

Question 4

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.

Answer A to Question 4

1) Can Barry Sue Sally Before May 25?

Contract

A contract is a promise or set of promises, for the breach of which the law provides a remedy. A valid contract requires an offer, acceptance, and consideration. Here, the facts provide that Sally (S) and Barry (B) entered into a valid written contract on April 1. Thus, it is stipulated that there was a valid offer and acceptance. The consideration requirement is also met, because B promised to pay money and S promised to convey the Phaeton to B. However, the fact that B promised only to pay \$200,000 when S thinks the car's "real value" is \$300,000 will not invalidate the consideration element; the court will not inquire as to the adequacy of consideration. What has really happened here is that S learned that another buyer was willing to pay more and, as a result, she has willfully breached her contract with B. Finally, the statute of frauds is triggered because the car is a movable good valued at greater than \$500. However, it will be satisfied because the contract is in a writing (assuming it is signed by the party to be charged, or Seller).

Thus, a valid contract existed between the parties as of April 1.

Anticipatory Repudiation

An anticipatory repudiation is a definite and certain expression of intent not to perform a contract before the time for performance is due. Under the parties' contract, S was to deliver the car on May 25. However, on May 10, S told B that she had accepted \$300,000 cash for the vehicle from an Italian collector. The fact that she sold the car to another party and then told B about it is a definite and certain expression of intent not to perform the contract; she already sold the car to someone else and there are only two 1932 Phaetons that exist.

Wrongful Prevention

A party may also prevent a contract by conduct that wrongfully prevents the occurrence of a condition. A condition is a requirement that must be met or excused before the duty to perform becomes absolute. All contracts contain at least one condition; that is, that the other party will perform. Here, S was obligated to convey the Phaeton ("the car") to B as a result of their contract. By selling the car to someone else, S has wrongfully prevented the occurrence of the condition that she actually transfer title of the car to B.

Effect of Anticipatory Repudiation / Wrongful Prevention

When a party anticipatorily repudiates or prevents the occurrence of a condition, the aggrieved party may 1) encourage performance, 2) treat the repudiation as final and sue for breach, or 3) await performance and sue for breach. The repudiating party may also retract her repudiation unless the aggrieved party has indicated that he considers the repudiation final or detrimentally relied thereon.

Here, S has already accepted \$300,000 from a wealthy Italian collector for the car that she promised to sell to B. Moreover, she added that she will deliver the car to a shipping company for transport to Italy within a week. B has not communicated intent to treat the repudiation as final. He may, however, do so, and then sue for breach prior to May 25 because S's conduct indicates that she has certainly repudiated the contract.

Conclusion:

B may sue S before May 25 because she has repudiated and/or wrongfully prevented performance of the contract.

2) Provisional Remedies / Likelihood Court Would Grant

Injunction

An injunction is a device that a party may use to stop another party from acting or, in some circumstances, force another party to act in a certain manner. An injunction requires the following elements:

Inadequate Legal Remedy

Because an injunction is an equitable remedy, the court must first determine that the legal remedies available to the plaintiff are inadequate. Here, the parties bargained for the transfer of a rare vehicle that B intended to use to attempt to win a first place award in the Concours. B specifically wanted a rare vehicle such as this because he thought that winning the Concours would help him increase his subscriptions and advertising revenues. It is true that B could procure another rare car that may have a similar chance of winning the car show, however. Nevertheless, B contracted for a rare good and the fact remains that the breaching party will be delivering the car to the shipping company for transport to Italy within a week.

No amount of damages will prevent the car from being shipped to Italy. Thus, the legal remedy is inadequate.

Property Right

Historically, the court would only award injunctions with respect to property rights: namely, real property rights. Modernly, however, the court will award injunctions to enforce personal rights. While a car is personal property, the contract is better viewed as giving B the personal right to purchase the car. Thus, though the contract involves personal rights, the court will still enforce it.

Feasibility of Enforcement

The court must be able to issue an enforceable decree. An injunction is either mandatory, in that it requires a party to act, or prohibitory/negative, in that it prevents a party from doing certain acts. Prohibitory injunctions are easier for the court to enforce since the defendant will be required only to stop acting in a certain manner as opposed to doing something in an affirmative manner. Finally, the court will use its powers of contempt to enforce the injunction (either civil or criminal). Civil contempt coerces a defendant to act while criminal contempt punishes a defendant from failing to act. The

court here could use its powers of civil contempt to coerce S to stop transfer of the vehicle to Italy by issuing a negative decree.

Therefore, the feasibility requirement will be met.

Balancing of the Hardships

The type of balancing that the court will do depends on the type of injunction that [it] will issue.

Temporary Restraining Order

A temporary restraining order (TRO) is a temporary decree issued to preserve the status quo for the period leading up to the Hearing on the preliminary injunction. The court typically will not balance the hardships under a TRO. The plaintiff must be faced with imminent, irreparable harm and the issuance of a TRO must be necessary to preserve the status quo, typically lasting no longer than 10 days. It is obtained by going in Ex Parte and making a showing of proof of the aforementioned requirements. In most jurisdictions, the plaintiff must also post a bond proportionate to the possible amount of damages the defendant could suffer from a wrongful issuance of the TRO.

Here, B would request that the court issue a TRO preventing her from transporting the car to Italy within the week. Once the vehicle is in Italy, the court will no longer have jurisdiction over it. Depending on how long it may take for the court to hold a hearing on his preliminary injunction, the court may issue a TRO to enjoin S from shipping the car.

Preliminary Injunction

A Preliminary Injunction is an injunction that lasts during the pendency of the action, up and until trial on the permanent injunction is complete. In determining whether to issue the injunction the court will factor 1) the likelihood of Plaintiff's success, 2) Balance the Harms – the harm to plaintiff if the injunction is wrongfully denied versus the harm to the defendant if wrongfully granted, 3) The plaintiff must post a bond if he has not done so under a TRO, and 4) issuance is necessary to preserve the status quo.

Likelihood of Success

S has willfully breached the contract, which was stipulated as valid. In the face of such a breach, B enjoys a strong likelihood of success on the merits in a claim for either damages or specific performance since the parties were bargaining for a unique good (there are only two cars in existence). Thus, B has a strong likelihood of success on the merits.

Balancing the Harms

If the injunction is wrongfully denied, B will be deprived of perhaps his only opportunity to own a Phaeton. His motivations for purchasing the car are irrelevant. Most collectors of high end vehicles view the purchases of such as not only a hobby, but also as an investment. Thus, the fact that B wished to use the car to win the Concours, one of the most prestigious auto shows in the country, for profit motives, will not lessen the harm he suffers as a result of the breach. If anything, it means that he will suffer pecuniary

harm, as opposed to mere emotional harm from not purchasing a car he wanted to have, as a result of S's breach.

On the other hand, if the injunction is wrongfully issued, S will likely lose the opportunity to sell the vehicle to an Italian purchaser willing to pay \$300,000. However, as S now claims, if the true value is \$300,000 and she is selling it to someone for the same amount, she will not be damaged by not being able to sell it to this particular purchaser. Therefore, S's harms are comparatively slight.

Thus, the harms balance in favor of Barry.

Post a Bond

If B has not obtained a TRO and posted a bond, he will be required to do so upon the issuance of a preliminary injunction.

Necessary to Preserve the Status Quo

There are only two cars like this in existence. Keeping the car within the court's jurisdiction is necessary to maintain the status quo because otherwise B may not be able to obtain what he is entitled to under his contractual rights.

Therefore, the court will likely issue a preliminary injunction.

Permanent Injunction

A permanent injunction is not a provisional remedy; it is awarded after a full trial on the merits. The court will not typically balance the hardships unless the injunction pertains to a nuisance. Therefore, B's best recourse prior to trial on the merits is through one of the above-given preliminary methods considering he will likely pursue a claim for specific performance (thus making the issuance of a permanent injunction improper).

Conclusion:

The court may issue a TRO to prevent B's imminent harm if it is not possible to obtain a hearing on the preliminary injunction prior to S's shipment of the car to Italy.

3) Specific Performance/Replevin

Specific Performance

Specific performance is an equitable remedy that the court may utilize to enforce the terms of a valid contract. As discussed above, the contract between B and S is valid notwithstanding the fact that B may have got a "good bargain" by contracting for the car for \$200,000. To issue a decree of specific performance, the plaintiff must demonstrate.

Inadequate Legal Remedy

The legal remedy is inadequate when the parties are contracting for unique or specially manufactured goods. Here, the car is one of only two in existence. Thus, there is a small possibility that B could purchase another Phaeton. Moreover, B wished to have the car because it appeals to classic car enthusiasts; that is not to say, however, that it

is the only car that would win the award. Nevertheless, S's car was in "pristine condition." The condition, nor location, of the other vehicle is unknown. Thus, the legal remedy of damages will be inadequate if B is unable to recover the replevin, which, discussed below, is a legal remedy. However, even under replevin, if the defendant posts a bond then the legal remedy may be rendered inadequate because the court will not order the sheriff to seize the goods.

Definite and Certain Terms

The terms of the contract must be such that the court knows what type of order to issue. Here, the parties contract in which B agreed to buy and S agreed to sell "the Phaeton" for a price of \$200,000. The contract identified the subject matter of the contract, the parties, and stated a price and time for performance. The court could simply enforce the contract by requiring S to perform by delivering the car on May 25.

Mutuality

Historically, for a specific performance decree to be issued, the remedy had to be available for both parties. This requirement has since been relaxed under the security of performance test. Thus, as long as the court can secure performance of both parties to its satisfaction, the decree may be issued. Here, the court could force B to pay the contracted for price of \$200,000 while forcing S to deliver the car to B.

Feasibility of Enforcement

The court must be able to enforce the specific performance decree; personal service contracts will not be subject to specific performance. The facts do not provide where S or B live, but it is likely that both live in Columbia. Nevertheless, they entered into a contract in Columbia. S sought to place her goods into the Columbia stream of commerce. Therefore, the court very likely has jurisdiction over the parties and may enforce the decree using its powers of contempt, as discussed above.

Conclusion:

The court will issue a decree of specific performance if the legal remedy is inadequate.

Replevin

In the contract sense, replevin is the recovery of contracted-for goods by the plaintiff. Replevin is a legal remedy, in that the sheriff will seize the property; the defendant is not ordered to do anything. To obtain an order of replevin, the plaintiff must show 1) the goods are specifically identified in the contract, and 2) the plaintiff is unable to cover despite reasonable attempts to do so.

Specifically Identified

As discussed, the car was specifically identified in the contract because the contract specified S was to convey "the Phaeton," of which only two exist, to B. Therefore, the goods are specifically identified.

Plaintiff Unable to Cover

The facts do not provide that B has exerted efforts to cover. However, there are only two Phaetons in existence. It is not clear where the other one is located and what

condition it is in. Therefore, assuming B made reasonable efforts to do so, it is not likely he could cover.

Conclusion:

The court will issue an order of replevin as long as the defendant does not post a bond to stop collection of vehicle by the sheriff.

4) Damages for Breach of Contract

All damages must be causal, foreseeable, definite and certain, and unavoidable; that is, the plaintiff has a duty to take reasonable steps to mitigate his losses.

a) Damages for Nondelivery

This contract is for the sale of goods (the car); thus, the UCC applies. When the seller breaches under the UCC, the buyer is entitled to cover or market damages. Here, B would be entitled to damages in the difference between the \$200,000 contract price and the price of the other Phaeton in existence, if he was able to actually cover. Alternatively, B may seek damages of \$100,000 if the market price of the car is really \$300,000 as S has indicated.

b) Loss of increased circulation and advertising revenues

The buyer may also be entitled to consequential damages when their possibility is known at the time of contract or specifically communicated to the defendant. If S knew of the Concours, which she may have since it was one of the most prestigious shows in the country and she owned a vehicle that stood a good chance of winning it, then the fact that B would enter the car in the show is foreseeable. It is not clear that B indicated his intent to enter it in the show, or that C knew that he was motivated to increase circulation and advertising revenues thereby.

However, Barry has been operating Auto Designer's Digest for years, trying to win a first place award. Nevertheless, future increases in circulation and ad revenue as a result of winning a car show are speculative, and uncertain. Therefore, B will not obtain damages here.

c) Loss of \$5,000 entry fee

In some contexts, the plaintiff may recover reliance damages. Here, B paid the \$5,000 entry fee after contracting with S to purchase the car. He had no reason to suspect that S would breach the contract with him. Therefore, his reliance was foreseeable and B would be entitled to \$5,000 in reliance damages.

Conclusion:

B has a number of strong claims against S for her willful breach and will likely obtain a preliminary injunction and prevail under a suit for specific performance.

Answer B to Question 4

Applicable Law

1) This contract involves the sale of goods. As a result, the applicable law will be UCC Article 2. Because the goods being sold are over \$500, the UCC Article 2 Statute of Frauds provision requires the contract to be in writing, and contain all material terms and be signed by the party against whom enforcement is sought. The facts state that the requirements have been met.

Anticipatory Repudiation

Generally, a party cannot sue on a contract for breach until the time for performance has come due. Anticipatory repudiation is an exception to that general rule. Anticipatory repudiation applies when one of the parties to a contract makes a statement or an act that unequivocally and clearly shows that party will not perform on the contract. That is the case here. There is a valid contract between Barry (B) and Sally (S) supported by adequate consideration (B's promise to pay \$200,000 and S's promise to deliver the car) which is in writing.

There appears to be no defenses to the formation and enforceability of the contract. S may claim that the contract is unenforceable because the price provision is unconscionable. This would require her to show procedural and substantive unconscionability. There are no facts to support procedural unconscionability and the price (though \$100,000 less than what S claims the car to be worth) does not seem substantively unconscionable. The value of rare and antique items is very speculative and S, knowing her car to be rare and valuable, should look into its value before selling. Also, mistake as to the value of an item is generally not a defense to a contract, even if the other party knew or should have known the item was worth more. As a result, the court will likely find the contract enforceable.

S anticipatorily repudiated the contract when she said she had sold the car to an Italian buyer and was not going to sell it to B. Because of this repudiation, B is free to halt or suspend his performance on the contract and immediately sue for breach, assuming he has not yet paid the \$200,000 in full to S. If he has, he will have to wait until May 25, to sue. However, the facts do not state that he has fully performed at this point so he will be able to sue as of the date of the repudiation – May 10.

2) By the time B is able to fully have his case heard and decided, S may have already sold the car and he will have suffered substantial losses and will likely be unable to ever find another Phaeton for purchase. Thus, B should seek a Temporary Restraining Order and then a preliminary injunction immediately pending the outcome of his case. These will enjoin S from selling the car pending the outcome of the case, thereby preserving the "status quo".

A TRO can be obtained ex-parte in emergency situations. The TRO, if granted, will last for 10-15 days, depending on the applicable procedural rules. A hearing on a motion for

preliminary injunction, with both parties, must then be held, whereupon the court will determine whether to keep the injunctive relief in place.

To obtain a TRO/preliminary injunction, B must show a threat of immediate and irreparable harm, inadequacy of the remedy at law, a likelihood of success on the merits, and a balance of equities in his favor and a lack of defenses to his claim. Mutuality is not required.

B will argue that he is threatened with immediate and irreparable harm because S intends to ship the vehicle to the other buyer within a week. This harm will be irreparable because the Phaeton is an extremely rare car, he will not be able to find another one and it is unlikely that he will be able to find a comparable car in time for the Concours.

B will also argue that remedies at law – money damages, will be inadequate because the uniqueness of the car and the fact that, once the car is sold, he will not be able to find a comparable car for the Concours and he will have lost his purpose for buying the car. Due to the extreme rarity of the vehicle, the court is likely to find that B's remedies at law are inadequate.

Balancing the hardships of an injunction on B and S, a court will likely find that there will be substantially greater hardship to B if the contract is not performed than to S, since S can always sell the car later if she prevails in the case.

B has a likelihood of success on the merits, if he can show he is able to pay the \$200,000, perhaps by putting the sum into escrow and because the facts state he has a valid contract in writing.

S's defenses – unclear hands, laches, unconscionability, will fail as previously discussed.

B will receive a preliminary injunction and will be required to post bond to cover damages to S if it is found she was wrongfully enjoined.

3) Specific Performance

Specific performance is a remedy by which courts force parties to a contract to perform as promised in the contract. It is an equitable remedy, and all equitable defenses are available. In contracts for the sale of goods, Specific Performance is generally only granted in cases where the subject goods are extremely unique, custom, or rare. In this case, the car, being extremely old and rare and in apparently good enough condition to compete in a prestigious show will likely satisfy the requirement for uniqueness.

Valid Contract

B must show that he has a valid contract in order to get Specific Performance. Here, the facts state the written agreement is valid.

Feasibility

B must show that the contract terms are definite enough so that the court can feasibly enforce them. Here, the price, subject matter and the delivery date are definite, and the contract is fairly simple so a court will feasibly be enabled to order Specific Performance.

Mutuality

Mutuality of remedies is no longer required for Specific Performance.

Full Performance

B must show that he has fully performed on the contract or will definitely fully perform. Though he has not yet paid, he can put the \$200,000 in escrow to show this.

Damages Inadequate

B will have to show that damages - his at-law remedy will be inadequate. As previously discussed, he will be able to show this.

Defenses

S's defenses of unconscionability/unilateral mistake will fail as previously discussed. The facts do not support the defenses of unclean hands or laches being available to her. Specific Performance will be granted.

Replevin

Replevin is a remedy by which a rightful owner of personal property seeks to have that property returned to him by order of the court.

If the car is sold to the Italian buyer, B will have to seek its return by replevin. The facts do not indicate whether the Italian buyer knew of the existing obligation for S to sell the car to B. If he did, he would not be able to claim that [he] is a bona fide purchaser, who purchased in good faith and for value. If the Italian is not a bona fide purchaser B will be able to seek replevin. If the Italian had no knowledge of B's contract with S, he would be a bona fide purchaser for value and B would not be able to seek replevin of the car from him.

4) Non-delivery of the Phaeton

Generally, damages are designed to protect the parties' expectations – to put them in as good of a position as they would have been had the contract been fully performed. Damages must not be too speculative. Here, B expected to own a Phaeton for \$200,000 and S expected to receive that amount.

In a contract for the sale of goods where the seller breaches and keeps the goods, the buyer can recover the difference between the contract price and the market value of the goods at the time of breach, or the buyer can cover, by buying the same goods and receive the difference between the cost of cover and the contract price.

Here, the apparent market value of the Phaeton is \$300,000 at the time of breach. The K price was \$200,000. B can recover, as his expectation damages [are] \$100,000 or if he is able to buy another '32 Phaeton (unlikely) he could seek the differences between what he pays for the other Phaeton and the K price.

B can also recover all incidental damages incurred in dealing with S's breach.

Loss of Circulation /Revenues

Consequential damages are only recoverable to the extent they are reasonably foreseeable by the breaching party and not so speculative.

The facts do not indicate that S knew of B's purpose for purchasing the car or that he owned a car enthusiast magazine. Thus, the loss of circulation and revenue to B is likely not foreseeable to a reasonable person in S's position.

Even if S was aware of B's purpose, these damages are probably too speculative. First B would have to prove he would have won and that winning would have increased his circulation and revenue in some definite amount. This is likely not possible.

\$5,000 Entry Fee

B can recover the \$5,000 entry fee as reliance damages – money he spent on reliance on the K if this reliance was foreseeable to S.

If he told S he was going to enter it in the Concours or S should have known he was buying it to show, he will recover.