. Consortium is defined as comfort, solace, companionship, assistance, community, or sexual relations necessary for a successful marriage.*

The husband should argue that he is entitled to damages he suffered because his wife was only 40 years old and she was their main source of income. She had a higher earning capacity than he did and she did not have any underlying health conditions that would have shortened her life expectancy. He should argue that they had been together for 15 years and they had a long and happy relationship. He no longer has his companion, his comfort, and he cannot have sexual relations with his wife.

Considering these factors, the court will likely award the husband damages for lost wages and financial support, pain and suffering, loss of consortium. he likely will not recover for the past medical bills because the estate already was awarded and that would give him a windfall.

### 3b. Life insurance policy's impact

*Collateral source: If a P recovers from an unaffiliated third party, the defendant is still liable for the full amount of damages, even if that means the P recovers twice.*

In this case, the husband will likely be able to recover from both the life insurance policy and the defendant because the insurance company is an unaffiliated third party. The moving company was still negligent and is still liable to the husband for their wrongdoing, even if he recovers twice.

The life insurance policy has no impact on the husband's award of damages.

**END OF EXAM**