

Scott Pearce's  
Master Essay Method

Remedies

## *Remedies Approach*

**Introduction:** A complete understanding of remedies is central to effective performance on the essay section of any Bar Examination. Not only are these issues intrinsic to torts, contracts and property, they regularly come up on the other subjects as well. In particular, remedies issues are common in Corporations and Trusts. This lesson will give you a chance to review and practice many of the ideas we've just covered in the first three lessons. You may wish to proceed through some of the other lessons before working through these questions. Regardless, it is difficult to overstate the importance of remedies, so here are eight more questions for your consideration.

### I. Damages

#### A. Torts

1. Compensatory
2. Punitive

#### B. Contracts

1. Compensatory (Expectancy)
2. Consequential (Must be foreseeable at the time the contract is made.)

### II. Restitution

A. Money: quasi contract analysis prevents unjust enrichment

B. Replevin: pretrial remedy to recover specific personal property

C. Ejectment: recovery of specific real property, designed to remove trespassers

### III. Equity

#### A. Torts: Temporary and Permanent Injunctions

1. Inadequate legal remedy
2. Property interest (defined very broadly today)
3. Feasibility
4. Balance of hardships
5. Defenses: laches, unclean hands, 1st Amendment freedom of speech

B. Contracts: Specific Performance

1. Inadequate legal remedy
2. Definite and certain contract
3. Feasibility
4. Mutuality
5. Defenses: laches, unclean hands, unconscionability, personal servitude

C. Equitable Restitution

1. Constructive Trust: requires a party to turn over property s/he has both possession of and title to.
2. Equitable lien: Like a constructive trust, but the party can obtain other property in the hands of the wrongdoer. Tracing bank accounts or assets.

IV. Special Contracts Remedies

A. Rescission: Cancel a contract

1. Mistake, misrepresentation are the most common reasons for rescission.
2. Sale to a BFP is the most common defense.

B. Reformation: Revise a contract to reflect the true intent of the parties

1. Scrivener's error is the most common reason for reformation
2. Sale to BFP is a defense, parol evidence rule is not a defense.

V. Fiduciary Liability

A. Fiduciary relationships can exist by contract. Corporate insiders are often fiduciaries to the company and to investors. Trustees are fiduciaries to the beneficiaries and to the trust.

B. Fiduciary Duties

1. Duty of Loyalty
2. Duty of Care
  - a. Prudent investor rule
  - b. Business judgment rule
  - c. Duty to diversify

## Remedies

Copyright July, 2008 – State Bar of California

Barry is the publisher of Auto Designer's Digest, a magazine that appeals to classic car enthusiasts. For years, Barry has been trying to win a first place award in the annual Columbia Concours d'Elegance ("Concours"), one of the most prestigious auto shows in the country. He was sure that winning such an award would vastly increase the circulation of his magazine and attract lucrative advertising revenues. This year's Concours was scheduled to begin on June 1, with applications for entry to be submitted by May 1.

Sally owned a 1932 Phaeton, one of only two surviving cars of that make and model. The car was in such pristine condition that it stood a very good chance of winning the first place prize.

On April 1, Barry and Sally entered into a valid written contract by which Barry agreed to buy, and Sally agreed to sell, the Phaeton for \$200,000 for delivery on May 25. In anticipation of acquiring the Phaeton, Barry completed the application and paid the nonrefundable \$5,000 entry fee for the Concours.

On May 10, Sally told Barry that she had just accepted \$300,000 in cash for the Phaeton from a wealthy Italian car collector, stating "That's what it's really worth," and added that she would deliver the car to a shipping company for transport to Italy within a week.

1. Can Barry sue Sally before May 25? Discuss.
2. What provisional remedies might Barry seek to prevent Sally from delivering the Phaeton to the shipping company pending resolution of his dispute with Sally, and would the court be likely to grant them? Discuss.
3. Can Barry obtain the Phaeton by specific performance or replevin? Discuss.
4. If Barry decides instead to seek damages for breach of contract, can he recover damages for: (a) the nondelivery of the Phaeton; (b) the loss of the expected increase in circulation and advertising revenues; and (c) the loss of the \$5,000 nonrefundable entry fee? Discuss.

**Remedies – Outline of Issues**  
**Copyright 2008 – Scott F. Pearce, Esq.**

- I. Can Barry sue Sally before May 25? Yes.
  - A. The Agreement between Barry and Sally
  - B. Anticipatory Repudiation
  - C. Conclusion
  
- II. Barry's Provisional Remedies
  - A. Temporary Restraining Order
  - B. Preliminary Injunction
  - C. Conclusion
  
- III. Specific Performance and Replevin
  - A. Specific Performance
  - B. Replevin
  - C. Conclusion
  
- IV. Damages
  - A. Non-Delivery of the Phaeton
  - B. Loss of Circulation and Ad Revenue
  - C. Loss of \$5,000 Entry Fee
  - D. Conclusion

**Remedies – Answer**  
**Copyright 2008 – Scott F. Pearce, Esq.**

I. Can Barry sue Sally before May 25? Yes.

A. The Agreement between Barry and Sally

Barry's rights against Sally are based on their April 1 contract for the purchase and sale of Sally's 1932 Phaeton car for \$200,000. This contract was valid. Sally does not have a defense to the formation of her agreement with Barry. The analysis that follows will conclude that Sally also does not have a defense to the enforcement of this contract.

B. Anticipatory Repudiation

On May 10, Sally told Barry that she had just accepted \$300,000 in cash for the car from another buyer. This constitutes a repudiation of the contract by Sally. She has told Barry that she won't perform according to their valid agreement. Sally has no defense to her breach of the contract. Her sole motivation is greed, since the overseas car collector is willing to pay 50% more than Barry.

As the non-breaching party, Barry has three options. He can sue now. He can wait until performance is due and then sue when Sally does not perform. He can seek further assurances. Under the circumstances, Barry has a compelling reason to sue now. Sally has indicated she will deliver the car to a shipping company on or about May 17 for transport to the Italian buyer. If Barry waited until May 25 to sue, he might be limited to money damages. His preferred remedy is specific performance, as discussed below.

C. Conclusion

Because Sally repudiated the contract, Barry can sue Sally before May 25.

II. Barry's Provisional Remedies

A. Temporary Restraining Order

As soon as his lawsuit against Sally is filed and served, Barry can go to court *ex parte* - without Sally's presence - to seek an emergency injunction called a Temporary Restraining Order (T.R.O.). This remedy is designed to keep the status quo in place until a formal noticed hearing can be conducted to determine whether the T.R.O. should be stopped or extended.

At the *ex parte* hearing, Barry would show the court his contract with Sally and explain how she has repudiated the agreement. He will further show that he will suffer permanent harm if the T.R.O. is not granted, since Sally will ship the car to Italy if the court does not intervene.

Barry can make a compelling showing and the court is likely to grant the T.R.O..

#### B. Preliminary Injunction

The court would only consider issuing a Preliminary Injunction during a formal noticed hearing, with both parties represented. The purpose of a preliminary injunction is to keep the status quo in place pending trial. Barry can make a good case for a Preliminary Injunction, but he would prefer the pretrial remedy of Replevin, discussed below, because that would allow him to take possession of the car in time for him to enter it into the Concours d'Elegance on June 1.

#### C. Conclusion

A court would likely grant an *ex parte* T.R.O. to Barry to prevent Sally from delivering the Phaeton to the shipping company. After a noticed hearing, it is likely that the court would choose the legal remedy of Replevin, discussed below, over granting a Preliminary Injunction.

### III. Specific Performance and Replevin

#### A. Specific Performance

Specific performance is an equitable remedy that a successful plaintiff wins after prevailing at trial. The facts presented offer a textbook example of a case where specific performance is the appropriate remedy.

Barry can show that legal remedies are inadequate, because there are only two surviving 1932 Phaeton cars. Since the subject matter of the contract is a unique chattel, only the equitable remedy of specific performance will make Barry whole. The contract between Barry and Sally was definite and certain. No facts are present that suggest it would be less than feasible for the court to order specific performance. Mutuality is present, although this element is no longer strictly required. Sally has no defenses. Her repudiation of the contract with Barry is motivated solely by greed.

#### B. Replevin

Replevin is a legal, pretrial remedy in which the court grants to the Plaintiff possession of property that is the subject of the underlying lawsuit. In this case, Barry can make a compelling showing that he should be granted this remedy. The underlying contract between Barry and Sally is valid. Barry got into the contract with Sally because he wanted to enter the Phaeton in the annual Columbia Concours d'Elegance, which begins on June 1. The court will require Barry to post a bond, but there is no reason for the court to deny Barry the Replevin remedy he seeks.

#### C. Conclusion

Barry can obtain the Phaeton by replevin before trial. He will obtain Specific Performance as the result of the trial.

#### IV. Damages

If Barry chooses to seek damages for breach of contract, he will obtain substantial damages, although it is unlikely he will win all the damages which he seeks.

##### A. Non-Delivery of the Phaeton

The purpose of damages is to make the plaintiff whole. In this case, the Italian car collector's purchase price of \$300,000 is evidence that Sally's breach should be worth \$100,000 to Barry, since that is the difference between the contract price and the market price.

The same number, \$100,000, could be awarded to Barry in restitution. The purpose of restitution is to prevent the unjust enrichment of the defendant. In this case, Sally breached her contract with Barry so she could profit by an additional \$100,000. It would be unjust to let her keep that money.

##### B. Loss of Circulation and Ad Revenue

Barry was sure that winning the Concours First Place award would vastly increase the circulation of his magazine and attract lucrative advertising revenues. These damages are consequential damages. To be recoverable, they must be foreseeable to the breaching party at the time the contract was formed.

Barry has two problems. First, he can't prove that the Phaeton would have won the contest. Second, he can't prove how much money he would have made if the car had won. To be recoverable, damages must be reasonably certain. Barry's claimed damages about circulation and ad revenue are too speculative to be recoverable from Sally.

##### C. Loss of \$5,000 Entry Fee

It is likely that Sally was aware of Barry's plans to enter the car into the contest at the time she agreed to sell the Phaeton to Barry. Assuming that is the case, Barry would be able to recover the \$5,000 entry fee as foreseeable consequential damages.

##### D. Conclusion

If Barry decides to sue for damages, he will recover \$100,000 for the non-delivery of the Phaeton, and he probably will recover the \$5,000 entry fee.



## Contracts / Remedies

Copyright July, 2007 – State Bar of California

Paula, a recent art-school graduate, was trying to establish a reputation as an art acquisition agent, i.e., one who finds works of art for collectors interested in buying particular works. It is a business where reliability and confidentiality are critical.

Paula's first commission was to find for City Museum ("Museum") any one of the three originals in a series of paintings by Monay, titled "The Pond." Museum agreed to pay as much as \$300,000 for it and to pay Paula \$15,000 upon acquisition. The works of Monay are rare and held by private collectors, and none had been on the market in recent years.

Paula eventually tracked down Sally, a private collector who owned the three originals of Monay's "The Pond." After some negotiations, in which Sally expressed offhandedly how proud she was that she only sold to private collectors, Sally orally agreed to sell to Paula for \$200,000 whichever of the three paintings she selected. Paula agreed that, as soon as she could make the selection, she would transfer the purchase money into Sally's bank account. Paula immediately called the curator at Museum, who told her to select the first of the three in the series, and the curator immediately caused Museum's bank to wire-transfer \$200,000 into Sally's account to cover the purchase.

The next day, when Paula went to tell Sally which painting she had selected and to pick it up, Sally declined to go through with the sale. Sally accused Paula of deceit, saying it was only when she learned that the money for the purchase had come from Museum, that she realized that the painting would no longer be held privately. Sally tendered to Paula a certified check, which she had signed and drawn from her bank account, refunding the \$200,000. In the notation line of the check, Sally had written, "Refund on 1<sup>st</sup> of Monay Pond series."

Paula refused to accept the check and insisted on getting the painting. She explained that she had not disclosed her principal's identity because she was bound by confidentiality and that, unless she could deliver the painting to Museum, her budding career as an art acquisition agent was over. Sally told Paula, "That's too bad. Our contract wasn't in writing, so you can't force me to sell you the painting. Besides, you deceived me about why you wanted to buy it."

Can Paula obtain specific performance of Sally's agreement to sell Paula the painting? Discuss.

## **Contracts / Remedies – Outline of Issues**

**Copyright 2007 – Scott F. Pearce, Esq.**

- I. Paula v. Sally – Contract Theory of Liability
  - A. Contract Formation
  - B. Defenses to Formation
    - 1. Statute of Frauds
    - 2. Fraud in the inducement
    - 3. Conclusion
  - C. Breach
  - D. Defenses to Breach
  - E. Conclusion
  
- II. Specific Performance
  - A. Definite and Certain Contract
  - B. Inadequacy of Legal Remedy
  - C. Feasibility
  - D. Mutuality
  - E. Defenses
  - F. Conclusion

## **REMEDIES**

**Copyright July 2005 State Bar of California**

Stan and Barb entered into a valid written contract whereby (1) Stan agreed to convey to Barb 100 acres of agricultural land and water rights in an adjacent stream, and (2) Barb agreed to pay Stan \$100,000. When Stan and Barb were negotiating the deal, Stan said, "You know I want to make sure that this property will still be used for farming and not developed." Barb replied simply, "Well, I can certainly understand your feelings." In fact, Barb intended to develop the land as a resort.

The conveyance was to take place on June 1. On May 15, Stan called Barb and told her the deal was off. Stan said that a third party, Tom, had offered him \$130,000 for the land. Stan also said that he had discovered that Barb intended to develop the land.

On May 16, Barb discovered that Stan has title to only 90 of the 100 acres specified, and that he does not have water rights in the adjacent stream.

Barb still wishes to purchase the property. However, it will cost her \$15,000 to purchase the water rights from the true owner of those rights.

What equitable and contractual remedies, if any, may Barb seek, what defenses, if any, may Stan assert, and what is the likely outcome on each? Discuss.

**REMEDIES**  
**Copyright July 2005 - Scott F. Pearce, Esq.**  
**Outline**

- I. Barb v. Stan - Contract Theory of Liability
  - A. Formation
  - B. Defenses to Formation
  - C. Stan's Breach: Repudiation; Incomplete Parcel; No Water Rights
  - D. Defenses to Breach: Tom's offer, Barb's intent to develop
  - E. Conclusion: Barb wins
  
- II. Barb v. Stan - Remedies
  - A. Contractual Remedies: Reformation and Rescission
  - B. \$10,000 Abatement of the Purchase Price
  - C. \$15,000 Price Reduction over Water Rights
  - D. Damages
  - E. Specific Performance
    - 1. Inadequacy of Legal Remedies
    - 2. Definite and Certain Contract
    - 3. Feasibility
    - 4. Mutuality
    - 5. Defenses
  - F. Conclusions

## REMEDIES

Copyright July, 2003 – State Bar of California

In 1993, Polly and Donald orally agreed to jointly purchase a house on Willow Avenue. They each contributed \$20,000 toward the down payment on jointly borrowed the balance on the purchase price from a bank, which took a first deed of trust on the property as security for the loan. Polly paid her \$20,000 share of the down payment in cash. Donald paid his \$20,000 with money he embezzled from his employer, Acme Co (Acme).

Polly and Donald orally agreed that the house would be put in Donald's name alone. Polly had creditors seeking to enforce debt judgments against her, and she did not want them to levy on her interest in the house. Polly and Donald further orally agreed that Donald alone would occupy the property and that, in lieu of rent, he would make the monthly loan payments and take care of minor maintenance. They also orally agreed that if and when Donald vacated the property, they would sell it and divide the net proceeds equally.

Donald lived in the house, made the monthly loan payments, and performed routine maintenance.

In 1997, Acme discovered Donald's embezzlement and fired him.

In 1998, Donald vacated the house and rented it to tenants for three years, using the rental payments to cover the loan payments and the maintenance costs.

In 2003, Donald sold the house, paid the bank loan in full, and realized \$100,000 in net proceeds. Donald has offered to repay Polly only her \$20,000 down payment, but Polly claims she is entitled to \$50,000.

Having made no prior effort to pursue Donald for his embezzlement, Acme now claims it is entitled to recover an amount up to the \$100,000 net proceeds from the sale of the property, but in any case, at least the \$20,000 Donald embezzled. Donald has no assets apart from the house sale proceeds.

What remedies, based on trust theories, might Polly and Acme seek against Donald as to the house sale proceeds, what defenses might Donald reasonably assert against Polly and Acme, and what is the likely result as to each remedy? Discuss.

**Remedies – Outline of Issues**  
**Copyright 2003 – Scott F. Pearce, Esq.**

- I. Polly v. Donald
  - A. Breach of Contract
  - B. Purchase Money Resulting Trust
  - C. Constructive Trust
  - D. Donald's Defenses
    - 1. Statute of Frauds
    - 2. Unclean Hands
  - E. Conclusion
  
- II. Acme v. Donald
  - A. Embezzlement / Conversion
  - B. Purchase Money Resulting Trust
  - C. Constructive Trust
  - D. Donald's Defenses
    - 1. Laches
    - 2. Statute of Limitations
  - E. Conclusion

## REMEDIES

Copyright February 2001 - State Bar of California

In 1998, Diane built an office building on her land adjacent to land owned by Peter. Neither she nor Peter realized that the building encroached about ten inches on Peter's adjacent property. Because of the narrowness of Diane's lot, Diane did not have much latitude in the design of her office building. In December 2000, a town survey made for other purposes revealed the mistake. In constructing her office building, Diane inadvertently destroyed two dozen ornamental trees that had been on Peter's land for years.

Peter, who was a restaurateur, maintained a garden where he grew specialty vegetables for his restaurant. The vegetables have been unable to flourish without the filtered sunlight provided by the trees that Diane destroyed. As a result, Peter's costs have risen as he has been forced to buy more produce from suppliers. In addition, his reputation as a restaurateur has suffered because his customers had come to look forward to his fresh garden vegetables. Many of his customers have begun to frequent other restaurants, and the long-term effect on his business is incalculable.

Diane has had tenants in her building since it opened in 1998, and most of them have leases covering several years. To remove the encroaching wall would be costly to Diane, would reduce the office space, and would disrupt the tenants on the encroaching side of the building sufficiently that they could claim a constructive or even an actual eviction.

Diane's tenants have been parking on a lot in back of Diane's building. Diane paid for the paving of the lot under the mistaken belief that the lot was on her land. In reality, the lot is almost entirely on Peter's land. Diane has been charging her tenants \$50 a month to lease parking space in the lot. Peter has never voiced any objection to this practice because, until the town survey, he did not realize that the lot was on his land.

What remedies are available to Peter against Diane, and on what theories of liability are they based?

Discuss.

**REMEDIES**  
**Copyright February 2001 - Scott F. Pearce, Esq.**  
**Outline**

- I. Peter v. Diane - Theories of Liability
  - A. Encroachment of Office Building: Continuing Trespass, 1998-2000
  - B. Destruction of Peter's Ornamental Trees
    - 1. Conversion
    - 2. Trespass Causing Severance
    - 3. Waste
  - C. Parking Lot: Encroachment - Continuing Trespass
  - D. Diane's Defenses: None, other than a lack of knowing willfulness.
  - E. Conclusion: Diane is Liable
- II. Peter's Remedies
  - A. Damages
    - 1. Encroachment of Building
    - 2. Trees
      - a. Peter's Increased Costs
      - b. Peter's Damaged Reputation
      - c. Peter's Incalculable Lost Business
    - 3. Punitive Damages
  - B. Restitution - Parking Lot: \$50 per month per space - Diane has a right to recoup
  - C. Injunctive Relief
    - 1. Inadequacy of Legal Remedies
    - 2. Property Right
    - 3. Feasibility
    - 4. Balancing
    - 5. Defenses
  - D. Conclusion



## TORTS / REMEDIES

Copyright July, 2000 - State Bar of California

Dan operates a plant where he makes pottery. To provide a special high-capacity power source to his pottery kilns, Dan recently installed on the electric company's power pole outside of his building an electrical transformer that would increase the electrical current entering his plant from the main power line. He did this without the knowledge or consent of the electric company.

Dan did not know that the power line on which he installed the transformer also feeds power to the adjacent office buildings. Peter occupies one of those adjacent office buildings. In the building, he has an extensive computer network that he uses in his business of providing advanced computer services to local commercial enterprises. Peter has been in this business for ten years. He employs several highly paid computer operators and technicians.

Dan's installation of the transformer caused power surges each time his kilns were turned on and off. Soon after Dan had installed the transformer, Peter's computers began to malfunction and eventually were severely damaged by the repeated power surges. As a result, Peter lost a large amount of data stored in his computers. He laid off some employees without pay and shut down his business for two weeks while the computers were repaired and while the remaining employees restored the lost data.

During the shutdown, Peter lost considerable income because he was unable to furnish computer services to his customers. Peter and the laid-off employees have filed suit against Dan.

1. In an action against Dan, what theories, if any, might Peter assert and what defenses might Dan raise if Peter seeks to recover:
  - a. The cost of repairing his computers? Discuss.
  - b. The cost of restoring the lost data? Discuss.
  - c. His lost income? Discuss.
  - d. Loss of goodwill and other incidental effects of the disruption of his business? Discuss.
2. May Peter recover punitive damages? Discuss.
3. May the laid-off employees recover lost wages and benefits from Dan under any theory? Discuss.

**TORTS / REMEDIES**  
**Copyright July, 2000 - Scott F. Pearce, Esq.**  
**Outline**

- I. Peter v. Dan
  - A. Recklessness / Negligence
    - 1. Duty
    - 2. Breach
    - 3. Causation
    - 4. Damages
      - a. Cost to Repair
      - b. Cost to Restore Data
      - c. Lost Income
      - d. Loss of Goodwill
      - e. Punitive Damages
    - 5. Defenses
    - 6. Conclusion
  - B. Strict Liability
  - C. Trespass / Conversion
  - D. Conclusion
- II. May Peter Recover Punitive Damages?
- III. Employees v. Dan for Lost Wages

## REMEDIES

Copyright February, 2000 - State Bar of California

Chemco built a chemical processing plant in a rural area. As part of its operations, Chemco discharges waste into a local river at levels that are low, but constant. Chemco carefully monitors discharge levels on a regular basis.

About six months after Chemco began operations, Pat, a rancher, purchased a tract of grazing land traversed by the same river approximately one-half mile downstream of Chemco's location and stocked the tract with several thousand head of cattle. Within several months, some of Pat's cattle began to get sick and several died. Pat initially attributed the loss of his cattle to a variety of causes, including a recent change he had made in their feed. After another year following the onset of sickness among his cattle, with continuing loss of animals, Pat decided to test the water in the river. He discovered that the level of toxic substances in the river is sufficient to cause sickness and death to his animals. During the proceeding year, Pat's cattle loss totaled about \$100,000, and he projects that his losses will increase every succeeding year unless Chemco stops discharging waste into the river.

Chemco employs more than 1,000 persons in the rural community, by far the largest employer in the county. As a result of Pat's complaints, Chemco hired an engineering firm to investigate the wastes being emitted at its plant and learned that installation of a new filtration system could substantially reduce, if not eliminate, the emission. The filtration system would cost almost \$1,000,000, a sum that Chemco could pay only if it were financed over a ten-year term. Relocation of the plant would cost many millions of dollars and would cause Chemco to cease operations. Hauling, storing and distributing water for Pat's cattle from alternative sources would cost approximately \$100,000 per year.

Pat sued Chemco requesting an injunction either to enjoin all operations of Chemco or to require that Chemco cease or remedy the discharge or to require Chemco to furnish Pat with clear water from alternative sources. Pat also complained that he should be awarded substantial damages to compensate him for his past and prospective losses. Chemco opposed the prayer for an injunction on the ground that its operations in the area preceded Pat's activities, and asserted that either an injunction requiring any of the remedies sought by Pat or an award of damages of the magnitude sought by Pat would put Chemco out of business.

1. What arguments might be made for and against an injunction incorporating each of the forms of injunctive relief sought by Pat, and what would be the likely result in each? Discuss.
2. How should the court rule on Pat's claims for past and prospective damages? Discuss.

Do not discuss state or federal environmental laws.

**REMEDIES**  
**Copyright February, 2000 - Scott F. Pearce, Esq.**  
**Outline**

- I. Pat and Chemco's arguments for and against an injunction:
  - A. Pat's Theories of Liability: Nuisance, Strict Liability, Trespass
    - 1. Nuisance
    - 2. Strict Liability
    - 3. Trespass
  - B. Chemco's Defenses to Liability
  - C. Injunctive Relief Analysis
    - 1. Inadequacy of Legal Remedy
    - 2. Property Interest
    - 3. Feasibility
    - 4. Balance of Hardships
    - 5. Defenses to Equity
  - D. Conclusion
- II. Pat's claims for past and prospective damages:
  - A. Past Damages
  - B. Prospective Damages
  - C. Conclusion

**CONTRACTS / REMEDIES**  
**Copyright February 1999 - State Bar of California**

Maker manufactures printing presses. News, a publisher of a local newspaper, had decided to purchase new presses. Rep, a representative of Maker, met with Boss, the president of News, to describe the advantages of Maker's new press. Rep also drew rough plans of the alterations that would be required in the News pressroom to accommodate the new presses, including additional floor space and new electrical installations, and left the plans with Boss.

On December 1, Boss received a letter signed by Seller, a member of Maker's sales staff, offering to sell the required number of presses at a cost of \$2.4million. The offer contained provisions relating to the delivery schedule, warranties, and payment terms, but did not specify a particular mode of acceptance of the offer. Boss immediately decided to accept the offer, and telephoned Seller's office. Seller was out of town, and Boss left the following message: "Looks good. I'm sold. Call me when you get back so we can discuss details."

Boss next telephoned Pressco and rejected an outstanding offer by Pressco to sell presses to News similar to those offered by Maker. Using the rough plans drawn by Rep, Boss also directed that work begin on the necessary pressroom renovations. By December 4, a wall had been demolished in the pressroom and a contract had been signed for the new electrical installations.

On December 5, the President of the United States announced a ban on imports of foreign computerized heavy equipment. This removed from the American market a foreign manufacturer which had been the only competitor of Maker and Pressco. That afternoon, Boss received a telegram from Maker stating, "All outstanding offers are withdrawn." In a subsequent conversation, Seller told Boss that Maker would not deliver the presses for less than \$2.9 million. A telephone call by Boss to Pressco revealed that Pressco's entire output had been sold to another buyer.

1. Was Maker obligated to sell the presses to News for \$2.4 million? Discuss.
2. Assume Maker was so obligated. What are News' rights and remedies against Maker. Discuss.

## CONTRACTS / REMEDIES

### Outline

Copyright February 1999 - Scott F. Pearce, Esq.

- I. Was Maker obligated to sell the presses to News for \$2.4 million?
  - A. The UCC controls this transaction.
  - B. Contract formation
    - 1. The meeting between Boss and Rep
    - 2. Seller's December 1 letter to Boss: a valid offer
    - 3. Seller's letter did not specify a particular mode of acceptance of the offer.
    - 4. Boss's telephone message to Seller: a valid acceptance
    - 5. Acceptance effective upon dispatch
    - 6. Consideration
    - 7. Foreseeable Reliance
  - C. Maker's Defense to Formation: The offer was withdrawn on December 5
  - D. Maker's Breach: The December 5 telegram and Seller's subsequent conversation with Boss.
  - E. Maker's Defenses to Breach: Impossibility / Impracticably / Frustration
  - F. Conclusion
  
- II News' rights and remedies against Maker
  - A. Damages are inadequate
  - B. Restitution
  - C. Specific Performance
    - 1. Definite and Certain Contract
    - 2. Conditions Satisfied by Plaintiff
    - 3. Damages are inadequate - discussed above
    - 4. Feasibility
    - 5. Mutuality
    - 6. Defenses
  - D. Conclusion

## REMEDIES

Copyright February 1998 - State Bar of California

Halfway, Inc. is a nonprofit organization, licensed by the state, to assist with the rehabilitation of former convicts. It owns a five-bedroom house in a residential neighborhood of well-maintained single-family homes. The house purchased by Halfway is on a parcel zoned for multiple family use, as is a small apartment building across the street. The remaining parcels are zoned for single family use only.

For the past three months, Halfway has been using the building as a halfway house for parolees from state prison. At any given time, six to eight parolees live in the house while they look for employment and adjust to life in society. Most of the parolees are former sex and drug offenders. Such offenders have high recidivism rates. There is strict supervision by at least one resident director on the premises at all times. Halfway has successfully operated halfway houses in three other residential neighborhood locations in the state, attributing its success to the behavioral influences inherent in established residential environments.

Residents and property owners in the neighborhood have formed NASS, a neighborhood association that wants to prevent the halfway house from continuing to operate. NASS members are concerned about their safety, the safety of their children and their property values. While the halfway house was being renovated in preparation for the parolee program, one of Halfway's employees, not a parolee, assaulted a woman who lives in the neighborhood and is a NASS member.

NASS recently discovered that 20 years ago an injunction had issued and been recorded in the chain of title of Halfway's parcel forbidding the use of the property as a residence by unmarried persons living together. The injunction had issued because a group of college students, while living in the house, caused disturbances with late-night parties and loud rock music.

NASS, on behalf of its members, has sued Halfway. In its complaint, NASS prays for: (1) an injunction against operation of a halfway house on the parcel Halfway has purchased on the grounds that the halfway house constitutes both a public and a private nuisance and (2) a declaratory judgment that the 20-year-old injunction is an *in rem* injunction that prevents Halfway from operating a halfway house.

What evidence must NASS produce to make a *prima facie* showing on each of its claims, what defenses might Halfway reasonably assert, and how should this court rule on each of NASS's claims? Discuss.

**REMEDIES**  
**Copyright February 1998 - Scott F. Pearce, Esq.**  
**Outline**

- I. NASS v. Halfway
  - A. Association Standing
  - B. Public Nuisance: Special Injury
    - 1. Special Injury
    - 2. Public Safety, Health or Property
  - C. Private Nuisance
    - 1. Intentional Interference
    - 2. Balancing Test
    - 3. Conclusion
  - D. Defenses
  - E. Injunctive Relief
    - 1. Inadequate Legal Remedy
    - 2. Property Right
    - 3. Feasibility
    - 4. Balancing
    - 5. Defenses
  - F. Conclusion: No injunction will issue.
- II The Declaratory Judgment
  - A. The *in rem* injunction theory:
  - B. Defense
  - C. Conclusion



## REMEDIES

Copyright February 1997 - State Bar of California

Debbie purchased an ocean front vacation house located on Lot #1. Shortly thereafter Peter purchased the ocean front house located on adjoining Lot #2. The houses and lots are comparable in size, value and age.

After his purchase, Peter hired a surveyor to lay out the boundaries of Lot #2. The surveyor reported that a portion of the porch of Debbie's house is on Peter's property. In particular, her 10-foot wide porch extends laterally 7 feet onto Peter's property. The encroachment was made by the original developer 25 years before Debbie and Peter purchased their properties.

Six months after learning of the encroachment, Peter commenced an action to compel Debbie to remove the porch from his property.

1. How should the trial court rule on the merits of Peter's action? Discuss.
2. If the trial court issues a mandatory injunction requiring Debbie to have the porch removed within 30 days, but Debbie does not comply, what procedural steps should Peter take to make her comply and what should be the result? Discuss.
3. If the trial court concluded that Debbie wilfully disobeyed the injunction and fines her \$1,000, but on Debbie's appeal the appellate court concluded that the injunction should not have issued, how should the appellate court rule on whether Debbie must pay the \$1,000 fine? Discuss.
4. If Peter had not commenced his action until one year after his discovery of the encroachment and Debbie had moved to dismiss the action because of this delay, how should the trial court rule? Discuss.

**REMEDIES**  
**Copyright February 1997 - Scott F. Pearce, Esq.**  
**Outline**

- I. The Merits of Peter's Action
  - A. Encroachment
  - B. Defense: Adverse Possession
    - 1. Mental Element
    - 2. Physical Element
    - 3. Time Element
  - C. Remedies
    - 1. Damages
    - 2. Restitution
    - 3. Mandatory Injunction
      - a. Damages are Inadequate
      - b. Property Right
      - c. Feasibility
      - d. Balancing Hardships
      - e. Defenses
  - D. Conclusion
- II. Procedural Steps to Make Debbie Comply, and the Result
  - A. Contempt Sanction
  - B. Defense: Good faith appeal underway
  - C. Result: If Debbie does not ask for a stay, she will be sanctioned.
- III. The Appellate Court Will Uphold the Fine
  - A. Collateral Bar Rule
  - B. Debbie failed to seek a stay of the injunction.
  - C. Conclusion
- IV. Debbie's Motion to Dismiss
  - A. Statute of Limitations
  - B. Laches
  - C. Conclusion

## REMEDIES

Copyright July 1995 - State Bar of California

A woman who identified herself as Smith brought an auto into Carson's Auto Repair Shop (CARS) for repairs. CARS completed the repairs for \$5000, which is a fair price for the work done and the parts and materials supplied. The day the repair work was completed, police informed CARS that the auto had been stolen by Smith and that Brown was the owner. Police took possession of the auto and returned it to Brown. CARS has not been paid and Smith has disappeared.

Brown did not have insurance on the auto. A week after recovering the auto, Brown sold it and transferred title to Jones for \$8000, the fair market value of the auto in its repaired condition. Brown deposited the \$8000 in his bank account, bringing the balance in the account to \$22,000. a week after making the deposit, Brown withdrew \$20,000 and lost all of it gambling. One day later, Brown won \$1000 in the state lottery and deposited that amount into his bank account. no other changes in the account have taken place.

What remedies, if any, does CARS have:

1. Against Brown? Discuss.
2. Against Jones? Discuss.

**REMEDIES**  
**Copyright July 1995 - Scott F. Pearce, Esq.**  
**Outline**

- I. CARS v. Brown
  - A. Damages
    - 1. Brown never had a contract with CARS.
    - 2. Brown did not commit any tort against CARS.
    - 3. Conclusion
  - B. Restitution: Brown has been unjustly enriched by CARS.
    - 1. Constructive Trust
      - a. Commingling
      - b. Lowest Intermediate Balance
      - c. Replenishment
    - 2. Equitable Lien
  - C. Replevin
  - D. Injunctive Relief
  - E. Conclusion
- II. CARS v. Jones
  - A. Jones is a bona fide purchaser for value.
  - B. Conclusion

## REMEDIES

Copyright February 1988 - State Bar of California

Proff agreed to deliver a lecture at State College on January 10, 1985, for which he was to receive a \$10,000 fee. On December 31, 1984, he went to Flyright Travel Co. to ask about flights to State College. He told a Flyright employee that he had to be at State College by 3:00 p.m. When told that Midwest Flight #1, which left at noon, would get him to State College by 1:30 p.m., Proff purchased a reserved seat, non-refundable super discount ticket on that flight. The ticket, prepared by the Flyright employee, bore both the flight number and departure time stated by the Flyright employee.

Proff arrived at the airport at 11:30 a.m. on January 10th, ample time to check in and pass through security at that airport, but discovered that Flight #1 had departed at 11:25 a.m. in conformity with a new schedule that had been sent on December 1, 1984, to all travel agents authorized to sell Midwest tickets. Flyright had received the new schedule on December 5th but had not entered the change in the computer data used by its employees. Because no alternative transportation was available, Proff could not deliver his lecture. In response to a State College demand, he returned a \$5,000 advance he had received from the school.

On January 5, 1987, Proff filed an action against Flyright to recover damages. He alleged in his complaint that the damages were incurred because Flyright's negligence made it impossible for him to deliver his lecture and he therefore lost the lecture fee and the cost of the ticket. He also sought punitive damages.

Flyright seeks dismissal of Proff's complaint, by a procedurally proper motion, claiming:

1. The two-year statute of limitations for tort actions bars the suit.
2. The complaint fails to state a cause of action in tort.
3. The complaint fails to state a cause of action on any other legal theory.
4. Even if the complaint states a cause of action, the damages sought cannot be recovered by any theory suggested by the facts alleged.

How should the court rule on each of the grounds used in support of the motion to dismiss? Discuss.

## REMEDIES

### Copyright February 1988 - Scott F. Pearce, Esq. Outline

- I. Does the Two-year Statute of Limitations Bar the Suit?
  - A. When does the statute begin to run?
    - 1. Date of purchase?
    - 2. Date of injury?
  
- II. Does Proff's Complaint State a Cause of Action in Tort?
  - A. Negligent misrepresentation
    - 1. Material misrepresentation of past or present fact
    - 2. Vicarious liability: respondeat superior
    - 3. Negligence
      - a. Duty: ordinary care
      - b. Breach
      - c. Causation
      - d. Damages: ticket price and lost lecture fee
    - 4. Justifiable reliance
    - 5. Defenses: Contributory or Comparative Fault
  - B. Intentional misrepresentation (fraud) is necessary to justify punitive damages, but is not present here.
  - C. Conclusion
  
- III. Other Legal Theory: Breach of Contract.
  - A. Formation
  - B. Performance
  - C. Conclusion
  
- IV. Damages
  - A. Tort damages
    - 1. Compensatory
    - 2. Punitive
  - B. Contract damages
    - 1. Compensatory
    - 2. Punitive
  - C. Conclusion

## CORPORATIONS

Copyright February 1988 - State Bar of California

Since 1981, Art has been president of Exco, a publicly held corporation with net assets of approximately \$50 million. Exco manufactures computers. In 1985, Art negotiated an agreement for the purchase by Exco of all outstanding shares of Yang, Inc., a privately held maker of computer components, for \$5 million cash. The purchase was made in early 1986. At the time, other members of Art's immediate family were holders of the outstanding shares of Yang. This information was not known except to Art, Yang's management, and Bob, an Exco director.

Art negotiated Exco's purchase of Yang stock and executed the purchase agreement on behalf of Exco, relying on his authority as its president. Before the purchase documents were signed, however, Art discussed the proposed acquisition individually with Bob, Curt, and Don. Curt and Don are Exco directors who, with Art and Bob, comprise a majority of Exco's seven-person board of directors. Bob, Curt and Don each individually told Art that he approved the transaction.

After the purchase of by Yang stock by Exco, at the next regular meeting of Exco's board in June, 1986, Art informed all directors of the acquisition. While some questions were asked, there was no vote on the acquisition at the meeting. Except for Bob and Art, no other Exco director was informed of the previous ownership of Yang stock by Art's family members. Because Bob believed the acquisition was beneficial to Exco, he has never mentioned to any other Exco director his knowledge of the prior ownership of Yang stock by members of Art's family. The existence of such prior ownership could, however, have been discovered by a review of Yang's corporate records.

Since the purchase of its stock by Exco, Yang has been consistently and increasingly unprofitable. At the annual Exco shareholders' meeting in November 1987, Art, Bob, Curt, and Don were not re-elected as directors. In December 1987, the new Exco board replaced Art as its president.

1. Can Exco rescind the 1986 purchase of Yang stock? Discuss.
2. Can Exco recover damages for Yang's unprofitability from any of the following:
  - a. Art? Discuss.
  - b. Bob? Discuss.
  - c. Curt and Don? Discuss.

**CORPORATIONS**  
**Copyright February 1988 - Scott F. Pearce, Esq.**  
**Outline**

- I. Can Exco Rescind The 1986 Purchase of Yang Stock?
  - A. Art's Authority and Ratification
    - 1. Art's Authority:
    - 2. Ratification
  - B. Art's Breach of his Duty of Loyalty
    - 1. Breach:
    - 2. Remedies:
  - C. Rescission and Defenses
    - 1. Rescission
    - 2. Defenses
  
- II. Can Exco Win Damages From Art, Bob, Curt, and Don?
  - A. Art's Liability:
  - B. Bob's Liability:
  - C. Curt and Don's Liability