

Hybrid  
Remedies -Section 2  
Final Exam  
Spring 2024  
Prof. Foster

Final Exam Instructions

Read the following instructions prior to the exam. Do not turn the page or read the test prior to the exam beginning.

1. You get 3 hours for the exam once you start.
2. The exam is an individual exam. You may not discuss the exam with anyone else during the exam.
3. This is a closed book exam. You may not use any materials on the exam.
4. The exam has 3 questions. Each question is intended to be a 60-minute question and each is 100 points.
5. Manage your time, and GOOD LUCK!!!

Question 1:

Newstoday is a local newspaper and online news resource. For the last 20 years, it was the best place to read unbiased news. However, not many people buy newspapers anymore. Their online news stories gained some traction, but they didn't make much profit last year. In response, Newstoday created a new revenue stream with online classified ads.

The new revenue stream worked really well. The classified ads now require multiple webpages for someone to see all the ads. The web service provides statistics to Newstoday on a monthly basis. Over the last 3 months, Newstoday's page 1 ads achieved 50% more views than the page 2 ads. Due to this, Newstoday charges different prices for page 1 and page 2 ads.

Bob's Gas Station is a new business in the same town as Newstoday. The best way to increase business is buy ads on Newstoday's site. Bob's ordered page 1 ads for 3 months in a row. Bob's and Newstoday signed a contract for the initial 3 months. During those 3 months, Bob's profits increased by 50%. They were extremely happy with the increased profits and signed an additional contract for 6 more months of ads. They paid the premium page 1 price the entire time.

Newstoday discovered in the last month of the initial contract (month 3) that Bob's ad appeared on page 2, and had since the beginning of the contract. After the discovery and knowing Bob's profits increased, Newstoday left Bob's ad on page 2 and continued to charge Bob for page 1 ads. This continued for the next 6 months.

After both contracts expired, 9 months, Bob's discovered the ads were on page 2 the entire time. Bob's owner became upset because he also found out that another gas station that started at approximately the same time as Bob's received their page 1 ads and increased profit by 200%. If Bob received the 200% increase in profit, the business would have expanded and opened another gas station a few miles down the road. Before Bob's signed the initial contract, it told Newstoday about the plans to expand to additional locations once they reach \$400,000 of profit.

At the end of the year, Bob's would have been in 2 locations with significantly more profit had the ad actually appeared on page 1 on Newstoday's site. Assume for the purpose of this question that Bob's actual profits were \$300,000 (this includes the actual 50% increase). The 200% increase would have made profits \$400,000. Bob's sued Newstoday with every reasonable cause of action from the facts. Bob's requested recovery for the difference between page 1 ads and page 2 ads, the 200% increase in profit, the value and profit of a second gas station, and 2 million dollars of punitive damages.

Discuss whether Bob's can recover the amounts requested. Make sure to analyze arguments for both parties.

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Question 2:

Microchips LLC is a computer chip manufacturer with one main factory but numerous sales offices with 8 different regional sales managers. The company manufactures 5 different computer chip models. Last year, they discovered a new method to make a new computer chip model. The new method helped create an extremely fast computer chip while also keeping it small. The chips are so small they can be integrated into any handheld device. The new chips are the fastest chip on the market. No other company can reach the same processing speeds.

Peaches Inc. makes smart phones. These devices store files, make phone calls, and use other applications that require fast computing power. Smart phones need to be small enough to fit into someone's hand, so the computer chips in smart phones must be small. Peaches' smart phones are currently poor devices. Their processing speed is one of the slowest on the market because they focused their energy on creating a small phone. The only way to improve their processing speed is to get a smaller computer chip to fit within their device.

Microchips knew Peaches needed smaller computer chips so Jarvis, one of the regional sales managers, contacted an engineer at Peaches to discuss an exclusive agreement to sell all the new small computer chips produced by Microchips to Peaches. Peaches was excited because they knew the faster chip would make their smart phone the best on the market. After many discussions about price, the companies reached an agreement for \$250 a computer chip. Peaches would buy all the chips produced for 2 years. The exclusive agreement prevented Peaches' competitors from buying the chips, making Peaches' smart phone the fastest on the market for at least 2 years.

During Jarvis' negotiations with Peaches, Wanda, another regional sales manager, contacted FlipPhones LLC, the largest manufacturer of smart phones. She was unaware of Jarvis' negotiations, so 3 days after the Microchips and Peaches deal, Wanda negotiated an agreement between Microchips and FlipPhones for \$325 a chip. FlipPhones would purchase 50% of the chips produced by Microchips. The contract did not limit Microchips ability to sell the other 50% to Peaches.

Microchips only delivered half their production of chips to Peaches in the first month of the agreement. Peaches became irate because now FlipPhones could stay ahead of them in the smart phone business and understood how to make smaller computer chips. Peaches filed a suit against Microchips requesting an injunction to:

1. prevent Microchips from selling any computer chips to FlipPhones for 5 years;
2. require Microchips to fulfill the Peaches contract by selling all the new computer chips to Peaches; and
3. prevent any regional sales manager from negotiating with any smart phone manufacturer regarding the sale of any computer chip for the duration of the Peaches' contract for any chip sales.

Peaches also requested compensatory damages for lost profits for not receiving all the new model computer chips in the first month.

- A. Discuss whether Peaches can obtain the injunction against Microchips.
- B. Assume for this subpart Peaches can obtain an injunction. Discuss any issues with the injunction requested in 1 through 3.

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Question 3:

Electric vehicles are increasing in popularity, so many new companies started manufacturing electric cars. One company, Bunny Power, developed a prototype to go long distances but cheap to manufacture. The goal was to entice consumers looking for an inexpensive electric car.

In June, Bunny Power created a website and put a prototype in a showroom. Bunny would take pre-orders on a model that would be delivered the following January. Over 1000 individuals pre-ordered Bunny's new car. The production progressed according to plan. They confirmed a \$20,000 price to the 1000 pre-ordered individuals.

Juan pre-ordered one of Bunny's vehicles. He received his car in January. He loved his car and took every opportunity to drive it around town. He even took 300-400 mile road trips regularly just to enjoy the ride. The only problem he noticed with the car is it seemed to get hot when he took the long road trips. He responded to a survey from Bunny letting them know the car seemed to get hot on longer trips.

The overheating problem was not limited to Juan. Over 50% owners reported a similar problem to Bunny. Bunny's engineers investigated the problem on a car in the warehouse. After 2 months of investigating, the engineers discovered a major defect from an abnormal condition. No car company would have known the defect was possible at the time of manufacture. The defect caused the overheating, and the car was likely to catch fire at any moment on a long trip. The fix for the defect would bankrupt Bunny, but their engineers believed a software patch would decrease the chances of the fire. They knew it wouldn't eliminate the risk, but they genuinely believe the car would be safer.

Bunny continued producing and selling the cars with the defect. They continued to research more solutions for the defect, but they did not stop production. They sold another 1000 cars by June of the new year. Sue bought one of the cars in the second run of manufacturing.

Juan's and Sue's cars ended up catching fire and causing harm. Juan took his car on another long trip before Bunny's engineers discovered the defect. His car caught fire while driving. He was barely able to stop and get out of the car alive. He suffered burns on over 50% of his body and had his leg amputated. He lost his job, has massive medical bills, and is no longer able to take care of his kids. He is in pain daily.

Sue's car caught fire during a long car trip within a month of her receiving it. The engineers discovered the defect prior to the second shipment of cars, so they knew Sue's car could catch fire. They installed the software patch for Sue prior to delivery, but they hadn't fixed the defect. Sue noticed the car getting hot on her drive, so she decided to pull over. As soon as she stopped on the side of the road, the car caught fire. She immediately exited the car with minor injuries.

When the ambulance arrived at the scene of Sue's event, they recommended she go to the hospital for evaluation. The doctor at the hospital recommended an easy, minor treatment for her bruising and a few small burns. The treatment would fully cure Sue's injuries. Sue is terrified of modern medicine. She thought the small burn treatment would cause diseases later. She declined the treatment. Her burns ended up getting worse leading to infections. The infections required additional hospital visits, and her employer fired her for missing the additional time from work.

Discuss Juan's and Sue's potential damages. Also, provide a brief way to maximize a jury recovery for Juan.

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## Final Exam Outline

### Question 1:

#### Recovery options:

##### Page 1 ad vs. Page 2 ad:

Rule – General Compensatory Damages rule. Then add in the contracts expectation damages rule.

##### Application:

Agreed and paid for page 1 ads. Only received ads on Page 2. Discuss what was expected vs. what was actually delivered. Most likely conclusion here is get the difference in money for these.

##### 200% Profit Increase

Rule – Refer to the general compensatory damages rule. Make sure to delineate between rightful position and the as nearly as possible element.

##### Sub-issue – Rightful Position

Rule – Refer to expectation damages rule again.

Application – Discuss what the other gas station made in profit and how Bob's should have seen similar profit if they fulfilled their contract.

##### Sub-issue – As nearly as possible

Rule – Not speculative. Must be near certainty under Hatahley. Then state how Bigelow provided a different standard of reasonable certainty. Use the Bigelow case as an analogy here.

Application – Use the facts about the other gas station and how much Bob's made. Give reasons why this would be similar to Bigelow to allow the modeling of other businesses even though not certain how much profit would come from different marketing. Explain how defendant's conduct created the uncertainty.

##### Value of additional Gas Station

Rule – Expectation damage rule, then get into the consequential damage rule. Explain foreseeability and must be during negotiations.

Application – Newspaper knew Bob's wanted to expand and would when he placed the ad. They should have known the mistake would prevent the expansion. Then argue the other side using the Meinrath case. Conclusion is most likely can't get this because investments are too speculative.

Punitive damages:

Step 1 – Can you get them

Subissue 1: Standard

Rule – Willful, wanton, etc.

Application – Initial issue is negligence, not really willful, wanton, gross negligence, etc.

However, after discovery, keep doing the action. Could be willful after discovery.

Subissue 2: Contracts

Rule – No punitives in contract unless independent tort.

Application – Initial problem was breach of where it was put. The duty arose from the contract, so probably no independent tort. Argue the other side that once they found out, they signed a new contract knowing they would not put the ad in the correct spot. This could be fraudulent inducement similar to Formosa.

Step 2 – How much

Rule – If no cap, then due process. Can't be grossly excessive. 3 factors:

1. Degree of reprehensibility
  - a. Rule – Most important, Look to conduct, repetitive, etc.
  - b. Application – 1 time. Not egregious because still increased profit and had an ad.
2. Ratio
  - a. Rule – Single Digit
  - b. Decide on compensatories above and make the maximum 9 times compensatories. Probably argue the activity is not egregious, so may not need 9 to 1.
3. Civil vs. Criminal Penalties
  - a. Rule – Compare
  - b. Application – Fraud is criminal and punished, so probably should punish here. Not the strictest penalty in general.

Conclude 2 million is possible but probably too much.



## Question 2:

### Subpart A – Obtaining an injunction:

#### Rule – 3 steps:

1. Imminent threat of harm
  - a. Rule – not remote or speculative. Can prohibit lawful activity if it leads to an unlawful consequence.
  - b. Application – The first month already didn't deliver the chips according to the contract. Defendant also told them they would try to deliver 50% in the future.
2. No Adequate Remedy at law
  - a. Rule – When a good, must be unique and money would not make them whole.
  - b. Application – Fastest chip on the market. Plaintiff company needed the chip because they were doing poorly. Contract was for all chips, and could not get another chip that would perform similarly. Could compare to any of the cases, probably Campbell Soup. Argue the other side. It is a good, which normally doesn't get specific performance. Argue there is a remedy at law, which is normally cover price minus contract price. Lost profits are measurable, so money should be good enough. Conclude here that probably is unique because those numbers are most likely too speculative.
3. Balance the Hardships
  - a. Rule – Explain what interests to balance
  - b. Application – Discuss plaintiff's profits, the need for the chip, etc. Discuss defendant's breach of other contracts and business practices.

#### Subissue – Damages and injunction

Rule – can't get compensatory damages and injunction for the same harm.

Application – discuss whether the lost profits from not receiving the chips would be the same as specific performance. Good arguments for how sending the chips now would not help with the previous profits so not the same harm. Also good arguments that the loss is the chips, and now they get them.

#### Subpart B – Scope of the Injunction

Proposed Injunction Clause 1 – Prevent selling to other company for 5 years.

Rule – Scope of the injunction is limited to the scope of the violation.

Application – violation is one specific chip, not all of them. The current contract is also only 2 years, so 5 years is too long. Argue other side that need to negate any advantage from having the chips initially and the profit plaintiff will lose.

#### Proposed Injunction Clause 2 – Specific Performance

Rule – refer above

Application – this is the specific violation. This is just asking for specific performance of the contract, so if part A is satisfied, then this should be good.

Proposed Injunction Clause 3 – Prevent Regional Sales Managers from negotiating

Rule – refer above and then add in that company wide injunctions are disfavored. Must be limited to violation

Apply – This portion prevents all sales managers when only 2 messed up and contracted for this chip. The language also refers to all computer chips to all smart phone manufacturers, which is beyond the scope of the violated contract that is just the new model. The length is fine.

Question 3:

Juan's/Juan's Family's Remedies:

Overall Rule – Have the compensatory damage rule above to then go through each possible harm.

Cost of Car:

Rule – Then buyer's rule for as warranted vs. as delivered.

Apply – Car can't go the distance advertised. Argue other side that it has some value because can go on shorter trips.

Medical Bills:

Rule – Refer to basic rule above.

Application – Direct result of the defect. Precise amount.

Pain and Suffering:

Rule – Explain how this is compensatory and that someone could get it. Address the as nearly as possible problem.

Application – Direct result of the harm.

Jury Argument:

Rule – Can use per diem arguments. Explain why the per diem argument is effective.

Application – Give a paragraph about daily suffering and a small amount per day.

Loss of Companionship or guidance:

Rule – Kids can usually get loss of companionship or loss of guidance

Apply – He can't take care of his kids, so they don't have the same relationship. The counter argument is to look for any deterioration in that relationship.

Punitive Damages:

Step One – Can he obtain?

Rule – Willful, Wanton, etc.

Apply – They didn't know about the defect and no car company would have known the condition would happen. Counter argument is possible gross negligence not making sure safe since it is a car.

If found gross negligence, then could go through the amount. Difficult to have time for that here though. Should stop at this part since lack of discovery was not unreasonable.

Sue's Remedies:

Cost of Car: Same analysis as above

Small burns, bruising, etc.:

Rule – Refer to general rule above.

Application – direct cause of the harm here.

Infections, Hospital Visits, and Lost Job:

Rule – Refer above to general rule.

Apply – Go with the direct cause of these harms. These are precise harms.

Counter-Argument/Defense:

Rule – Mitigation is required before getting additional money damages. Look to time and place of decision. Must be reasonable in light of circumstances. Can take Plaintiff's characteristics into account.

Application – She turned down a treatment that would save all of these harms. Would not have the infections, lost job, etc. if she received first treatment. Not reasonable to turn down a treatment that would fully cure injuries over remote fear.

Counter-argument – we take Plaintiff's state of mind into account. Could compare to the note cases of the individuals refusing medical treatment due to bi-polar, religious purposes, etc.

Punitive Damages:

Step One – Can she obtain

Rule – Willful, wanton,

Application – This is different than Juan because they knew of the problem and still sent the cars to consumers. Explain how that is wanton.

Step Two - Amount

Rule – If no cap, then due process. Can't be grossly excessive. 3 factors:

1. Degree of reprehensibility

- a. Rule – Most important, Look to conduct, repetitive, etc.

- b. Application – knew and still shipped. Juan’s car burned and didn’t recall. Worried about profits.
- 2. Ratio
  - a. Rule – Single Digit
  - b. Decide on compensatories above and make the maximum 9 times compensatories. Won’t have an exact number for this one.
- 3. Civil vs. Criminal Penalties
  - a. Rule – Compare
  - b. Application – Not much here. Gross negligence or willful conduct isn’t always criminal but there are consumer protection laws. Could use those to say government wants to regulate.

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My notes:

Can Bob recover?

New Business - Speculative

Knowledge - continued anyway

Knowledge - in contemplation of the contract

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My essay:

1) Difference between page 1 and page 2 ads

Compensatory Damages:

The goal of Courts in contract law and tort suits is that of compensation. The purpose of compensatory damages is to restore the Plaintiff/injured party as nearly as possible to the position he would have been in had it not been for the harm caused by the other party (the Defendant). In contracts, the purpose of compensatory damages is to put the Plaintiff in a position as if the contract were fully performed.

Direct Damages/Expectation Damages:

Rules:

Expectation/direct damages are those damages that flow directly from a breach. With respect to compensatory damages in contracts, (here, what we would call Expectation Damages), the buyer's remedies are described as the difference between as warranted and as delivered, or the difference between fair market value (FMV) and the contract price. This means a buyer should be able to be awarded the difference between what he paid for an item versus what the actual FMV was for the items, or the price of the actually delivered item.

Analysis:

Here, Bob paid the premium price, aka, the price for page 1 ads, for 9 months, even though Newstoday placed his ad on Page 2. Thus, Newstoday warranted that Bob would have page 1 ads; however, they only delivered page 2 ads for Bob for the full 9 months. Thus, Bob should have only been paying the price for

page 2 ads. Due to this fact, Newstoday should reimburse Bob for the difference in ad price between page 1 ads and page 2 ads, and multiply that price times 9 to determined the amount of direct/expectation damages.

Conclusion:

Bob will be awarded the difference in price between page 1 ads and page 2 ads for one month, multiplied by 9 months, to put him in the position as if the contract had been fully performed as he paid for page 1 ads but received page 2 ads.

## 2) 200% Increase in Profit

Issue:

Whether Bob can obtain the 200% increase in profits he believes he could have obtained with a Page 1 ad.

Consequential Damages:

Rules:

Consequential damages are those that flow naturally and proximately from the intital breach. Consequential damages must be reasonable and foreseeable and can be obtained only if they were in contemplation of the parties, in contemplation of the contract.

Analysis:

Here, due to the fact NewsToday placed Bob's ad on the wrong page, he potentially lost business and did not see the increase in profits/revenue he was expecting. Bob claims this loss of revenue comes directly from NewsToday's breach of contract (not putting him on Page 1). Thus, these are consequential damages type of damages as they flow naturally and proximately from the initial breach.

Part 1 of Consequential damages analysis: Can Bob obtain consequential damages?

Rule:

As stated above, when assessing damages, the goal is that the Defendant should restore the Plaintiff/injured party as nearly as possible to the position he would have been in had it not been for the harm caused by the other party (the Defendant).

Analysis:

Part A: As nearly as possible analysis:

The as nearly as possible analysis is an evidentiary standard that required evidence or proof of the exact damages incurred. The amounts must be precise and near certain, and cannot be speculative in any way (Hataley). There is no compensation for group harm; but only for individual harm. It is difficult to measure grief or IIED. Even if the proof presented is not 100% certain and more of an "almost certain" calculation/standard, there must be proof from experts or the like who have calculated real numbers and come up with a value that is very close to the actual damages suffered (Bigelow's idea).

Here, there is no way to measure with any certainty how much Bob's profits would have increased had he been on page 1 versus page 2 of Newstoday. The facts tell us Newstoday did not make much profit last year, which doesn't lead one to believe many people read their onnline newspaper, which would indicate there would not be much of an audience to read Bob's gas station ad. Other facts tell us the online classified ads is something new that Newstoday only started one year ago. Therefore, there would not be much data concerning how other advertisers fared from their ads with Newstoday and how much their profit increased. Although the other gas station saw profits increase by 200%, there is nothing to lead us to believe this was all due, or even partially due, to their ads with NewsToday. It could have been completely random due to increased traffic in the town or the fact that gas station was closer to the freeway than Bob's, etc. Thus, as there is no way in which to calculate Bob's increase in revenue had he been on page 1, and Bob's assertion he would have seen an increase of 200% is completely speculative, Bob cannot prove with any certainty that his profits would have increased that much due to a Page 1 ad location. Thus, all of Bob's reasons are completely speculative, and speculation does not win the day in Court (Meinrath).

Bob, on the other hand would argue that his revenue did increase by 50% with a page 2 ad, and that there was no other reason his revenue increased other than because of this ad. Bob will also state that if the other gas station's revenue increased by 200%, his would have also, as if a page 2 ad can lead to a 50% increase, a page 1 ad probably would have led to a 200% profit increase like the other gas station. Bob will also argue that nine months is a long time, and that, in 9 monhts, he would have made a lot of extra profit had his ad had the Page 1 coverage. Unfortunately, although Bob's arguments are reasonable, they are still speculative and there is no way in which to prove them. Thus, he will have a hard time meeting the criteria for part a of consequential damages.

Part B: the position the party would have been in analysis:

Generally, when one looks at the position the party would have been had a contract been fully performed, we look at the results of similar contracts, the market value of similar contracts, and the replacement value of similar items/goods. In this scenario, this issue is two-fold. First, there is the fact that Bob would have had Page 1 ads, and second, is Bob's claims the position he would have been in had the contract been fully performed is one of a gas station making 200% profits. The first part is easy to remedy and addressed under

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expectation damages. As for the second part, as stated previously, unfortunately, Bob only made 50% profits and there is no way to determine whether he would have made even higher profits with a page 1 ad. Without an extreme advertising analysis by some sort of expert in gas station advertising, it is very difficult to know the position Bob would have been in had the contract been performed and had Bob run page 1 ads. Thus, the only certainty with respect to Bob's position had the contract been fully formed is that he would have received a page 1 ad. Everything else, is too hard to estimate.

Part 3 analysis of consequential damages: In contemplation of the contract:

Rule:

To obtain consequential damages, they must be in contemplation of the contract.

Analysis:

In the facts provided there is nothing that states Bob told Newstoday he was hoping for or that he required 200% profit from the ads with Newstoday. Newstoday doesn't appear to have made any guarantees to Bob that they would provide him with 200% profits if Bob placed a page 1 ad with them. In fact, even though we do not know if Bob knows about Newstoday's last 3 months' achievement of 50% more views on page 1 ads than page 2 ads, 50% more than a page two ad would not equal 200% in profit, but would only equal a 75% return in profit in Bob's case. Thus, it does not appear the promise of a 200% revenue profit was in contemplation of the contract.

Conclusion:

Bob most likely will not be able to prove he can get consequential damages, as they appear to be too remote and speculative.

Part 2 of Consequential damages analysis: Are there any limits with respect to obtaining consequential damages?

There are four reasons for which consequential damages can be limited.

The first one is an actual consequential damage limitation clause in a contract. Here, there is no consequential damage limitation clause in the contract that we know of, so this is not applicable.

The second reason for which consequential damages can be limited is a liquidated damage clause limiting same. Again, here, there are no facts stating there is a liquidated damages clause of any type, so this is not applicable.



The third reason for which consequential damages can be limited is the collateral source rule. This rule states that benefits/funds received from a collateral source cannot be used to reduce a Defendant's damages/damage award. Again, here, there are no collateral sources so this is not applicable.

Finally, there is the duty to mitigate, also referred to as the doctrine of avoidable consequences, which basically state a Plaintiff must do anything in his power to mitigate or avoid any damages that may result as a result of the Defendant's breach. The Plaintiff must mitigate in good faith and without delay. Here, as soon as the Plaintiff discovered what the Defendant had done, he approached Newstoday and told them he was upset. He did not run any future ads with them that we, the readers, know about. Thus, there does not seem to be anything else the Plaintiff could have done to mitigate his damages, other than maybe to run a negative social media campaign against the Defendant in the hopes, the Defendant would reimburse him in exchange for taking down negative reviews/posts.

Conclusion:

There do not appear to be any consequential damages limitations.

### 3) 2 Million Dollars in Punitive Damages

Issue:

Whether Bob should receive 2 million dollars in punitive damages.

Rule:

Punitive damages are meant to punish a Defendant and deter him from similar future conduct. Punitive damages are allowed as long as they are not unconscionable and as long as the State in which one is litigating allows them. To be awarded punitive damages, the Defendant's conduct must be shown to be willful, wanton, malicious, or outrageous.

Analysis:

Here, the Defendant's conduct is not on the level of, let's say, a murderer; however, the conduct is definitely willful and malicious. The Defendant discovers Bob's ad is on the wrong page; however, instead of informing Bob of same and apologizing, the Defendant acts in a clandestine way and does not inform Bob of the mistake. In fact, the Defendant keeps committing this "treachery" for 6 more months!! On top of that, the Defendant keeps charging Bob the wrong price, when the Defendant should have lowered the price of Bob's ad and refunded him for the money spent on the page 1 ads up until the day the mistake is discovered. Thus, the Court will determine the Defendant's conduct is willful, wanton, and malicious, and slightly outrageous and punitive damages will be awarded in some fashion; however, as stated previously, this

is not along the same level as dumping chemicals into a river or something, so the punitive damages will be on the smaller side.

There are three things to consider when assessing punitive damages, especially as if a punitive damage award is considered grossly excessive, it could potentially violate due process, and be thrown out.

The most important indicia of whether a punitive damage is grossly excessive is the degree of reprehensibility of the Defendant's actions. Here, the Defendant is naughty and greedy in that he is deceitful in his business practices and overcharges one of his clients for something the client does not actually obtain. Although this is frowned upon in the business world, and in some ways, constitutes some type of fraud, this type of behavior is not particularly reprehensible. In other words, lying and deceitful business practices are not good, but no one is being harmed physically by these actions. It also appears as though this was not the typical business practice of Newstoday, but more of a mistake, that the manager/owner of Newsday was potentially too lazy to fix or decided not to fix as he was short on cash. Either way, as we do not have any facts to indicate Newstoday did this on a regular basis, and in fact we know, Newstoday acted properly with the competing gas station nearby, this appears to be a one-off. Thus, the Court would not find Newstoday's actions all that reprehensible.

The next element to analyze is the ratio of the compensatory damages awarded to the punitive damages. Often, if the compensatory damages are small or nominal, larger punitive damages can be awarded. Additionally, Courts prefer smaller ratios when looking at the ratio between compensatory and punitive damages, and prefer single digit ratios. With respect to Federal Maritime Law, Courts have decided the ratio between compensatory and punitive damages cannot be large than 1 to 1, and most states have put caps on the ratio and stated it cannot be more than a single digit ratio. Thus, in this scenario, Bob could only be awarded punitive damages that were a single digit ratio between his awarded compensatory damages.

The final element to analyze is to compare the punitive damages to criminal and civil penalties for similar crimes/civil violations. Here, there really isn't any known criminal/civil penalty or fine for the act of not running someone's ad on a particular page of an online newspaper and not telling them about it. I suppose this could be considered a fraud of some type, and thus, one would look at the civil/criminal penalties for fraud under the State and local statutes and discover what the amount of a fine/penalty for same would be. I would imagine it would not be a particularly hefty fine or require much jail time, which would indicate punitive damages should be on the smaller side. Thus, here, under element 3, punitive damages of 2 million dollars is grossly excessive,.

Conclusion, Bob might be able to get punitive damages, but the amount will be very small and WAY under the 2 million dollars he is requesting. As there are little to no compensatory damages awarded, Bob might get a slightly higher punitive damage award than he would have received had there been more compensatory

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damages.



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### **1) Can Peaches obtain an injunction against Microchips?**

**The first question we must analyze is whether Peaches can obtain an injunction.**

#### **Injunction**

An injunction is an equitable remedy that can be issued by a court to have a party either perform or refrain from performing a certain act. An injunction can be issued if the following elements are met: 1) there is an imminent threat of illegality, 2) the plaintiff will suffer irreparable harm without injunctive relief, and 3) there is a balance of equities that lean in the plaintiff's favor while not placing an undue hardship on the defendant.

#### **Imminent threat of illegality**

An imminent threat of illegality means that the harm must be ripe, and is not too remote or speculative (*Almurbati v. Bush*) and is not based on fear or speculation (*Nicholas v. Connecticut Halfway House*). An imminent threat can also include lawful conduct that can have an unlawful result (*PepsiCo*). The court will also apply a 3 part test to determine whether the case is moot, which is 1) the intent to comply, 2) the effectiveness of any discontinuance of the harm, and 3) character of past violations.

Here, Peaches will likely not be able to fulfill this element of imminent threat of illegality because there may be some issues with Peaches' exclusive agreement with Microchips. Microchips knew that Peaches Inc. makes smart phones and needed the fast computer chip so that the Peaches smart phones would operate with better processing speed. Some courts could say that Peaches Inc were savvy business people to set up an exclusive agreement with Microchips, others could say that setting up an exclusive agreement where there are no other competitors that can buy the chip is not in the best public interest of the market. However, Peaches could argue that Microchips specifically reached out to them to set up an exclusive agreement, and this was Peaches expectation

of the contract.

The first part of the injunction is for Microchips to be prevented from selling any computer chips to FlipPhones for 5 years. This will likely be invalid because of the time periods. In *PepsiCo*, the injunction was valid in order to give the other business time to cure the competitive advantage. Here, Peaches was expecting to have a competitive advantage for two years based on the agreement with Microchips. The court will likely approve an injunction to prevent Microchips from selling any computer chips to FlipPhones for 2 years. This will allow Microchips to perform on the original agreement they had with Peaches prior to the next agreement they formed with FlipPhones. Peaches will maintain their competitive advantage for 2 years. A 5 year injunction will likely exceed the scope, as it should be limited to only 2 years which is the time period for the violation.

### **Irreparable Harm / Inadequate Remedy at Law**

Irreparable harm means the plaintiff will suffer harm that does not have a legal remedy, or can't be solved with money damages. Specific performance can be a remedy if a legal remedy is not available, such as in *Campbell Soup v Wentz*, where Wentz was required to deliver the red carrots rather than regular carrots.

Here, Peaches may have a strong argument to specific performance on the contract because the exclusive agreement said that Microchips would sell all the chips they produced for 2 years to Peaches. Peaches wants this specific chip because it is the fastest one on the market and gives them a competitive advantage over the other cell phone companies. Even though Microchips makes 5 different computer chip models, none of them will put Peaches back into the rightful position had Microchips performed their contractual duties.

Microchips could argue that they have 5 different computer chip models and could sell Peaches alternative goods for the other 50% that they sold to FlipPhones. However, this argument will likely fail because Peaches specifically wants to fastest chip model so they

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can maintain their competitive advantage. Microchips could also argue that specific performance on this contract will be an undue burden on them because they can earn an additional \$75 per chip when selling them to FlipPhones, and this will result in lost profits for Microchips. Peaches can counter and say that they already had a deal with Microchips before FlipPhones signed their agreement with Microchips. Therefore, the second agreement is void because the original agreement with Peaches was exclusive.

Therefore, Peaches will likely be successful in ordering specific performance on the contract because Peaches will suffer irreparable harm if Microchips does not perform.

### **Balance of Equities**

The last element is there must be a balance of equities that leans in the plaintiff's favor without placing an undue burden on the defendant to comply. Microchips can argue that it would be an undue burden for them to comply with the contract because they will lose profit, as they are expected to earn more from the agreement with FlipPhones. However, Peaches inability to maintain their competitive advantage will likely outweigh any burden on Microchips. Additionally, Peaches may suffer additional harms by not being able to fulfill their orders since they were expecting a certain number of chips for their phones. If Peaches made a whole bunch of phones expecting an additional 50% of computer chips, they will also be breaching their contracts with their customers who are expecting a phone that performs at top speed.

Therefore, since Microchips was ready to have an exclusive agreement with Peaches prior to the agreement with FlipPhones 3 days later, the balance of equities lean in Peaches favor and will likely allow them to get the injunction for at the least the first two items. The third request exceeds the scope, which I will discuss on the next call.

## **2) The second question is what the scope of the injunction.**

### **Scope of the Injunction**

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The scope of the injunction must be limited to the scope of the violation and must not include any potential future violations. Additionally, the court will look at any undue burden on the defendant. The rule from *Goodyear* states that no company wide injunctions are allowed unless it is part of a company's policy. Finally, the court in *VanWagner* ruled that specific performance is not okay if there is a legal remedy available.

### **Scope of the violation**

Request #1 exceeds the scope of the violation because it prevents Microchips from selling any computer chips to FlipPhones for 5 years. Peaches is requesting specific performance on the exclusive agreement which would be 2 years of sales from Microchips. An additional 3 years is excessive and would be past the time that Peaches would want to maintain their competitive advantage. Additionally, an injunction can not include potential future violations, which Peaches is looking to include 3 years into the future after their 2 year agreement is over. Thus, this first request likely exceeds the scope of the violation where Microchips breached the original 2 year agreement with Peaches.

Request #2 is likely valid because the rule from *VanWagner* states that specific performance can be ordered if there is no legal remedy available. Here, Peaches requested all of the top speed computer chips be sold to them so no other smart phone companies could compete with them. Specific performance of the Microchips selling all of the new computer chips to Peaches would be the only remedy, thus this request is likely valid.

Request #3 likely exceeds the scope as it is a company wide injunction.

### **Company Wide Injunction**

The court in *Goodyear* ruled against a company wide injunction because it exceeded the scope of the violation. Goodyear was a nationwide company, and there was one charge of age discrimination at one store location, but the whole company was punished for this. Similarly, in this case, Microchips is a computer chip manufacturer with one main factory but with numerous sales offices with 8 different regional sales managers. The 3

call in the injunction calls for any regional sales manager from negotiating with any smart phone manufacturer regarding the sale of any computer chip for the duration of the Peaches' contract for any chip sales. This request exceeds the scope of the original breach of contract between Jarvis and Peaches. Microchips manufactures 5 different types of chips, so this injunction would prevent their 8 regional sales managers from doing any negotiations with any other smart phone manufacturers, some of which may not be interested in a top performing chip like Peaches was.

**Therefore, request #3 would need to be reduced down to preventing maybe Jarvis and Wanda from doing negotiations, but should not extend to all of the regional sales managers and to any smart phone manufacturer.**

### **Undue Hardship**

A defense to an injunction is whether it places an undue hardship on the defendant. The first two requests of the injunction are likely valid, but the last request would place an undue burden on Microchips to comply. Jarvis was the first regional manager who set up an exclusive contract with Peaches, which was already problematic because it cuts out the rest of the competition and likely resulted in Microchips losing money, as we saw with the contract between Wanda and Peaches. Had Jarvis been open to doing maybe 50% of the business with Peaches, Microchips could have done another contract with other company for a higher price. If all of the Microchips regional managers are prevented from doing any negotiations with any smart phone providers, Microchips will lose money on their potential sales for the other 5 types of computer chips that they manufacture.

### **Compensatory Damages for Breach of Contract**

Compensatory damages requires that the injured party be put back into the position they would have been in had it not been for the harm of the other party. The rule from Chatlos is this includes being restored to the rightful position and as nearly as possible. Compensatory damages in contract are direct damages that result from the plaintiff's lost benefit of the bargain. This is normally the monetary loss associated with the defendant



not performing their contractual duties.

Case law states that there is no recovery for compensatory damages and an injunction for the same harm. Peaches would likely not be able to recover for both, and they would need to choose which remedy would be the best to put them back into their rightful position. Peaches would, if they chose, be able to recover for compensatory damages as they lost the benefit of the bargain. However, "as nearly as possible" requires that damages be calculated with reasonable certainty. There is no guarantee as to what Peaches would have earned had she received all of the chips as ordered, so those damages would be difficult to calculate. Additionally, if Peaches were to get an injunction for specific performance, they would not be able to also get compensatory damages for breach of contract.

**Therefore, Peaches would need to choose which remedy would place them back in their rightful position, either compensatory damages or the injunction.**



3)

Juan v. Bunny

## **Compensatory Damages**

In awarding compensatory damages, the court must place the plaintiff, as nearly as possible, in the position they would have been had it not been for the other party's wrongful conduct.

### Rightful Position

To place the plaintiff in their rightful position, the court can grant damages that were suffered due the defendant's wrongful conduct. Here, Juan (J) will seek to be placed in his rightful position before he suffered from the car fire and suffered burns on 50% of his body, had his leg amputated, lost his job, incurred massive medical bills, lost the ability to care for his kids, and was left with daily pain. All of these harms are due to Bunny's (B) wrongful conduct so remedying them will put him in his rightful position.

### As Nearly As Possible

In determining damages as nearly as possible, the court will consider the Hateley factors: 1) proof of individualized harm, 2) the damages are not speculative, and 3) the plaintiff isn't seeking to recover for group harm. Here, J has proof of his individualized harm because he suffered burns on 50% of his body, had his leg amputated, lost his job, incurred massive medical bills, lost the ability to care for his kids, and was left with daily pain. He is not seeking to recover for anyone but himself so his damages are individualized and not for group harm. J can produce his medical bills and his paystubs for the job he lost to prove that his damages are not speculative. Placing J in the position as nearly as possible to before the accident occurred would mean he can make his wages

from the job he lost and he will not have medical debt (even though this doesn't fully compensate him for losing a limb and suffering burns).

**Therefore, the court will likely find that they are able to put him in his rightful position as nearly as possible by calculating his compensatory damages based on the proof of losses he has suffered as a result of B's wrongful conduct.**

## **Expectation Damages**

Expectation damages are available in breach of contract cases to the non-breaching party. The intent is to put the non-breaching party in the position they would have been in had the breaching party fully performed their duties under the contract.

### Buyers Remedy

In calculating buyers remedies, the court will look to the circumstances surrounding promises or warranting made by the seller to the buyer. If goods were warranted to perform a certain way and they call short, the damages will be calculated at the fair market value of the goods as warranted minus the value of the goods as received. If no warranties were made, the buyer can recover the difference between the market value and the contract price. Here, J will argue that he should be able to recover the \$20,000 he paid for the electric car because it was warranted to be valued at \$20,000 but it caught fire and is now worthless. **The court will likely provide recover for the price of the vehicle.**

## Consequential Damages

Consequential damages are secondary and derivative losses that resulted from the circumstances of the breach of contract. In order to award consequential damages, the

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court will look to whether the damages were in contemplation of the parties at the time of contracting. To analyze whether they were in contemplation of the parties, the court will analyze: 1) whether the damages were foreseeable at the time of contracting, 2) whether the plaintiff communicated them to the defendant, and 3) whether the damages are for investment funds which may be too speculative. Here, J will argue that he should recover for any expenses he had to incur, such as renting a car or Uber fees, that resulted from his injury. He will argue that car manufacturers and sales companies know that when cars malfunction, a rental has to be provided. He will point to the fact that he told B in their survey that the car overheated and that here there is no investment funds. **The court will likely provide consequential damages to J.**

## Affirmative Defenses

### Mitigation

Mitigation is a prerequisite for consequential damages. A plaintiff doesn't have a duty to mitigate, however, they cannot recover for any damages they could have avoided. A plaintiff must mitigate reasonably, in good faith, and without unreasonable delay. Here, B will argue that J could have mitigated when he informed them of the overheating. He could have brought the car into a dealership to have it looked. J will counter that his car caught fire before the engineers discovered the issue and developed the software patch so he could not have mitigated because there would have been no solution at that time. He will argue that he mitigated in good faith, reasonably and without delay when he informed them the car overheated in the survey. **The court will likely find that J reasonably mitigated.**

### Collateral Source

At common law, evidence of third party payments to a plaintiff to compensate them for their injuries are not admissible to reduce a defendants damages liability. Here, B could

argue that J might be getting some insurance to cover his medical bills and unemployment to offset his loss in wages. **However, under common law this will not reduce B's liability to J.**

## Punitive Damages

Punitive damages are available where the defendant's conduct is reprehensible. The intent is to punish and deter a defendant's bad conduct.

## Reprehensibility

A defendant's conduct is reprehensible if they acted willfully, wantonly, with reckless disregard or with gross negligence. Here, J will argue that B's conduct was reprehensible because they were made aware of the overheating issue by over 50% of owners of the first batch of cars. He will argue that their actions were at least grossly negligent because it took them two months to discover a solution but they did not notify any of the owners at that point as to the danger of the malfunction. They could have put out a recall notice or done something to warn drivers that a dangerous condition was being investigated. B will argue that they did not act grossly negligent because they started investigating the issue as soon as they received the reports of overheating. It took them two months to discover a defect that would not have been detected at time of manufacturing. They also came up with a software patch to make the car safer. J will argue that when they discovered the defect, they also discovered that they would go bankrupt and they intentionally didn't stop producing the cars and instead went with a patch that would not eliminate the risk. He will point out that they continued to sell the car knowing it was defective. B will argue that they were not negligent at the point that J suffered his accident because they did not know what was wrong with the car at that point so they acted reasonably given their manufacturing operations. **The court will likely find that B acted at least with gross negligence.**

## Ratio

The Supreme Court has held that punitive damages cannot be grossly excessive and provided constitutional guidance that ratios of more than a single digit between compensatory and punitive damages are likely unconstitutional. Awards above single digits are possible if the conduct was especially reprehensible, however, it is a difficult standard to meet. Here, J will be able to recover up to 9 times his compensatory damages.

## Criminal/Civil penalties

The court will also look to available civil and criminal penalties for B's actions to assess punitive damage awards.

## Non-Quantifiable Harms

Damages can be given to compensate an injured plaintiff for the emotional, mental and physical consequences of their injury. Here, J will argue that he should recover damages for intentional infliction of emotional distress and the loss of his ability to take care of his kids. If J can quantify these damages with reasonable certainty, he will be able to recover for them.

## Per Diem

Suggesting a per diem amount to the jury for ongoing pain and suffering is not improper or prejudicial. Here, J's attorney can suggest a daily damages amount that J can recover for his ongoing pain and suffering. The attorney can point to the fact that J has lost his ability to take care of his kids which is a huge emotional pain. Additionally, he can argue J suffers from phantom pain because his leg has been amputated. J also suffers from daily

physical pain because he suffered burns on 50% of his body which is a significant amount of pain for anyone to tolerate daily.

Golden Rule

The attorney will not be able to ask the jury to put themselves in J's shoes and think about what value they would place on the pain and suffering from that perspective.

Sue v. Bunny

Compensatory Damages, see rule above.

Here, Sue (S) will argue that she should be able to recover for her medical bills and hospitalization because they were not speculative damages and she can produce bills to quantify them. She will argue that she is not recovering for a group harm. **The court will likely award her compensatory damages for any damages she can quantify minus the damages she could have avoided (see below).**

**Sue will also argue that she should recover for the lost wages she suffered from losing her job after the accident, however, for the reasons stated under "Mitigation" below, she will not be able to recover these damages.**

Buyers Remedy, see rule above.

Here, for the similar reasons as J, S will recover the cost of the car.

Punitive Damages, See rule above.

Here, S has a stronger argument to prove that B acted willfully and wantonly because they had already discovered the defect and developed the software path knowing that it did not eliminate the risk of fire. Yet, despite that knowledge, they continued producing and selling the cars with the defect. She will point to the fact that they knew that the cars

could still catch fire and yet they continued selling it and sold one to her. She will further point to the fact that they installed the patch before her car was delivered but they didn't fix the defect. **The court will likely find that B acted willfully and wantonly when they sold the car to S despite knowing about the defect and the disastrous consequences. She will be able to recover up to 9 times her punitive damages.**

## **Affirmative Defenses**

Mitigation, see rule above.

Here, B will argue that S did not mitigate in good faith or reasonable when she refused medical treatment.

### **Refusal of Medical Treatment**

In a personal injury case, the court will take into account the plaintiffs individual characteristics and religious beliefs when it comes to refusing medical treatment. Here, the facts state that S refused treatment because she was terrified of modern medicine. They do not state it was due to a religious reason so there is no constitutional protection for religious freedom. B will argue that it was unreasonable for S to refuse medical treatment that was easy and minor and would have prevented further damage. Sues refusal to get medically treated for bruising and small burns led to her developing infections that required multiple hospital visits and her being fired from her job. She was fired from her job for missing additional work time due to the additional hospital visits that resulted from her refusing the initial easy, minor treatment. They will argue that they should not be liable for any expenses following her refusal to accept medical treatment since she did not reasonably mitigate and could have easily avoided those losses. S can argue that her fear of modern medicine is rooted in a mental health issue to strengthen her argument, however, given the non-invasive, easy and minor nature of the medical treatment she refused and the degree of the losses she incurred based on that decision, **the court will**



**likely find she did not reasonably mitigate and B is not liable for any damages beyond the initial hospital visit for evaluation.**

**END OF EXAM**

