



California Bar Examination

**Essay Questions
and
Selected Answers**

July 2017



The State Bar Of California
Committee of Bar Examiners/Office of Admissions

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ESSAY QUESTIONS AND SELECTED ANSWERS

JULY 2017

CALIFORNIA BAR EXAMINATION

This publication contains the five essay questions from the July 2017 California Bar Examination and two selected answers for each question.

The answers were assigned high grades and were written by applicants who passed the examination after one read. The answers were produced as submitted by the applicant, except that minor corrections in spelling and punctuation were made for ease in reading. They are reproduced here with the consent of the authors.

Question Number

Subject

- | | |
|----|--|
| 1. | Community Property |
| 2. | Professional Responsibility / Evidence |
| 3. | Remedies |
| 4. | Civil Procedure |
| 5. | Torts |

ESSAY EXAMINATION INSTRUCTIONS

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

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

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

QUESTION 1

Wanda, a successful accountant, and Hal, an art teacher, who are California residents, married in 2008. After their marriage, Wanda and Hal deposited their earnings into a joint bank account they opened at Main Street Bank from which Wanda managed the couple's finances. Each month, Wanda also deposited some of her earnings into an individual account she opened in her name at A1 Bank without telling Hal.

In 2010, Hal inherited \$10,000 and a condo from an uncle. Hal used the \$10,000 as a down payment on a \$20,000 motorcycle, borrowing the \$10,000 balance from Lender who relied on Hal's good credit. Hal took title to the motorcycle in his name alone. The loan was paid off from the joint bank account during the marriage.

At Wanda's insistence, Hal transferred title to the condo, worth \$250,000, into joint tenancy with Wanda to avoid probate. The condo increased in value during the marriage.

On Hal's 40th birthday, Wanda took him to Dealer and bought him a used camper van for \$20,000, paid out of their joint bank account, titled in Hal's name. Hal used the camper van for summer fishing trips with his friends.

In 2016, Wanda and Hal permanently separated, and Hal filed for dissolution. Just before the final hearing on the dissolution, Hal happened to discover Wanda's individual account, which contained \$50,000.

What are Hal's and Wanda's rights and liabilities, if any, regarding:

1. The condo? Discuss.
2. The motorcycle? Discuss.
3. The camper van? Discuss.
4. The A1 Bank account? Discuss.

Answer according to California Law.

QUESTION 1: SELECTED ANSWER A

California is a community property state. Unless the parties have agreed otherwise in writing, all property acquired during the course of marriage is presumed to be community property (CP). Property acquired before marriage and after the marital economic community has ended is presumed to be separate property (SP). In addition, property acquired by gift, devise, or descent is presumed to be SP as well. To determine the characteristic of an asset, courts generally trace the property to the assets that were purchased.

At divorce, all CP is equally divided between the parties unless they have otherwise agreed in writing, orally stipulated to in open court, or an exception applies to the general rule of equal division of CP at divorce. A spouse's SP remains his or her SP at divorce. With these general principles in mind, each property will be assessed individually.

The Condo

At issue is whether the condo is completely part of Hal's (H) SP or whether the community estate has an interest in the condo. As stated above, property acquired by gift or devise, such as an inheritance, is presumed to be SP of the spouse receiving the gift/inheritance. Here, H's uncle left him the condo and Hal inherited it. Therefore, unless H and Wanda (W) expressly agreed in writing that it was to change from SP to CP, H owned it as SP alone. However, the facts indicate that H transferred the title to the condo to W into a joint tenancy with W to avoid probate. Therefore, at issue is whether this vested the community estate with an interest in the apartment.

In California, property that is held in joint form is presumed to be CP. Therefore, when H transferred his interest in the Condo to W as joint tenants, the law will presume

that he intended to gift the condo to the CP and for each to hold as joint tenants with right of survivorship. When property that is held in joint form is to be divided at divorce, two statutes apply. First, in order for the transferring spouse to have an interest of ownership it must establish that there was either a written agreement that he was to hold it as SP or that the deed itself contains language that the property is only to be SP. Here, no such written agreement exists. On the contrary, W and H agreed to transfer the condo to W and H as joint tenants. However, a spouse who "gifts" SP to CP is entitled to reimbursements for down payment, principal payments for the mortgage, and for improvements made to the property. Here, H essentially paid the price of the condo \$250k when he transferred it from his SP to CP. Therefore, he will be entitled to receive a \$250k return on the apartment's value if it is deemed to be CP. The remainder of the condo's apartment will be CP.

However, H can argue that the transaction should be set aside because it is presumptively obtained through undue influence and, therefore, void. In the course of dealing with one another, spouses owe the same duties as those who are in confidential relationships. This duty imposes upon them the highest duty of good faith and fair dealing when the spouses enter into transactions with each other during their marriage. If one spouse gained an unfair advantage over the other in a transaction, the court will presume that the transaction was obtained via undue influence and, thus, invalidate it. The spouse who obtained the advantage will have the burden to prove that the transaction was entered into by the other spouse freely and voluntarily with full knowledge of all the facts relevant to the transaction and the basic effect of the transaction.

Here, H will argue that W insisted that he transfer the property into both of their names as joint tenants to avoid probate. H will argue that because W was an accountant, he believed her word and relied on her professional experience to believe that the best move for the couple was indeed to hold it as joint tenants. Furthermore, he will argue that as an art teacher who knows nothing about estates and marital property, he relied on her word and did not know that holding as joint tenants will deprive him of

full interest in the condo if they were to divorce. W has the burden here. She will have to show that she explained everything to H and that she indeed told him of the basic effect of the transaction. However, this does not appear to be the case. It appears that all W did was insist that H transfer it to avoid probate, but did not inform him of any other consequences that such a transfer may have. Therefore, H has a good argument to void the transfer to W as joint tenants for the condo because W gained an unfair advantage over him.

If H is successful in arguing that the presumption that property held in joint form is CP, W may argue that the transfer constituted a valid transmutation. A transmutation is an agreement by the parties that changes the form of ownership from CP to SP, or SP to CP, or one's SP to the other's SP. However, to be valid, there must be a written agreement signed by the party whose interest is adversely affected and expressly state that a change of ownership is to occur. Here, this is not the case.

The Camper Van

At issue is whether the camper van is H's SP due to a gift from W or it remains as CP. During their marriage, the parties can enter into agreement to change the character of any particular property by transmutation. As stated above, transmutation is when the parties change CP to SP, or SP to CP, or one's SP to the other's SP. However, for a transmutation to be valid, it must be in writing, signed by the party whose interest is adversely affected and expressly states that a change in ownership is to take place. The general exceptions to writing requirements do not apply here. The only exception is when a spouse gives a gift of a tangible item of personal property to the other spouse. However, this personal gift exception only applies to gifts of low value and does not apply to those with substantial value.

Here, the wife purchased a camper van for \$20,000 on H's 40th birthday using money paid from their joint bank account, titled in H's name. Title alone does not establish the characteristic of property for community law purposes. Rather what is

more important is the funds that were used to acquire the property. Here, the funds were used from a joint bank account. The joint bank account is indeed community property because both of them were depositing money into it from the income they earned from their respective jobs. Therefore, the camper van purchased with CP is presumed to be CP unless there was a valid transmutation or other exception. Here, there was no valid transmutation. When W gifted the camper van to H, it was not accompanied by any written agreement, signed by W, that stated that H was to own the property as his SP and that W was gifting it to him outright. The issue then is whether the personal gift exception applies here. It does not. Generally, the personal gift exception applies to gifts of personal property with low value (such as a piece of jewelry that was inherited by a spouse). A \$20,000 camper purchased with CP will not be presumed to be a personal gift from one spouse to the other for community property law purposes. The subjective intent of the spouses does not matter.

In conclusion, the camper van is CP subject to be divided 50/50 between H and W because it was acquired with CP property and no exception applies to change its characterization.

The Motorcycle

To determine whether property is CP or SP, the courts will trace the funds used to acquire to purchase the property. Here, H used an initial down payment of \$10,000 to purchase the motorcycle. This \$10,000 was his SP because he had inherited it from his uncle and, as stated above, gifts acquired via inheritance are presumed to be SP. However, H then paid off the remainder of the 10k from a loan borrowed from a lender. Thus, the issue is whether then \$10,000 credit to purchase the motorcycle was CP or SP. Each spouse has an equal right of management over CP and, therefore, has the right to individually enter into agreements to purchase property on credit without the approval of the other. Determining whether a property purchased with a credit from a lender hinges on the primary intent of the lender and where he was looking for assurances before giving out the credit. For example, if the purchasing spouse used his

own SP for collateral for the credit purchase, then it would be presumed to be SP because the lender's primary purpose for giving the loan was due to the collateral. However, where the lender relies on the purchasing spouse's good credit, the property purchased with that credit is presumed to be SP. This is because one's good credit or reputation as having good credit is community property.

Therefore, because the lender relied on H's good credit in giving out the \$10,000 loan for the purchase of the motorcycle, the \$10,000 is presumed to be CP. As a result, H owns a 50% SP interest in the motorcycle because he used \$10k to purchase the property (50% of the purchase price) and shares the other half of the value of the motorcycle as CP with W. To conclude, H owns 50% of the motorcycle as SP and both H and W own the other half of the motorcycle as CP.

Additionally, even if the court determines that the lender's primary intent was based on H's SP and, therefore, the motorcycle was not presumed to be SP, the community estate will still have a 50% interest due to the principal debt reduction method. Where a spouse has acquired property before the marriage or acquired property through inheritance and then CP funds are used to pay for the principal of the property, the community estate obtains a pro rata interest in the property based off of the principal debt reduction due to funds paid from the CP. Here, the remaining \$10k of the motorcycle's balance was paid off with the joint bank account during the marriage, which is indeed CP. Therefore, the community estate would be entitled to a principal debt reduction of 50%, meaning it would have an interest of 50% of the total value of the motorcycle.

The A1 Bank Account

As stated above, all property acquired during the course of marriage is presumed to be CP, regardless of who holds title to the property. Here, W owned an individual bank account at A1 Bank without telling Hank and deposited some of her earnings into it. Earnings by each spouse are deemed to be community property when earned during

the course of the marriage. It does not matter where the spouse transfers the earnings or what type of account she transfers it into. The fact remains that the funds that she deposited in the A1 Bank were CP and she was not entitled from hiding CP or depriving H of his rights to the CP. The fact that she held the bank account solely in her name is not determinative here. Where the A1 Bank account would matter is if third party creditors of H's debts were seeking payment from him, they would not be able to attack this bank account because W expressly held the Bank account in her name, H did not have any rights of withdrawal and there was no commingling. However, at divorce, the bank account is subject to equal division as it was funded by W's earnings. Thus, H and W own 50% interest each in the bank account.

At issue is whether H may argue for an exception to the equal division of assets to apply here because W misappropriated CP. Although the general rule is that CP is to be divided 50-50 on divorce, a spouse who misappropriated community funds may not be entitled to receive an equal share due to her wrongful acts. H will argue that W misappropriated community funds here because she secretly opened up a bank account without informing H and deposited only her earnings in there. H will argue that because each spouse's earnings are CP he was entitled to those funds during the course of their marriage as it was supposed to be part of the community estate rather than W's private funds. Due to this misappropriation, H will argue that W should be forced to forfeit her interest in the A1 Bank and that he be entitled to take the 50k in full. Ultimately, this is a decision for the judge to make when he is ordering the divorce decree.

Additionally, H may argue that W again breached her duty of good faith and fair dealing by hiding the funds from him. He will argue that W had assumed control over the couple's finances and used that power to obtain an unfair advantage over H by hiding funds from him. He will argue that the agreement to allow her to control the couple's finances imposed a duty on W to use the duty of the highest good faith and fair dealing when she managed the finances and that she breached it by failing to disclose all the funds to H. W will have to overcome the presumption of undue influence by

showing that H knew of all the facts constituting the transaction. However, because H did not have any idea about the secret bank account it will be impossible for W to overcome this burden.

Therefore, H has a strong argument for having the court strip W's interest in the A1 Bank account funds and reward the full 50k to H for breaching her fiduciary duties as a spouse and for misappropriation of community funds. However, it is important to note that H's and W's marital economic community ended in 2016. The marital economic community ends when there is a permanent separation by the parties and an intent by one of the spouses to not resolve the marriage. The filing for a marriage dissolution is determinative evidence of such intent. Therefore, the marital economic community ended in 2016. From that time, any money that W deposited into the A1 Bank Account will be presumed to be her SP since the marital economic community has ended.

QUESTION 1: SELECTED ANSWER B

General Presumptions

California is a community property state (CP) all property acquired from the date of the marriage until separation is presumed to be CP - owned by the spouses equally 50/50. All wages earned from the time or labor of a spouse during marriage are CP. Property acquired before marriage or after separation is presumed to be Separate Property (SP) of the acquiring spouse. Property received by gift, bequest, or devise is also the separate property of the receiving spouse, as are the rents, issues and profits produced by SP. The character of the property may not be changed simply by changing the manner in which the property is held, the property will be traced to its source and characterized according to the source used to acquire the property. Upon divorce, spouses are entitled to in kind 50/50 distribution of all property.

Transmutation

One spouse may not gift themselves community property. In order to change the character of property from CP to SP or SP to CP, there must be an agreement in writing signed by the spouse whose interest is adversely affected explicitly stating that the spouse intends and understands that she is altering the character of the property. Oral agreements will not be a valid transmutation.

1. THE CONDO

The general presumption is that property acquired during the marriage is CP. Hal acquired the condo in 2010 which was during his marriage to Wanda. However, by law, property acquired through inheritance is the separate property of the inheriting spouse. Since Hal acquired this property from his uncle through inheritance, the condo was Hal's SP. The issue is that Hal, at Wanda's insistence, titled the property in Joint tenancy with Wanda.

Title in Joint Form

A married couple who takes title in joint form when it is inconsistent with the nature of the funds used to acquire the property will be presumed to have intended the property as CP. Taking title in joint form with no indication that a spouse wanted to reserve a separate property interest creates the presumption of CP. Here, Hal and Wanda took title in joint form and Hal did not reserve any separate property interest, there also is no other writing that evidences an agreement between Hal and Wanda for Hal to keep a separate interest so the court will presume that because they took title in a joint form that they intended the property to be CP.

Transmutation by Deed

In order for spouses to change the character of property from SP to CP as in the case with the condo being Hal's SP and then later conveying to CP, there must be a valid transmutation. The issue is whether the deed from Hal to Hal and Wanda will be a valid transmutation of his interest. Typically, a deed satisfies the writing requirement for the transmutation if signed by the party adversely affected, in this case Hal. However, Hal may not have intended for interest in the property to be adversely affected. The facts indicate that he only agreed to put the condo in joint tenancy after Wanda's insistence that he do so in order to avoid probate. It is likely that Hal being an artist relied on Wanda's assertion because Wanda was a successful accountant who would have known the consequences of such decisions as titling property in a particular manner. The courts have been unclear in whether or not they consider a deed by one spouse to other spouses to be a valid transmutation. Assuming that that the deed from Hal to Wanda is a valid transmutation, then at most Hal would be allowed reimbursement for his SP that was used to acquire the condo by the community. The reimbursement will be allowed without interest or apportionment of increase in value to the items. A court would likely use the value of the property at the time it became CP which for the condo was \$250,000, Hal would be reimbursed for the \$250k at divorce and the remaining value of the condo would be divided in kind 50/50 between Hal and Wanda.

Fiduciary Duties of Spouses

Spouses owe one another the highest duty of care and are fiduciaries to one another. If one spouse breaches her fiduciary duty to the other and takes advantage of that spouse by gaining an interest financially or in an asset, then the non-breaching spouse may be able to set aside the conveyance on those grounds. Here, Wanda was a successful accountant and Hal was an art teacher, there is a strong possibility that but for Wanda's insistence that Hal put the condo in joint form that he would not have done so. By insisting that the condo be in joint title, Wanda gained a financial interest in property that she would have otherwise had no rights to because it was received by Hal through inheritance. If Hal can show that Wanda breached her duty to him in convincing him to put the condo in joint form only to benefit herself, Hal may be able to have the conveyance set aside.

Equal Rt of Mgmt

Each spouse has an equal right to manage the assets of the community and keep the other spouse reasonably informed as to the financial situation. Here the facts indicate that Wanda managed the couple's finances and that she also kept a secret bank account without Hal's knowledge. By doing this she breached the duty to share management with Hal and used it to her advantage to try to hide \$50k - Hal will also be able to use this to bolster his case that Wanda breached her fiduciary duty to him and should not be allowed to take an interest in the condo.

Conclusion as to the Condo: Hal will likely be entitled to reimbursement for his contribution of SP to CP - in this case the condo was valued at \$250k at the time he conveyed to Joint Tenancy so he will have a right to reimbursement of the \$250k and the remaining value will be CP. However if the court finds that the deed was not a valid transmutation from Hal's SP to CP then the condo would remain Hal's SP.

2. THE MOTORCYCLE

One spouse may not appropriate CP to themselves by simply taking title to the property in their name alone. When both SP and CP are used for the purchase of an asset the

funds used to acquire the property will be traced to their source and the property will be characterized in accordance with funds used for acquisition.

Down Payment

Property that was initially SP will continue to be SP even if the SP is exchanged or sold and the form changes. Hal inherited \$10k from his Uncle - inheritance is an area of SP. Hal then took his \$10k of SP and used it for a down payment on a motorcycle that he took title to in his name alone. Had the motorcycle cost only \$10k, there would be no issue here because the \$10k used to purchase the motorcycle could be traced directly to the inheritance which was Hal's SP making the motorcycle then SP as well. The motorcycle cost \$20k, though, so it must be determined where the other \$10k came from and whether the additional \$10k can be traced to other SP or to CP.

Credit - Intent of the Lender

The credit, good will and reputation of a spouse belong to the Community during the marriage, this also includes credit scores. A loan taken out during the marriage is a community debt unless it can be shown that the lender in determining whether to loan one spouse the money relied solely on the borrowing spouse's separate property for repayment. The fact that a lender "relied" on one spouse's good credit is not the determining factor because good credit of one spouse belongs to both spouses as community property. When Hal borrowed the additional \$10k from the lender, the lender ,relied on Hals good credit - Hal's good credit belongs to the community and so therefore, the loan for the motorcycle was a community debt. If there were other facts that indicated that the lender relied on Hal's separate property interest - such as the condo - for repayment then the debt could belong to Hal alone, but based on the facts present that the lender relied on credit of Hal the debt was community debt.

Repayment of Loan w Joint Acct \$

Wages and earning of a spouse are community property if earned during the marriage. Here Wanda and Hal were putting their earnings into a joint checking acct which was used to pay off the motorcycle loan. Because CP was used to pay off half of the

motorcycle loan, the community owns a 1/2 interest in the motorcycle.

Conclusion as to the motorcycle: Hal owns the motorcycle as 50% SP because half of the purchase price can be traced to his SP inheritance, the community owns the other 50% interest because community property was used to obtain the loan and pay off the loan.

3. CAMPER VAN

When one spouse uses CP to buy a gift for the other spouse and puts title into that spouse's name alone, it is presumed to be a gift. While one spouse may not appropriate CP, one spouse may make a gift of interest in CP to the other spouse as SP. In this case, Hal will argue that Wanda taking him out for his 40th birthday and buying the camper van was her gifting her interest in the CP to Hal as his SP. On the other side, Wanda will argue that she did not intend to make a gift to Hal as SP, but instead intended to retain a CP interest in the van and that there was no valid transmutation from CP to Hal SP.

Gift Exception to Transmutation

There is an exception to the requirement that all transmutation be in writing. The exception is for gifts given to one spouse that are for that spouse's personal use and that are not substantial in value. Here Hal may argue that the van would also fall into the gift exception even if there was no writing that evidenced Wanda's intent to make a gift. Hal did use the camper van for fishing and summer trips with his friends. There is no mention of Wanda participating in these trips which would indicate that the van was for her personal use. However the gift must also not be substantial in nature and the van cost \$20k; whether or not this is of substantial value would be considered in light of Hal and Wanda's station in life - their assets etc. While this may be an arguable issue, courts have typically found that cars are not items that are personal enough in nature to fall within the exception.

Conclusion as to the Van: If a court finds that by purchasing the van and titling it in

Hal's name alone that Wanda intended a gift of her CP to Hal SP, then the van will be considered Hal's SP at divorce. Otherwise by tracing the funds to the CP checking account the van will be deemed cp.

4. A1 BANK

Wages earned by either spouse's time, labor, or skill during the marriage belong to the community. Here Wanda took her earnings during the marriage which are CP and deposited them into a secret acct w/o Hal's knowledge or name. Regardless of the fact that Hal's name is not on the account, Wanda's wages still belong to the community and, therefore all of the money in the account (\$50k) is CP. A court may continue to have jurisdiction over the proceedings and assets until they are all disbursed. Just because in this case Hal did not discover the \$50k until right before the final hearing will not affect his rights - and if Wanda purposely hid the money or failed to inform the court of its existence then she may be denied interest in the money to the extent that justice and fairness require.

Conclusion : The \$50k in the A1 acct is CP subject to in kind division upon divorce.

QUESTION 2

Claire had been a customer of Home Inc., a home improvement company owned by Don. Dissatisfied with work done for her, she brought an action against Home Inc. and Don in California state court, alleging that they had defrauded her.

Don entered into a valid retainer agreement with Luke, engaging Luke to represent him alone and not Home Inc. in Claire's action. Luke then interviewed Don, who admitted he had defrauded Claire but added he had never defrauded anyone else, before or since. Luke subsequently interviewed Wendy, Don's sister. Wendy told Luke Don had admitted to her that he had defrauded Claire. Luke told Wendy that Don had admitted to him too that he had defrauded Claire. Luke drafted a memorandum recounting what Wendy told him and expressing his belief Wendy would be a good witness for Claire.

Shortly before trial, Don fired Luke. Don soon died unexpectedly.

Claire filed a claim against Don's estate and a claim against Home Inc., alleging as in her action that they had defrauded her. As the final act in closing Don's estate, the executor settled Claire's claim against the estate, but not against Home Inc.

At trial against Home Inc., which was now the sole defendant, Claire has attempted to compel Luke to testify about what Wendy told him, but he has refused, claiming the attorney-client privilege. She has also attempted to compel him to produce his memorandum, but he has again refused, claiming both the attorney-client privilege and the attorney work-product doctrine.

1. Should the court compel Luke to testify about what Wendy told him? Discuss. Answer according to California law.
2. Should the court compel Luke to produce his memorandum:
 - a. To the extent it recounts what Wendy told him? Discuss. Answer according to California law.
 - b. To the extent it expresses his belief that Wendy would be a good witness for Claire? Discuss. Answer according to California law.
3. What ethical violations, if any, has Luke committed? Discuss. Answer according to California and ABA authorities.

QUESTION 2: SELECTED ANSWER A

1. Should the court compel Luke to testify about what Wendy told him?

Attorney-Client Privilege: Don and Luke

The attorney-client privilege protects confidential communications made to facilitate legal representation. It is narrower than the duty of confidentiality, which applies to any information related to the representation of a client, even if no attorney-client relationship is formed. The attorney-client privilege protects communications made by the client or the client's agent to the lawyer or the lawyer's agents. In the corporate context, the attorney-client privilege, in California, protects communications made by a spokesman for the corporation or by someone whose actions could be imputed to the corporations for purposes of liability.

The attorney-client privilege attaches and applies even if a lawyer is subsequently removed from a case. Thus, here, Don's decision to fire Luke did not prevent the privilege from applying to confidential communications made to facilitate legal representation. However, in California, the attorney-client privilege ends when the client dies and his estate is entirely disposed of. Consequently, here, the attorney-client relationship between Luke and Don ended when Don died and his estate settled Claire's claim against the estate. In California court, Luke would not be able to claim attorney-client privilege.

Moreover, the issue here is whether the attorney-client privilege covers communications between Wendy and Luke in the first place. As noted, in order for the privilege to apply, the communication must be confidential and it must be made for the purposes of facilitating a legal relationship. Additionally it must be communicated by either the client or the client's agents. Here, it does not appear that the communication was confidential or that Wendy was Don's agent. Wendy told Luke that Don had admitted to her that he

had defrauded Claire. By sharing this information with a third party, Don arguably made it unprotected because it was no longer confidential. Consequently, the attorney-client privilege would not apply on that basis.

Second, it does not appear that Wendy was Don's agent. The attorney-client privilege will potentially protect communications made by a client to the lawyer's agent, such as a physician hired to examine the client, or by the client's agent, such as an employee speaking on behalf of the corporation. But it does not cover statements made by everyone who knows the client or is in a familial relationship with him or her. Here, Wendy does not appear to have been acting in any way as an agent of Don, nor is she an agent of Luke. Consequently, the attorney-client privilege between Luke and Don would not apply.

Attorney-Client Privilege: Wendy and Luke

Additionally, Wendy was not speaking with Luke for the purpose of facilitating his legal representation of her--she was not a client. Moreover, as noted above, it does not appear the communication was confidential. Consequently, there does not appear to be an argument for an independent attorney-client privilege between Wendy and Luke.

Given that Wendy's statement does not appear to have been protected by the attorney-client privilege based on Luke's representation of Don or any purported attorney-client relationship between Luke and Wendy, the court should likely compel Luke to testify about what Wendy told him.

2. Luke's Memorandum

Attorney-Client Privilege

As noted above, the attorney-client privilege does not seem applicable here, either based on Luke's representation of Don or any purported attorney-client relationship

between Luke and Wendy. Consequently, the attorney-client privilege is not a basis for the court to refuse to compel production of the memorandum.

Work Product

In California, the work product privilege applies solely to materials prepared by the attorney in anticipation of litigation. This is unlike the federal rules, where the work product doctrine applies generally to materials prepared in anticipation of litigation. Materials prepared in anticipation of litigation that are comprised of the attorney's mental impressions, notes, or opinions, are absolutely protected and are not discoverable. Other materials prepared in anticipation of litigation received are qualified work product. These materials may be discoverable upon a showing of substantial need and inability to acquire the materials elsewhere.

a. Wendy's Statements

To the extent the memorandum recounts what Wendy told Luke, it is qualified work product. This portion of the memorandum would not constitute Luke's mental impressions or opinions regarding the interview. It is merely a factual recounting of the interview. Consequently, this portion of the memorandum would likely receive qualified protection. If Claire can show substantial needs and inability to acquire the information contained in the interview without compelled disclosure, then the court should compel Luke to produce his memorandum. However, this seems unlikely to apply here. The facts indicate Don died, but they do not state that Wendy died. Based on the facts, it appears that Claire could easily subpoena Wendy in order to ask her questions and try to establish the same information she is seeking from Luke. Without this showing of inability to get the information without compelled disclosure, it appears unlikely the court should compel Luke to turn over the memorandum.

b. Luke's Belief That Wendy Would be a Good Witness for Claire

To the extent the memorandum expresses Luke's belief that Wendy would be a good witness for Claire, it is absolutely privileged. This portion of the memorandum is made up of Luke's mental impressions and opinions. The court should absolutely not compel Luke to produce this portion of the memorandum. It is worth noting that the mere presence of an absolutely protected mental impression or opinion in a document does not make the entire document or the information contained therein absolutely privileged. If the court did determine there was substantial need and unavailability, and chose to compel Luke to produce the memorandum to the extent it recounts his interview with Wendy, then it could redact or eliminate the portions of the memorandum that are absolutely privileged.

3. What ethical violations, if any, has Luke committed?

Fee Agreement--Financial Duties

In California, fee agreements must be in writing unless the amount is less than \$1,000, the work is for a corporation, the client agrees to forego a written agreement, the work is routine, or there is an emergency. Here, Don entered into a valid retainer agreement. Thus, there is an assumption that this requirement is satisfied. But if the retainer agreement was not in writing, it would likely be a violation of California ethical rules because none of the exceptions appear applicable. The ABA does not have a similar requirement for non-contingent fee agreements--they do not have to be in writing, although it is encouraged. Consequently, there is no ABA violation regardless of whether the fee agreement is in writing.

Luke's Decision to Tell Wendy about the Fraud--Duty of Confidentiality

The duty of confidentiality requires a lawyer not to disclose information learned in the course of representation. It attaches even when no attorney-client relationship is

formed, unless there is a disclaimer in plain English, so long as the information is related to legal representation. It survives the representation and the client.

Here, Luke violated the duty of confidentiality by telling Wendy that Don had admitted to defrauding Claire. Luke learned of this information in the course of representing Don, thereby making the information confidential. Luke then failed to safeguard this information by actively revealing it to Wendy.

California and ABA authorities provide exceptions to the duty of confidentiality when a client makes a claim against a lawyer, when the information relates to the services provided by the attorney, when disclosure is required by the court, and when the lawyer learns information relating to imminent death or substantial bodily injury of a third-party. An attorney is also allowed to reveal information that is necessary to represent the client or that the client consents to him revealing. The ABA permits disclosure when a client is using the lawyer's services to perpetrate fraud or commit a crime that is likely to result in substantial financial loss. It also permits disclosure when seeking an ethical opinion on a matter. California does not have an exception for financial loss. Here, none of these exceptions seem applicable. It does not appear that Don consented to Luke telling Wendy that Don had defrauded Claire, nor does it appear that such an admission to Wendy was necessary for Luke's representation of Don. Luke may argue that there was implied consent because Wendy told him that Don had admitted the fraud to her, but it does not appear that Don ever instructed Luke to share this information prior to the interview. Under ABA authorities, Luke could argue that his disclosure was necessary to prevent financial loss, but this argument would not prevail because Don was not using Luke's services to defraud anyone and, since the fraud had already occurred, there was no imminent, substantial financial loss to any party. Moreover, this exception is inapplicable in California.

Consequently, Don likely breached his duty of confidentiality by telling Wendy about the fraud.

Luke Testifying at Trial--Duty of Fairness

Under ABA authorities, a witness may not represent a client if he is likely to have to testify at trial. A client generally may not testify at his client's trial unless his testimony relates to his services, a breach of his duties, or his testimony is necessary to prevent undue hardship. In California, an attorney may testify at a bench trial and may testify if his client consents at a jury trial. Here, Luke would not breach his duty by testifying in the suit against Home Inc. because it was not his client.

Duty of Competence

An attorney owes a duty of competence to his clients. He must have the necessary skill, thoroughness, and preparation required for competent representation. The duty requires the attorney to communicate with the client about important matters. Here, Don fired Luke shortly before trial. Although these facts do not themselves implicate the duty of competence, it suggests that Luke may not have been acting competently in his representation of Don, leading Don to fire him from the case. Moreover, the fact that Luke chose to reveal confidential information, apparently without consulting with Don, further suggests a violation of the duty of competence. California punishes intentional, repeated, or reckless violations of the duty of competence. Here, the facts do not suggest one way or another whether Luke intentionally, repeatedly, or recklessly violated his duty of competence. Thus, it is unclear whether he would be subject to any discipline even if he did act incompetently according to ABA authorities.

Duty of Loyalty

The duty of loyalty requires an attorney not to use non-public information against a client in a subsequent proceeding. According to ABA authorities, if there is a significant likelihood that an attorney will be materially limited in his representation of a client by professional or personal interest, the attorney can only take on the representation if: he reasonably believes he can provide representation unaffected by the conflict, he informs

the client, and he receives consent. The informed consent must be memorialized in writing. In California, there is no reasonable belief requirement, both potential and actual conflicts require disclosure, and consent must be in writing unless it is based on an attorney's past representations or personal conflicts. Here, Luke took on the representation of Don, independent of Home Inc. If Luke had tried to represent both Home and Don, then he would have had a significant risk of material limitation and a potential conflict, which would have required informed written consent under the ABA and consent in writing in CA. Given that he did not appear to have any conflicts here, he is likely not in violation. However, if he testifies at Home Inc.'s trial, he may violate his continuing duty of loyalty if he reveals any non-public information he learned in the course of representing Don.

Duties on Withdrawal

When an attorney is fired, he must return all unspent retainer money as well as the client's papers and documents necessary for representation. California authorities specifically prohibit holding on to client documents for the purpose of getting paid. Here, so long as Luke returned Don's papers and any unspent retainer money, he likely did not commit a breach of his duties upon withdrawal from representation.

QUESTION 2: SELECTED ANSWER B

1. LUKE'S TESTIMONY ABOUT WENDY'S STATEMENT

Protection by Attorney Client Privilege

At issue is whether Luke's interview of Wendy is protected by the attorney-client privilege.

In California, the attorney-client privilege attaches to a communication made in confidence between a client and his lawyer in the course of the representation. The client, the sole holder of the privilege, can bar the lawyer from testifying as to the content of the communication. However, the privilege does not survive the death of the client after the client's executor has finished distributing his estate. There are certain exceptions to the attorney-client privilege, including when the lawyer reasonably believes that disclosure would be necessary to avert serious bodily harm to others, and when the client is attempting to use the lawyer's services to perpetrate a crime or fraud.

Here, as part of his preparation for trial, Luke interviewed Don's sister, Wendy. Wendy told Luke that Don had admitted to her that he had defrauded Claire, but never anyone else. Nothing in the facts indicates that Wendy did not tell Luke this information in confidence. Her statement, however, was not a communication between a lawyer and client, but between a lawyer and a third party. It therefore falls outside the scope of the attorney-client privilege. Moreover, by the time Claire was attempting to compel Luke to testify at trial, Don had died. We also know that his executor had closed his estate, since the executor had settled Claire's claim against Don. Therefore, Don's ability to invoke the privilege died along with him, and there is no bar under the attorney client privilege to Luke's testimony. The court should compel Luke to testify.

2. LUKE'S MEMORANDUM

Attorney-Client Privilege with Regard to Wendy's Statement and Luke's Belief

At issue is whether Luke's description of Wendy's statement or Luke's belief about Wendy's suitability as a witness is protected by the attorney-client privilege.

As noted above, the attorney client privilege only attaches to confidential communications between lawyers and clients, and it does not survive the death of the client. Here, Luke wrote a memorandum after interviewing Wendy that contains two components: Wendy's statements, described above, that Don had admitted he had defrauded Claire; and Luke's belief that Wendy would make a good witness for Claire. Neither of these is a communication between Don, the client, and Luke, the lawyer. Moreover, because Don is deceased and his estate has been closed, no one survives to invoke the privilege. The attorney-client privilege does not provide a justification for Luke to refuse to produce the memorandum.

Work Product Doctrine with Regard to Wendy's Statement

At issue is whether Luke's memorandum, to the extent that it recounts Wendy's statement, is protected by the work product doctrine. California law privileges from discovery documents produced in anticipation of litigation. It also draws a distinction between a qualified privilege, which attaches to statements of fact recounted in work product, and an absolute privilege, which attaches to statements of belief or opinion by an attorney contained in work product. The qualified privilege may be overcome by a showing that there is a substantial need for the facts contained in the work product and that they are unavailable through other means, whereas the absolute privilege cannot be overcome. The work product doctrine survives the death of the client.

Here, Luke's memorandum contains Wendy's statement that Luke had defrauded Claire. Luke prepared this memorandum after Don retained him to defend him in the fraud action, causing him to interview Wendy. It was therefore made in anticipation of litigation, placing it within the scope of the work product doctrine. The description of what Wendy told Luke, however, is a factual one. It is therefore subject only to a qualified privilege, and Claire may be able to overcome it. Don's admission that he defrauded Luke would be damning evidence against Home Inc., the remaining defendant at trial. Claire can likely show that there is a substantial need for the testimony. However, it does not appear on these facts that Claire would not be able to

obtain this testimony by other means. She could simply subpoena Wendy, or she could have noticed Wendy's deposition during discovery, to obtain Don's admission from Wendy herself. If Wendy is for some reason unavailable, then Claire may be able to compel production.

Therefore, the qualified privilege that attaches to Wendy's statement likely protects the memorandum from discovery.

Work Product Doctrine with Regard to Luke's Belief

At issue is whether Luke's belief about Wendy's suitability as a witness is protected by the work product doctrine. As noted above, this belief is expressed in a memorandum that Luke prepared in anticipation of litigation; indeed, there would be no other reason to speculate as to whether Wendy would make a good witness. Luke's belief, however, is absolutely protected by the work product doctrine, since it expresses a lawyer's beliefs and opinions about the proper strategy for trial. Therefore, regardless of what showing Claire makes at trial, it is protected, and the court should not compel production.

Overall Conclusion

Neither Wendy's statement nor Luke's belief is protected by the attorney-client privilege, but both are likely protected by the work product doctrine. The court should deny the motion to compel.

3. LUKE'S ETHICAL VIOLATIONS

Duty of Confidentiality

At issue is whether Luke breached his duty of confidentiality to Don.

Under the ABA and California rules, a lawyer owes his client a duty of confidentiality. This duty prohibits a lawyer from revealing to any third party information learned from or about the client in the course of the representation, unless an exception applies. It attaches as soon as a lawyer-client relationship begins. Here, Luke and Don entered into a lawyer client relationship when they executed a valid retainer agreement. Luke

then interviewed Don and learned that Don had defrauded Claire—a fact learned about Don during the course of the representation. Luke then, in his conversation with Wendy, revealed this fact to Wendy. This was thus a disclosure of a client's confidential information, so unless an exception applies, Luke is subject to discipline under both the ABA and California rules.

Exceptions to the Duty of Confidentiality

i. Implied consent

A client may impliedly consent to a lawyer's use of his confidential information, when such disclosure would be a natural and necessary feature of the representation. Here, Luke could argue that Don impliedly consented for him to reveal this information to Wendy, since Wendy was Don's sister and Luke might need the information to build a rapport with her. However, especially since Luke only revealed the information after Wendy had told him what Don had told her, this exception does not apply.

ii. Averting physical harm

A lawyer may reveal a client's confidential information under the ABA and California rules if he reasonably believes that disclosure is necessary to avoid imminent bodily harm to a third person. In California, the harm must arise out of a criminal act, and the lawyer must first attempt to dissuade the client and inform him of the lawyer's intent to reveal. Here, Don admitted to past fraud, which seems to pose no risk of bodily harm—criminal or otherwise—to anyone. Therefore, this exception does not apply.

iii. Serious financial harm using the lawyer's services

The ABA, but not California authorities, allow disclosure if the lawyer believes it to be reasonably necessary to avoid serious financial harm to a third party, and the harm would be perpetrated using the lawyer's services. Here, Don admitted to fraud in the past, but said he had not defrauded anyone else since. Nor does he appear to have sought Luke's help in perpetrating any such fraud. Therefore, this exception does not apply.

iv. Fact has become generally known

Under both ABA and California rules, a lawyer may reveal a client's confidential information if that information is no longer confidential because it has become generally known. Here, Luke can argue that because Wendy already knew that Don had admitted to defrauding Claire, there was no breach of confidence by revealing what Don had told Luke. However, although this fact might have been known to Wendy, it was not *generally* known in the world. Therefore, this exception does not apply.

Conclusion

Luke is subject to discipline because he breached his duty of confidentiality and no exception applies.

Safeguarding the Client's Property

At issue is whether Luke violated any ethical rules by not returning the memorandum to Don when Don fired him.

A lawyer owes his client a duty to safeguard the client's property under both ABA and California law. This includes a duty to return to the client all materials related to the representation upon the end of representation. A lawyer may not retain a client's case file, including for the purposes of recovering his fee. Here, Don fired Luke before trial, but Luke appears to have kept possession of the memorandum recounting his meeting with Wendy until the time of trial. Therefore, by failing to return the memorandum to Don or his estate, Luke breached his duty to safeguard client property.

QUESTION 3

Rick Retailer owns all pieces but the queen of a chess set carved by Anituck, a famous artist who carved 15 chess sets. No one today owns a complete Anituck chess set.

Six existing Anituck queens are owned by collectors. The last one was sold in 1983 for \$175,000. The current owners have refused to sell their queens to anyone.

If Rick could exhibit a complete Anituck chess set, he would draw people worldwide who would buy memorabilia with pictures of the full chess set and other products. It is impossible to know exactly how much Rick would make, but a complete Anituck chess set could be worth in excess of \$1 million.

Last week, Sam Seller brought to Rick an Anituck queen he found in his attic and asked if it was worth anything. Rick asked what Sam wanted for the queen. Sam asked whether \$450 would be fair. Rick replied that \$450 would be fair and offered to write a check immediately. Rick and Sam entered into a valid contract. Sam agreed to hand over the queen the next day.

The next day, Sam called Rick and said, "I learned that you defraud people out of expensive antiques all the time and that the queen is worth thousands of dollars. I am going to sell the queen to another collector."

Rick has sued Sam for specific performance for breach of contract, and has sought a temporary restraining order and a preliminary injunction.

What is the likelihood that Rick will obtain:

1. A temporary restraining order? Discuss.
2. A preliminary injunction? Discuss.
3. Specific performance? Discuss.

QUESTION 3: SELECTED ANSWER A

(1) TEMPORARY RESTRAINING ORDER

The issue is whether or not Rick will likely be successful in obtaining a temporary restraining order.

TEMPORARY RESTRAINING ORDER

A temporary restraining order (TRO) is an order granted in equity that preserves the status quo until a preliminary hearing on the matter can be heard. They are generally granted in emergency situations. For a TRO to be granted, the party seeking the TRO must show: (1) **irreparable harm** will occur in the absence of awarding the TRO; (2) **balance of hardships** favors granting the TRO; and (3) the party seeking the TRO is **likely to prevail on the merits**. While a TRO may be granted *ex parte* (without opposing counsel's presence), courts will generally require a strong showing of a good-faith effort to notify the opposing party or a strong showing of why notice could not be effectuated. TRO's are awarded for a short duration, typically 10-14 days, depending on the jurisdiction. Some courts also require a showing that damages are inadequate.

Here, Rick is seeking a temporary restraining order in order to prevent Sam from selling the Anituck queen to another collector. We do not know when Sam will find a collector or when the sale will be executed. Rick will likely be excused from providing **notice** of the TRO to Sam because Sam, agitated, may decide to expedite the sale to another collector. If the jurisdiction requires a showing that **damages are inadequate**, Rick will be successful because the chess piece is unique (there are only 15 chess sets made, 6 possessed by collectors who are refusing to sell). Moreover, as discussed further below, Rick's damages are speculative with respect to how much he would make if he had the complete chess set. Thus, the notice and inadequate damage elements are satisfied)

In all jurisdictions, in order to be successful, Rick must satisfy the elements:

(1) **Irreparable Harm:** irreparable harm may occur because it is possible that Sam will sell the queen to another collector before the preliminary hearings. If Sam sells the queen to another collector, Rick will suffer irreparable harm because there are only 15 pieces made in the entire world, 6 owned by collectors and all other current owners have refused to sell their queens. Thus, this factor leans in favor of a finding that Rick will suffer irreparable harm.

(2) **Balance of Hardships:** The balance of hardships must favor granting a TRO, which means that the party seeking the TRO will be substantially harmed if the TRO is not granted during the period before a hearing can be had. Rick will argue that the balance of hardships favors approving the TRO. If Sam does not go through with the sale, Rick will be prevented from obtaining another queen piece. Because Sam does not currently have an expiring offer from another collector, the court will likely find that the balance of hardships favors granting Rick a TRO until a full hearing on the merits can be had.

(3) **Likely to Prevail on the Merits:** While it is true that Rick will likely not be successful in being awarded specific performance (see below), the court does not analyze the parties defenses when granting a TRO. On its face, there appears to be a valid contract and Sam is repudiating on the contract: Rick offered to buy and Sam agreed to sell the chess piece for \$450. Thus, it appears that Rick will likely prevail on his action for specific performance. At the later hearing, the court will consider defenses and other equitable remedies. Thus, the court will likely find that Rick will prevail on the merits.

CONCLUSION

Because the court does not consider defenses in granting a TRO, the court will likely grant Rick a TRO to restrain Sam from selling the piece until a hearing could be had on

the matter. If Sam fails to comply with the courts order, he will be held in contempt.

(2) PRELIMINARY INJUNCTION

The issue is whether or not Rick will likely be successful in obtaining a preliminary injunction.

PRELIMINARY INJUNCTION

Similar to a TRO, a preliminary injunction is an injunction issued to preserve the status quo until a full hearing on the merits can be had granted by equity courts. In addition to the elements of the TRO (irreparable injury, balance of hardships, likelihood to prevail on the merits, and in some jurisdictions, inadequate legal remedies), in order for a preliminary injunction to be granted, the opposing party must have notice and an opportunity to be heard at the hearing and no defenses may apply. Additionally, the court may require the plaintiff (here, Rick) to post a bond in case Rick is ultimately not successful in his claim for specific performance.

(1) **Irreparable Harm.** See above.

(2) **Balance of Hardships.** See above.

(3) **Likelihood of Prevailing on the Merits.** See above.

(4) **Inadequate legal remedy.** See above.

(5) **Notice.** Rick must give notice to Sam and give Sam an opportunity to be heard at the hearing for the preliminary injunction. At that point, Sam will be able to raise all of his defenses (see below). If Rick fails to give Sam notice, then the court will deny Rick's preliminary injunction.

(6) **Bond.** The court may require Rick to post a bond to cover any losses to Sam in the event Rick ultimately loses the claim for specific performance. Courts are more relaxed on this requirement if the plaintiff is indigent. There are no facts with respect to Rick's current earnings, thus it is not possible to ascertain whether the court will excuse Rick from the bond requirement.

(7) **No Defenses.** In order for the court to grant a preliminary injunction, there must not be any viable defenses raised by the defendant. Here, Sam will likely be successful in defending against the grant of the permanent injunction by claiming **unclean hands**.

Unclean Hands: Unclean hands is an equitable defense. Under this defense, a plaintiff who acted unfairly with respect to the current action will be barred from recovery because they too have "unclean hands." Here, Sam will likely successfully argue that Rick materially misrepresented the value of the chess piece. The last chess piece to be sold was for \$175,000 and Rick knew this. Thus, it would be inequitable for him to buy the piece for \$450, knowing the true value of the piece, and representing to Sam that \$450 is a fair price. Rick will argue that he did not know the true value of the goods. However, this argument will likely fail because Rick understood and appreciated the value of the full set (\$1,000,000) and how much money he could make selling memorabilia pictures of the full chess set and other products. Because injunctions are granted in equity, it will be unfair to allow Rick to recover when he was not acting fairly. Thus, the court will likely find the defense of unclean hands applies.

Laches: Laches is another equitable remedy in which case the plaintiff's unreasonable delay in bringing a claim caused substantial prejudice to the defendant. Here, Rick is seeking the preliminary injunction immediately after learning that Sam is repudiating on the contract and thus the laches defense does not apply.

Misrepresentation. See below in damages section.

CONCLUSION

The court will likely not grant the preliminary injunction because Sam will likely successfully raise an unclean hands defense.

(3) SPECIFIC PERFORMANCE

In order for Rick to be entitled to specific performance, there must be a breach of contract.

GOVERNING LAW

The UCC governs contracts for the sales of goods, which are tangible, moveable things. Common law governs all other contracts, including service and real estate contracts. Here, because the queen set is a good (tangible, moveable thing), the **governing law** is the UCC.

ANTICIPATORY REPUDIATION

Under the UCC, if a party unequivocally expresses their intent to not perform their obligation under the contract, the party has anticipatorily repudiated, which entitles the other party to stop performance and sue immediately. Here, under the terms of their contract (which was valid, see below), Sam was obligated to sell Rick the chess piece for \$450. Sam called Rick and told him that he was going to sell the queen to another collector. Because Sam only had one queen piece, this expression evidences Sam's refusal to perform.

Accordingly, Rick is entitled to stop performance and sue Sam for damages or for specific performance.

SPECIFIC PERFORMANCE

The issue is whether or not Rick will likely be successful in obtaining specific performance.

In contracts, specific performance is a remedy in which the court orders the defendant to perform his obligations under the contract. This is usually available only for unique goods and for real estate transactions. In order for the court to grant specific performance, the following elements must be met: (1) valid contract with clear and definite terms; (2) inadequate legal remedy; (3) feasibility of enforcement; (4) mutuality of performance; and (5) no defenses.

VALID CONTRACT

In order for the court to order specific performance, there must be a valid contract with definite and certain terms. To be valid, a contract must have assent (offer and acceptance) and be supported by consideration. Here, because the queen set is a good (tangible, moveable thing), the **governing law** is the UCC. Under UCC principles, there was a valid contract formed, at least on its face: there was an offer (offer to buy the chess piece by Rick); there was acceptance (Sam agreed to sell the chess piece), and there was consideration (\$450 in exchange for the good).

Additionally, because the contract price was for \$450, evidence of the oral agreement did not need to be in writing because the Statute of Frauds does not apply.

Moreover, the facts state that the contract was valid. Thus, this element is satisfied.

However, as discussed below, Sam will likely be successful in raising defenses to the contract formation, including misrepresentation and unilateral mistake.

INADEQUATE LEGAL REMEDY

Money damages must be inadequate in order for a court to grant specific performance. Here, Rick will likely be successful in satisfying this element because the queen set is unique -- there are only 15 sets made and the current owners are refusing to sell their queens to anyone. Moreover, money damages are speculative. Rick does not know how much he would make if he has the full chess set -- he believes that people all over the world would come to him to take memorabilia pictures and purchase other products. He also speculates that the value of the entire chess set would be about \$1,000,000. However, these calculations are entirely speculative. Because the goods are unique, the UCC will allow specific performance.

FEASIBILITY

This element refers to whether or not a court can enforce the specific performance. This is usually not a problem in situations where the court is ordering the defendant not to do something (negative) because of the court's power of contempt. Ordering behavior may be more difficult if the defendant is in another jurisdiction and there are oversight issues. Here, that doesn't seem to be the case. The court can order Sam to perform his contract obligations (sell the queen to Rick for \$450), and if he fails to do so, the court can hold him in contempt.

MUTUALITY OF PERFORMANCE

Mutuality of performance requires each party to the contract to be willing and able to perform their obligations. Here, this element will be satisfied because Rick has the \$450 to pay for the chess piece, and Sam still has the chess piece in his possession.

DEFENSES

Both equitable and legal defenses are available because specific performance is an

equitable remedy, but because it requires the existence of a valid contract, contract defenses also apply.

Misrepresentation. Misrepresentation is a defense in which case the party seeks to either rescind the contract or argue that the contract never existed because there was no meeting of the minds. Misrepresentation applies where a party (1) makes a misrepresentation; (2) about a material fact; (3) with the intent to induce reliance; and (4) the other party actually and justifiably relied. Here, Sam will likely be successful in invalidating the contract on this ground. Rick misrepresented the true and fair value of the chess piece, telling Sam that the offering price was fair. However, chess pieces are worth thousands of dollars. The material fact element is satisfied because the price is a fact of the basis of the bargain--the selling price. Rick intended to induce Sam's reliance into believing it was worth only \$450 so that Sam would sell it to him for that price. Sam did enter into a contract on that basic assumption, and thus the elements are satisfied. Thus, Sam will likely be successful in defending this contract.

Unilateral Mistake. Unilateral mistake is generally not a defense to a contract. A mistake exists where the party is mistaken about a material fact that is a basic assumption of the contract. If the non-mistaken party knew or should have known that the other party was mistaken, the court will allow the contract to be rescinded. If the other party knew the other was mistaken, then the court will allow the contract be reformed to reflect the intention of the mistaken party. Here, Rick will argue that the court should not prejudice Rick just because Sam failed to do his research and learn the true value of the chess piece. This argument will likely fail because, as previously indicated, Rick knew, or at least should have known, of the true value of the chess piece and that Sam was mistaken. Here, Sam asked Rick if the asking price (\$450) was fair... demonstrating his reliance on Rick's response. Thus he was mistaken.

Unclean Hands. See above.

Laches. Will not apply (see above).

CONCLUSION

The court will likely not grant Rick specific performance.

QUESTION 3: SELECTED ANSWER B

1. Temporary Restraining Order ("TRO")

A TRO is a temporary injunction ordered by the court to maintain the status quo until a hearing for a preliminary injunction, and then ultimately a hearing and trial on the merits, can be heard. A TRO lasts no longer than necessary to have the hearing on the preliminary injunction and should not last longer than 14 days. In order to get a TRO, a plaintiff must show they will suffer irreparable harm in the amount of time it takes to wait for a preliminary injunction hearing and that they are likely to succeed on the merits of their case. Typically, the plaintiff must give defendant notice of the TRO and there should be a hearing, unless the plaintiff can show that he tried to notify defendant and failed, or notifying defendant may lead to the irreparable harm. In such case, a TRO hearing may be done ex parte. Here, there are no clear facts showing Rick attempting to notify Sam about a TRO hearing, but he may argue it would be counterproductive because Sam may sell the queen after being served notice of a hearing.

Irreparable Harm

Here, Rick is likely to suffer irreparable harm unless the court grants the TRO preventing Sam from selling the Queen. A TRO is necessary because Sam could likely sell the valuable queen in the amount of time it would take to wait for a preliminary hearing, and if he did so, Rick would be unable to retrieve the queen and unable to replace it because of how rare the Anituck queen piece is. The harm would be irreparable since there are only six existing Anituck queens and the last one was sold 20 plus years ago. Therefore, Rick can likely establish irreparable harm requirement for a TRO.

Likely to Succeed on the Merits

Rick must show/demonstrate a probability that he will be successful on the merits. Here, there was a contract to sell the queen piece between the parties, and the facts state there was a valid contract. Although Sam has many defenses, he can ultimately raise on the merits as to the validity of that contract, the showing of an agreement to enter the contract is likely sufficient to establish the likelihood of success for a TRO.

Balancing of Hardships and Placing of Bond

The court will also balance the hardships in determining whether to grant a TRO. The court will balance the hardship to the plaintiff (extent of the irreparable harm) without the TRO and the hardship to the defendant should the TRO be ordered. Here, the hardships clearly weigh in favor of Rick. Should the court deny the TRO, Sam may sell the queen. The last time a queen was for sale was 1983 and there may not be another opportunity to buy one for years. Moreover, the potential losses if this occurs are monumental, as the completion of the set with the queen could be worth millions to Rick. Meanwhile, the delay in selling the piece in the event that Rick loses on the merits is of very little effect on Sam. He will still possess the queen piece and be able to sell at just a high price. Therefore, the court should grant the TRO preventing Sam from selling the queen piece.

The court should, however, require Rick to post a bond to insure against any injuries that Sam may suffer in the amount of time it takes to have a preliminary hearing should Sam be wrong and lose on the merits.

2. Preliminary Injunction

The process and requirements for a preliminary injunction are almost identical to the requirements for a TRO. The preliminary injunction preserves the status quo for the time it takes to hear the case on its merits in trial. A preliminary hearing may never be

done ex parte, and so defendant must be given notice of the hearing. Like a TRO a plaintiff must show irreparable harm and likelihood of success on the merits. Here, for the reasons stated above, the court should grant Rick's request for a preliminary injunction preventing Sam from selling the rare Anituck queen until after a trial on the merits. Again, the court may require Rick to post a bond to cover any potential injuries Sam may suffer from a result of having to wait to sell until after the trial should Rick lose.

3. Specific Performance

Governing Law

The UCC governs all contracts for the sale of goods. Here, the contract is for the sale of a queen piece of a chess set, which is a movable, tangible thing, and therefore goods. Therefore, the UCC governs.

Specific Performance

Specific performance is an equitable remedy in which the court compels a party to a contract to perform his duties under the contract as he promised. A court will grant specific performance when (i) there is a valid, enforceable contract with certain and definite terms (ii) the plaintiff has already performed or is ready, willing and able to perform his duties under the contract, (iii) legal remedies are inadequate, (iv) enforcement of the contract by the court is feasible (v) and the defendant has no defenses to the contract.

(i) Valid, Enforceable Contract with Certain and Definite Terms

A court will not enforce a contract unless there is a valid contract and certain and definite terms so the court knows what to enforce. Here, the facts state Rick and Sam entered a valid contract. Moreover, the terms are certain and definite, the sale of the

queen in exchange for \$450. Although it is not clear if there was a writing, the statute of frauds does not apply here because the contract is for the sale of goods for less than \$500 since the price was set at \$450.

(ii) Plaintiff is Ready to Perform

To receive specific performance, the plaintiff seeking performance must have been ready to perform himself. Here, Rick offered to write Sam a check immediately, thus indicating he was willing to perform his side of the contract.

(iii) Inadequate Legal Remedies

In order to receive specific performance, the plaintiff must show that legal remedies, typically damages, are inadequate. In the case of contracts for property, legal remedies may be inadequate if the property is rare or unique. Here, the chess piece is nearly a one of a kind. There are only six in the world and rarely do they become available for sale. Therefore, damages are inadequate because Rick could not use money to cover by going out and buying the queen somewhere else. Therefore, legal remedies are inadequate.

(iv) Enforcement is Feasible

A court will only grant specific performance if enforcement of the contract is feasible. The court enforces orders of specific performance through its contempt power, so the court must have jurisdiction over either the property or the person. Here, so long as Sam and Rick are before the court, there should be no issues of feasibility of enforcement. If Rick wins, the court will simply order Sam to perform under the contract and sell the queen piece to Rick or else be held in contempt of court, subjecting himself to civil and potentially criminal penalties. Therefore, the specific performance is feasibly enforced by the court.

(v) Defenses

The court will not grant specific performance if the defendant has a viable defense. Since specific performance is an equitable remedy, equitable defenses are available to the defendant. Here, Sam has multiple defenses he may raise against Sam to prevent specific performance.

Misrepresentation

A misrepresentation occurs when one party makes a false statement intended or reasonably known to induce action by the other party and the other party justifiably relies on that statement to his detriment. Here, Sam asked Rick if \$450 was a fair price. Sam replied to Rick that \$450 would be a fair price, even though he knew this was false. He also knew that Sam was likely to rely on this false statement because he had asked Rick if it was a fair price and clearly did not know for himself. Also, Rick clearly intended his response that it was fair to induce Sam to sell at that price. Sam may not have been justified in depending on Rick without seeking his own valuation, especially considering what Sam later learned about Rick's practice of swindling people. However, the court would likely find that Sam did in fact rely on the false statement by Rick, and that this misrepresentation would prevent a granting of specific performance.

Unilateral Mistake

A contract may be voidable by a mistaken party if the mistake was concerning a material fact of the bargain, the mistake had material effect on the bargained for exchange, the unmistaken party knew or should have known of the mistaken party's mistake, and the mistaken party did not assume the risk of the mistake. Here, Sam was mistaken as to the value of the queen piece. He asked for \$450 when the queen was in reality worth thousands of dollars. This is a material fact and has a material effect on the bargained for exchange since it impacts how much Sam would have asked for the

queen and agreed to sell it for had he known its true value. Moreover, Rick had reason to know of Sam's mistake because he knew the piece was worth thousands of dollars as a collector of chess pieces and someone looking for the queen. When Sam suggested \$450, Rick would have known he was mistaken as to its value. Finally, the risk is likely not one Sam assumed. Typically both parties assume the risk of a bad deal and over or under valuing the property. However, here Sam specifically asked Rick if \$450 was a fair price and Sam had reason to know that Sam was relying on Rick's evaluation. As such he was not assuming the risk of being wrong. Therefore, the court may void the contract due to Sam's unilateral mistake.

Unclean Hands

Unclean hands is an equitable defense that prevents the court from granting equitable remedies when the one seeking performance has exercised some misconduct in the transaction at issue in the case. Here, Sam lied to Rick about the fairness of the price. As such he likely did not come to court with clean hands and will not be granted remedy in a court of equity.

UCC Good Faith and Fair Dealing

The UCC implies a duty of good faith and fair dealing in all contracts for sale of goods. Here, Rick breached this duty by lying to Rick. Therefore, it would not be enforced under the UCC.

QUESTION 4

Buyer, who was living in New York, and Seller, who was living in California, entered into a valid contract, agreeing to buy and sell a painting claimed to be an original Rothko, supposedly worth \$1 million, for that amount. In a separate valid contract, Buyer agreed to buy from Seller a parcel of California real property worth \$5 million, for that amount. Buyer and Seller completed the purchase of the painting on June 1; they were to complete the purchase of the real property on June 30.

On June 15, Buyer resold the painting, but obtained only \$200, because the painting turned out to be a fake. Buyer promptly notified Seller of his intent to sue Seller for damages of \$1 million. Seller then informed Buyer that Seller would not go through with the purchase of the real property.

Buyer filed suit against Seller in federal court in California. Buyer claimed fraud as to the painting, alleging only that Seller committed "fraud in the supposed value," and sought \$1 million in damages. Buyer also claimed breach of contract as to the real property, and sought specific performance. Buyer demanded trial by jury on all issues.

1. May Buyer join claims for fraud and breach of contract in the same suit against Seller? Discuss.
2. Is Buyer's allegation sufficient to state a claim for fraud involving the painting? Discuss.
3. Does the federal court have subject matter jurisdiction over the suit? Discuss.
4. May the federal court apply California law to decide the breach of contract claim involving the real property? Discuss.
5. On what issues, if any, would Buyer be entitled to a jury trial? Discuss.

QUESTION 4: SELECTED ANSWER A

1. JOINDER OF CLAIMS

Joinder of Claims

Generally, a plaintiff may bring any number of claims against the same defendant, even if they are unrelated or do not have a common nucleus of operative fact, in the same action. If the claims are brought in federal court, at least one of the claims must satisfy the requirements of subject matter jurisdiction.

Here, both the fraud claim with respect to the Rothko painting and the breach-of-contract claim with respect to the real property are being brought by the same plaintiff, Buyer (B), against the same defendant, Seller (S). Therefore, the two claims may be joined, and they may be brought in federal court if one of them satisfies subject matter jurisdiction. (The issue of subject matter is discussed below, in Part 3.)

Abstention

If a state law claim is joined to another claim, the federal court asked to hear those claims may abstain from hearing the state law claim, sever it, and remand it to a state court if the interest of the state in resolving the questions of law that are at issue are particularly high. There is a high threshold for abstention, such as in *Pullman* abstention, where a federal court will decline to address a constitutional question whose adjudication depends on the resolution of an unresolved issue of state law.

Here, the two claims, both based on state law, are for fraud and breach of contract. These are fairly common and ordinary common law (or possibly statutory) causes of action. Neither New York nor California would have a particularly strong interest in

divesting the federal court of the case, since the law is mostly, if not entirely in this case, resolved. Therefore, joinder will survive any abstention challenge, and neither claim will be subject to severance and remand.

Conclusion

The claims may be joined in the same suit.

2. SUFFICIENCY OF PLEADING

Well-Pleaded Complaint

To survive a Rule 12(b)(6) motion to dismiss for failure to state a claim on which relief can be granted, the pleading in a complaint must allege enough facts to give the defendant notice of the cause of action and the facts on which the claim is based. Under *Twombly* and *Iqbal*, a federal court must apply a two-part test to determine whether a complaint is sufficiently well-pleaded. First, the court strikes all conclusory legal allegations. Second, taking all remaining factual allegations as true, the court determines whether the facts as alleged would make it plausible for the plaintiff to succeed in obtaining the relief that is sought.

Here, B's complaint with respect to the Rothko painting alleged only that S committed "fraud in the supposed value." This pleading most likely fails the *Twombly-Iqbal* test. With respect to the first step, the pleading is essentially entirely a conclusory legal allegation. The complaint states only that fraud relating to the value of the painting occurred. Strictly construing *Twombly-Iqbal*, the entire allegation must be stricken when applying the first step of the test. The second step may be applicable if the test were loosely construed, and the court took the phrase "supposed value" to mean that fraud can be proved based on the fact that the painting's value as stated by S was false. But falsity alone does not give rise to an action for fraud. Fraud requires intentional, knowing, or reckless conduct with respect to a falsity. Thus, the pleading must allege,

in addition to the existence of a falsity, some indication of fault on S's part. Because it fails to do so, it is not well-pleaded.

Fraud Pleadings

For claims of fraud, the Federal Rules require fact-pleading, rather than the notice-pleading permitted by *Conley*, and, to a lesser extent, *Twombly* and *Iqbal*. The plaintiff must allege specific facts that made the defendant's conduct fraudulent.

B's cause of action with respect to the painting is one of fraud, meaning that the fact-pleading standard applies. As discussed above, B did not allege specific facts that demonstrate fraud. To meet the required level of specificity, B should have at least alleged that 1) S represented to B that the painting was a genuine Rothko, 2) that the painting was not a genuine Rothko, 3) that S had requisite mental state required for fraud, and 4) that the painting was not worth the value that S placed on it, and which B paid. Because the pleading did not allege any of these things, even if B can successfully defend his complaint from a notice/plausibility-pleading challenge, the complaint will not survive a fact-pleading challenge.

Conclusion

B's allegation is not sufficient to state a claim for fraud.

3. SUBJECT MATTER JURISDICTION

Federal Question Jurisdiction

Federal courts are courts of limited subject matter jurisdiction. Subject matter jurisdiction can be conferred on a federal court either through federal question jurisdiction or diversity jurisdiction. Federal question jurisdiction exists where the cause of action, as stated in the complaint, arise under a federal law or federal issue.

Here, B's claims are for fraud and breach of contract. Neither of these are federal claims, so the court does not have federal question jurisdiction.

Diversity Jurisdiction

Generally, diversity can confer subject matter jurisdiction on a federal court if 1) all plaintiffs are completely diverse from all defendants and 2) the amount-in-controversy exceeds \$75,000.

Complete Diversity

Complete diversity is measured at the time a lawsuit is filed, and exists if no plaintiff is a citizen of a state of which any defendant is a citizen. For individuals, the state of citizenship for diversity purposes is the state of domicile, i.e. the state wherein the individual resides and has expressed or demonstrated an intent to reside permanently.

Here, B lives in New York. Although he sought to purchase real property in California, it is unclear whether he intends to leave New York. At any rate, as of the time the suit was filed, B was domiciled in New York because he was residing there at the time and expressed no intent to leave. Meanwhile, S is domiciled in California because he lives there and no facts suggest that he is domiciled in any other state. Thus, B is a citizen of New York, and S is a citizen of California. Complete diversity exists between all plaintiffs (B) and all defendants (S).

Amount-in-Controversy

The amount-in-controversy must exceed \$75,000 in order for diversity jurisdiction to exist. This requirement is satisfied based on a good-faith pleading that the plaintiff is entitled to at least \$75,000 in damages. In addition, where the relief sought is an injunction or specific performance, the amount-in-controversy may be satisfied if the

court finds that the economic value of the requested relief exceeds \$75,000.

Here, both of B's claims against S satisfy the amount-in-controversy. The claim of fraud alleges damages of \$1,000,000. The allegation is in good faith because the painting that B bought was supposedly worth \$1,000,000, and B paid that much for it, to his loss of \$999,800. Meanwhile, although specific performances rather than a specific monetary amount is sought as a remedy in the breach-of-contract case, the property to be awarded to B if the claim is successful is worth \$5,000,000. Because both causes of action request relief that is worth well over \$75,000, the requirement is satisfied.

Aggregation of Claims

A plaintiff may aggregate multiple claims against the same defendant in order to satisfy the amount-in-controversy requirement.

Had either or both of his claims been worth less than \$75,000, B could have aggregated them in order to plead a total amount-in-controversy in excess of \$75,000. Of course, since both claims independently satisfy the requirement, this rule does not control.

Supplemental Jurisdiction

A court may exercise supplemental jurisdiction over a claim if it arises out of the same transaction or occurrence as a claim, between the same plaintiff and defendant, over which the court already has subject matter jurisdiction.

If one or the other of the two claims B is bringing against S failed to meet the requirements of diversity jurisdiction, B could still argue that the two claims arose out of the same transaction or occurrence. Although S would respond that the contracts for the painting and the real property were completely separate and occurred nearly a month apart, B might counter that the breach of the contract for the sale of real property was causally connected to B's discovery of the allegedly fraudulent sale of the painting.

Indeed, S only informed B that S would not go through with the sale of the property after B notified S of his intent to sue S for \$1,000,000. Both arguments are persuasive, so it is not clear what the result would be if the court were forced to decide the issue of supplemental jurisdiction. However, as analyzed above, the court need not decide this issue because each claim separately falls within the court's diversity jurisdiction.

Conclusion

The court has subject matter jurisdiction.

4. CHOICE-OF-LAW

Erie Doctrine

Generally, in diversity cases, the federal court applies state substantive law, based on the law of the state in which the court sits, and federal procedural law. First, the court must ask whether there is a conflict between state and federal law. If so, then the court must ask whether there is a federal statute or Federal Rule that addresses the issue. If such a federal statute exists, the court must apply it. If a Federal Rule addresses the issue, the court must ask whether the Rule expands, abridges, or modifies a substantive right. If so, then the court may only apply the Rule if its effect on the right is incidental. If there is no federal statute or Rule on point, the court must ask whether the failure to apply state law would change the outcome in the case. If so, then the court must apply the state law. Finally, if the inquiry reaches past this point, the court must consider the relative interests of the state and federal judiciaries in adjudicating the issue, as well as the need to dis-incentivize forum shopping.

That said, here the *Erie* analysis is simple. There is no conflict between state and federal law with respect to the breach-of-contract claim, because there is no federal law of contract. Moreover, the law of contract is inherently substantive. Therefore, because the court sits in California, *Erie* dictates that it should apply California substantive law to

resolve the claim.

Law of the Situs

The default choice-of-law for determining disputes over real property is to apply the choice-of-law (or the substantive law, if the choice-of-law is silent) of the state in which the property is located.

Based on this default rule, the federal court should apply California law to decide the breach-of-contract claim because the real property at issue is located in California.

Conclusion

The federal court may, and probably should, apply California law to decide the breach-of-contract claim.

5. JURY TRIAL

Right to Jury Trial

In federal cases, a plaintiff is entitled to a jury trial, per the Seventh Amendment of the Constitution, in any action at law. However, there is no entitlement to a jury trial in an equity action. Whether a case is one of law or equity is a purely federal question, and must be decided by the court according to federal law.

Here, the action for fraud is an action at law. The remedy sought is monetary damages amounting to \$1,000,000. Therefore, B is entitled to a jury trial on that claim. Meanwhile, the action for breach-of-contract is an action in equity, because the remedy sought is the equitable remedy of specific performance. If B amended the complaint such that, in the alternative to seeking specific performance, it requested money damages, then the action would be at least in part at law and therefore subject to his

right to a jury trial.

Conclusion

As pleaded, B is entitled to a jury trial on the fraud claim but is not entitled to one on the breach-of-contract claim.

QUESTION 4: SELECTED ANSWER B

Joinder of Buyer's Claims Against Seller

Joinder of claims in federal court is governed by the Federal Rules of Civil Procedure, regardless of whether or not the original claim was filed under diversity. This is because the FRCP are affirmative federal law under the Supreme Court's decision in *Hanna*, and they act to pre-empt any contravening state law, even if that state law is purely procedural and otherwise would govern under the Erie Doctrine.

Under the Federal Rules, a plaintiff may join any and all claims that he has against the defendant, regardless of whether or not they arise out of the same transaction or occurrence, a common nucleus of operative fact, or any other shared basis in law or fact. The plaintiff, in other words, is the master of his complaint. Here, the plaintiff has joined claims against this specific defendant. Regardless of whether or not they arise out of the same CNOOF they nevertheless satisfy the requirement for joinder of claims.

Sufficiency of Buyer's Allegation to State a Claim

Under Federal Rule 12(b)(6), which controls in a state law diversity action properly brought in federal court, the Supreme Court has held that a plaintiff must allege specific facts that operate to push the allegations over the line from speculative to plausible. This comes from the *Twombly and Iqbal* line of cases. This does not move the requirements for pleading from the traditional notice pleading requirement that only requires the plaintiff to provide a short and plain statement of the allegation to fact pleading requiring a detailed list of all facts in the case that make the claim likely to survive, which is what is required under California. Again, what is required to survive a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted is that the complaint does not allege sufficient facts to make the allegation of fraud plausible.

Fraud Requirements

In determining whether or not sufficient allegations exist to find that there was fraud in a contract, a federal court sitting in diversity in California will apply California law. In California, the common law of contracts applies. Fraud in contract requires that the plaintiff 1) knowingly 2) misrepresent 3) a material term in the contract.

12(b)(6) Analysis

Here, the facts demonstrate that the painting was claimed to be an original Rothko, supposedly worth \$1 million, which the Buyer bought for \$1 million. However, the Seller will argue in his 12(b)(6) motion that the complaint does not state factual allegations that tend to show that the plaintiff knew that the Rothko painting was a fake, nor even that if he did represent the Rothko as an original, that he had any reason to suspect it was false. Unless the Buyer is able to amend his complaint, which he is eligible to do once as of right within 21 days of the service of a motion to dismiss (or, under California law, before an answer is served) to allege facts with sufficient specificity that a reasonable finder of fact could conclude that the allegations were plausible, then the Buyer's allegation is likely not sufficient to state a claim for fraud involving the painting.

Subject Matter Jurisdiction

Federal courts are courts of limited subject matter jurisdiction. Unlike California state courts, which may hear any claims that are brought before it subject to other limits (including personal jurisdiction), there must be an affirmative grant of federal subject matter jurisdiction that allows for each claim to be properly heard.

Federal Question Jurisdiction

Federal courts have jurisdiction over any claim that arises under the Constitution, statutes, or treaties of the United States. Furthermore, they also have federal question jurisdiction where either there is an important federal interest at stake that effectively supersedes state law (such as in the foreign relations domain) through the application of the modern federal common law, as well as in state law questions that require the interpretation of federal law under the *Merrell Dow* and *Grable* doctrine.

In this case, the court is adjudicating claims of fraud and breach of an obligation to purchase real property. These are not federal questions; they do not arise under federal positive law, federal common law, nor do they contain substantial federal questions that must be answered in order to resolve state law claims. Therefore, there is no federal question jurisdiction over either claim.

Diversity Jurisdiction

In order for there to be diversity jurisdiction over a state law claim, the claim must both satisfy the diversity requirements and the amount-in-controversy requirement. Multiple claims can be aggregated in order to satisfy the amount in controversy requirement. I first consider diversity; then move on to the amount-in-controversy for each claim.

Diversity

Under a standard state law claim brought in diversity jurisdiction, there must be complete (so-called "*Strawbridge*") diversity between all plaintiffs and defendants. Each plaintiff must be a citizen of a separate state from each defendant. Citizenship for individuals, which is the fact pattern in question here, is determined by domicile, which is where a person resides with intent to remain. The facts state that Buyer lives in New York, and Seller lives in California. There are no other parties to the suit. Assuming that both Buyer and Seller intend to remain in their states indefinitely and are therefore citizens of separate states, the requirement of complete diversity is satisfied.

Amount-in-Controversy

In order for diversity jurisdiction to exist over state law claims, the total amount in controversy must exceed \$75,000. A plaintiff may aggregate all the claims that they have, even unrelated claims, to satisfy the amount in controversy requirement against the defendant. The amount-in-controversy claimed must have been arrived at in good faith, though it does not need to be precise.

Here, the amount in controversy substantially exceeds \$75,000. The Buyer, in his fraud action, is alleging in good faith that he expected to receive a painting valued at \$1

million dollars but instead received a painting valued at only \$200 due to the defendant's fraud. That is a difference of \$999,800, well over \$75,000, and that would be the plaintiff's recovery in expectation damages. And the real estate property in question is valued at \$5 million, alleged in good faith, and given that the title to that property is in dispute, the amount in controversy requirement there is also satisfied. Therefore, independently and together, the plaintiff has properly alleged an amount in controversy in excess of the federal requirement for diversity jurisdiction.

Therefore, the federal court has subject matter jurisdiction over these claims through diversity.

Supplemental Jurisdiction

Supplemental jurisdiction allows a state law claim that does not otherwise have jurisdiction to be attached to a federal claim that has subject matter jurisdiction. This is so-called pendent party or ancillary jurisdiction. Here, both state law claims together and independently meet the requirements for diversity jurisdiction, so supplemental jurisdiction does not apply.

Application of California Law to Decide Breach of Contract Claim

Erie

Under the Erie doctrine, there is no general or federal common law. A court sitting in diversity instead applies the substantive law of the state in which it sits, including choice-of-law law, in order to decide questions of law. A federal court sitting in California should apply California law to decide what law to apply.

California Choice of Law

The federal law should therefore apply California choice-of-law law to decide what substantive law to apply. California choice-of-law law for real property in state court requires that a California court use the law of the jurisdiction in which the property is located (as opposed to a contract, where the court will determine whether or not the contract itself has a choice-of-law provision - if that choice-of-law provision is not

contrary to public policy, it will apply it. If the choice-of-law provision is contrary to public policy or there is no choice-of-law provision, the California court will apply a governmental interest analysis to determine what law to apply. That analysis essentially queries the relative interests of the governments in question in order to decide what law to apply.)

Real Property

Here, because the situs of the property in question is located in California, a California court would apply its choice-of-law law to use California substantive law to adjudicate the claim as to the real property contract, unless there is a choice-of-law provision in the land sale contract that requires the application of the law of a different state. However, this fact pattern does not suggest any such choice-of-law provision, and so I do not assess this any further.

Contract

In the event, that the choice-of-law question is adjudicated according to contract principles, a federal court applying California choice-of-law law should proceed to balance the interest of the governments in having their law apply. The two states whose laws are implicated here are California and New York. California has an interest in protecting its citizens from claims of fraudulent sales; New York has an interest in protecting its citizens from fraudulent sales. These are relatively equal interests. However, the Buyer filed in California, which may indicate his willingness to have California law applied; the painting was also with the seller in California at the time the alleged contract was signed and fraud committed. These weigh in favor of imposing California law.

Therefore, in either case, the federal court, properly applying California choice-of-law law, may apply California law to decide the claim.

Issues in Which Buyer is Entitled to Jury Trial

Traditionally, under the Erie Doctrine, procedural questions are decided under federal

law and substantive questions are decided under state law (unless the procedural dispute is outcome-determinative between filing in a state or federal court, in which case the state procedural law trumps federal law). However, questions of jury procedure are Constitutional in basis and therefore federal law always trumps state jury procedural law.

The Seventh Amendment to the Constitution guarantees a jury trial upon timely demand to litigants in questions of law. There is no right to a jury trial for questions of equity. While under the Federal Rules of Civil Procedure, actions are no longer brought exclusively in law or equity - there is instead only the "civil action" - the application of the right to a jury trial is determined by whether or not the cause of action contained in the complaint would have qualified for a jury trial in 1789.

Fraud and Damages: Remedy at Law

Damages are a remedy at law. Therefore, the Buyer is entitled, upon timely demand, to a jury trial on the issue of damages (provided that the claim survives the various hurdles earlier laid out).

Real Property and Specific Performance: Remedy at Equity

Specific performance is a version of an injunction, which is a remedy at equity. A litigant is not entitled to a jury trial on an issue of equity; it may instead be decided by a bench trial.

Mixed Issues of Law and Equity

When a complaint alleges both legal and equitable remedies and demands a jury trial, the court should separate the questions and hold a jury trial on the legal question first. It can then move to a bench trial on the equitable question.

Therefore, in this case, Buyer is entitled to a jury trial on the question of his damages in fraud. That should be held first; the court can then move to his demand for specific performance on the real estate contract.

QUESTION 5

Concerned about the dangers of texting while driving, the Legislature recently enacted the following section of the Motor Vehicle Code:

No person shall operate a motor vehicle upon a public road while using a mobile telephone to send or receive a text message while such vehicle is in motion.

Doug was driving down a busy street while texting on his cell phone. Doug lost control of his car, slipped off the road, and hit Electric Company's utility pole. The pole crashed to the ground, and the fallen wires sent sparks flying everywhere. One spark landed on a piece of newspaper, setting the paper on fire. The burning paper blew down the street, landing on the roof of Harry's house. The house caught fire and burned down.

A technological advance, the Wire Blitz Fuse (WBF), had made it possible to string electrical wires that would not spark if downed. Nevertheless, Electric Company had retained an old wiring system that it and other utility companies had used for years. Electric Company believed that adoption of the WBF system would require a significant increase in electrical rates, and that the WBF system had yet to gain widespread acceptance in the industry. Studies showed that utility companies that replaced their old wiring systems with a WBF system experience vastly increased safety and reliability.

Harry has sued both Doug and Electric Company.

1. What claims may Harry reasonably raise against Doug, what defenses may Doug reasonably assert, and what is the likely outcome? Discuss.
2. What claims may Harry reasonably raise against Electric Company, what defenses may Electric Company reasonably assert, and what is the likely outcome? Discuss.
3. If Harry prevails against Doug and Electric Company, how should damages be apportioned? Discuss.

QUESTION 5: SELECTED ANSWER A

H v. D

Harry (H) can bring a negligence claim against Doug (D)

Negligence

A negligence claim consists of duty, breach, causation, and damages. All elements must be present for a plaintiff to recover.

Duty

A person does not generally owe a duty to act. However, if a person acts, they owe a duty to act as prudently as the reasonable man would and is liable for harms that come to foreseeable plaintiffs for the failure to act with reasonable care. In the majority *Cardozo* view, a foreseeable plaintiff is anyone who is in the zone of danger. Under the minority, *Andrews* view, a foreseeable plaintiff is anyone who is harmed if the defendant could have foreseen harming anyone, even if the person harmed was not the type of plaintiff the defendant foresaw harming.

Standard of Care

Generally, people owe a duty to act with the care a reasonably prudent man would take. There are different standards for landlords or other special relationships.

In this case, D was driving. A reasonably prudent man would have foreseen that bystanders or property could be harmed by inattention to driving. H can argue that D could foresee that texting while driving could have caused him to crash into a person's property. It was foreseeable that he would have run into H's mailbox. Therefore, it was foreseeable that H was in the zone of danger. The fact that D did not in fact run into H's mailbox but instead hit the utility pole which caused a fire is not too remote. D could have crashed into the utility pole that snapped and fell directly into H's house, rather than sparked and caught fire. H will argue that under *Cardozo* he was a foreseeable

plaintiff in the zone of danger because a driver should have foreseen that distraction would cause him to crash into a person's property. D will argue that this is too attenuated. While H may have been in the zone of danger for his mailbox being smashed, H was not a foreseeable plaintiff for having his house burned down. The key question, however, is not whether D could foresee the type or extent of harm, but rather could D foresee H as a plaintiff. As long as H's house was on the road, H was a foreseeable plaintiff in the zone of danger.

D will argue H was not foreseeable because the burning paper "blew down the street," implying that the crash occurred far from where he texted. However, H was in the zone of danger because he was on the street where D was driving and texting. It will be a close call, and many courts will not find H was a foreseeable plaintiff in the zone of danger under the *Cardozo* view. Under the *Andrews* view, H will certainly be a plaintiff D owes a duty of care to, because D could have foreseen his texting while driving would injure someone.

Breach

Assuming D owes H a duty of care, there must be a breach. A driver owes a duty to others to drive responsibly and not be distracted. A reasonably prudent man would not text and drive. Therefore, H will successfully argue that D breached his duty of care.

Negligence Per Se

H can also argue D breached his duty of care under a negligence per se theory. Under negligence per se, a defendant has breached his duty if he violated a 1) statute addressed at the behavior 2) the statute was designed to protect against a specific type of harm 3) the statute protected a specific class of people, and the plaintiff harmed is in that class of people in a way the statute was designed to protect against. Defendants can argue that in the situation it was more reasonable to not follow the statute, because the statute was vague and overbroad, or it would have been more dangerous to follow the statute than to violate it.

In this case, none of the defenses apply. D violated a statute that addressed his behavior. It said that no one should operate a motor vehicle upon a public road while using a mobile telephone and to send or receive a text message while the vehicle is in motion. D was driving the car. He was texting on his cell phone while driving down the street. Because he texted while he was driving, he lost control of his car and hit the utility pole. D will argue that the danger the legislature was trying to avoid was running over people. H will argue that it was to protect against people being run over and against property damage. D will rebut that even if it protected against property damage, the plaintiff it sought to protect would be the owner of the property. It is too much of a stretch to say the legislature intended to pass the statute to establish that a person who crashed while texting is responsible for a burning house down the street. It is simply too attenuated from the likely purpose of the legislature. Therefore, his negligence per se claim will not be successful.

Causation

For a negligence claim to succeed, there must be both actual (but-for) and legal (proximate) causation.

But for (actual)

But for causation means that but for the defendant's action, the plaintiff would not have been harmed. In this case, but for D crashing into the pole, the pole would not have crashed to the ground. But for the pole crashing into the ground, the wires would not have sent sparks up, and the burning paper would not have landed on the roof of H's house. There is but for causation.

Proximate (legal)

The breach must also be the proximate cause of damage. Proximate cause are foreseeable causes. There can be intervening events between D's breach and H's harm as long as D's breach was still a substantial factor in causing D's harm. However, superseding events breach the chain of causation. Superseding events are unforeseeable events such as a criminal act or act of god.

In this case, H will argue that it was foreseeable that Doug texting while driving could result in his house being damaged. As stated above, he will argue it is foreseeable that a distracted driver will drive into another person's property. Even though H's property was damaged in a different way, D could have still foreseen that his actions would lead to this result. However, D will argue that the burning paper is an unforeseeable event, more similar to an act of God. The odds that he would hit the pole just right, the wires would spark, and the wind would take the burning paper down the street onto H's roof is unforeseeable. This is a close case, and different courts might come out differently on it. Under the Andrew's perspective, there would be proximate cause. However, under the *Cardozo* perspective, this would be similar to the explosion in the train station -- the harm is too attenuated from the breach.

Damages

The damages must have been caused by D's breach. If there was causation, then the court will find there are damages. H was damaged by D's breach of care. His house burned down because of D's action.

Defenses

Contributory Negligence

D can argue that H was contributorily negligent. Good roofs will not catch fire if a sheet of burning paper lands on top of it. Roofs are treated to ensure fire cannot spread. If H's house can be burned so easily, it may be because H did not build to code or maintain his roof as he ought to. D might be successful in arguing H was contributorily negligent. That will reduce his damages but not prevent him from paying, unless they are in a contributory negligence jurisdiction.

Abnormally Dangerous Activity

H could also bring an abnormally dangerous activity claim against D. This claim would be unsuccessful. Abnormally dangerous activities are those that 1) present a substantial risk of bodily harm or death 2) are uncommon to the area and 3) cannot be

mitigated by sufficient care. In this case, driving is a common activity. Texting while driving, even if a stupid decision, is a common activity in the area. It can be mitigated by only texting while stopped or in other ways.

2. H v. EC

Abnormally Dangerous Activity

H could bring an abnormally dangerous activity claim against EC. This claim would be unsuccessful. Abnormally dangerous activities are those that 1) present a substantial risk of bodily harm or death 2) are uncommon to the area and 3) cannot be mitigated by sufficient care. The courts often look to whether the value to society of conducting the activity outweighs the risk and probability of harm. In addition, courts do not hold utility companies strictly liable for activities they are engaged in that makes them public utility companies. This is a matter of public policy.

In this case, utility poles are common to the area. While transmitting electricity can present a substantial risk of bodily harm or death, it can be mitigated by sufficient care. In addition, the value to society outweighs imposing strict liability for any damages that arise from running the pole. The wires are also a part of the activity that makes the utility company a public entity: transferring of electricity in the community.

Negligence

H can bring a negligence claim against EC. He has a greater likelihood of success than against D.

Duty

See above.

Standard of Care

See above. That of a reasonably prudent man.

EC owes a duty to all foreseeable plaintiffs to conduct its activities with the same

prudence a reasonable man would have. H is a foreseeable plaintiff, because it is foreseeable that wires can break, causing sparks that create fire. Under both the *Cardozo* and *Andrews* view, it is foreseeable that a plaintiff's house may be burned down by such a spark. Thus, H is a foreseeable plaintiff.

Breach

H will argue that it has not breached its duty of care because it is using the same wiring system that other utility companies use. Defendants can look to industry standards to show that they have not violated the duty of care. However, industry standards are not dispositive. H can argue that WBF would have prevented the fire, it was not reasonable to rely on old wiring systems, and EC should have anticipated its wires sparking. EC will argue that WBF has not gained widespread acceptance among the industry and installing WBF would require significant increase in electrical rates. Ultimately, a court will have to apply Hand's theory to determine whether there was a breach. Hand's theory compares the burden against the probability and the risk. It will look at the expense of installing WBF and compare it to the risk of its wires being defective (and the cost of the resulting damage) against the probability that the wires would break. If the court finds installing WBF or something similar is less than the risk of the old wires causing a fire x the probability of the wires causing a fire, then EC will have breached its duty of care.

Causation

But For

See above. But for not updating the wire system, the wires would not have sparked and caused the fire that burned down Henry's house.

Proximate

See above. It was foreseeable that old wires could break and send sparks. It was foreseeable that sparks could catch fire and spread, causing property damage. EC can argue that the wind was a superseding cause. However, it is foreseeable that the wind would catch a spark and carry it.

Damages

The breach in the duty of care caused the spark to land on H's house which resulted in real property damage.

Defenses

Contributory Negligence

D can argue that H was contributorily negligent. Good roofs will not catch fire if a sheet of burning paper lands on top of it. Roofs are treated to ensure fire cannot spread. If H's house can be burned so easily, it may be because H did not build to code or maintain his roof as he ought to. D might be successful in arguing H was contributorily negligent. That will reduce his damages but not prevent him from paying, unless they are in a contributory negligence jurisdiction.

Defective Product

H can sue for a defective product. Products can be defective in design, manufacture, or label. For a company to be strictly liable, it must be a part of the distributor chain. It could be a manufacturer, distributor, or retail. Companies that do not regularly sell products cannot be held strictly liable.

In this case, EC does not sell its wires. It sells electricity, but that is not a product. Therefore, H's suit will be unsuccessful.

Warranty

N can sue for the breach of warranty of merchantability of fitness for the defective wires. However, to sue for breach of contract there must be privity or N must be a member of the household.

3. Damages

In the majority of states, plaintiff can recover from defendants in joint and several

liability. That means he can recover all of the damages from either of the defendants. However, he cannot "double dip" and recover anything more than 100% of his damages. A jury will apportion the fault. If the jury assigns 70% of fault to A and 30% of fault to D, and plaintiff recovers 100% from A, A can demand D reimburse him 30%. In the minority of states, plaintiff can only recover in several liability. That means he can only recover damages from the defendants in proportion to the fault they were liable for.

If the court does find that D and EC are both liable, then a jury should determine the fault. The jury may reasonably decide that the majority of the damages should be apportioned to D because without his negligence the pole would not have fallen down. His actions set it in motion.

QUESTION 5: SELECTED ANSWER B

1. H's claims against D and D's defenses

Harry (H) will file a claim for negligence against Doug (D)

Negligence

To successfully assert a negligence claim, the plaintiff must show that the defendant (i) had a duty, (ii) breached that duty, (iii) the breach of that duty was the actual and proximate cause of the plaintiff's injuries, and (iv) that the plaintiff suffered damages.

Duty

All defendants owe a duty of reasonable care to all foreseeable plaintiffs. The majority (Cardozo) view is that all plaintiffs are foreseeable if they are in the zone of danger. The minority (Andrews view) is that all plaintiffs are foreseeable.

Here, D was driving down a busy street, and therefore owed a duty of care to all foreseeable plaintiffs. H will argue that he is a foreseeable plaintiff because his house is on the street, and houses on a street are within the zone of danger if someone is not driving carefully.

Breach

A defendant breaches a duty of care if the defendant does not act as a reasonably prudent person would in carrying out an activity. Here, H will argue that a reasonable person would not text while driving on a busy street. H will argue that reasonable people know that texting is distracting, and driving a vehicle while distracted is dangerous, and a reasonably prudent person would not drive while distracted. On the other hand, D will argue that that many people text while driving, and since many people do it, he did not act unreasonably while texting. D's argument will probably fail, and D will be considered to have breached his duty.

Negligence Per Se

Negligence per se is a doctrine that replaces the standard duty of care with a statute. If the legislator has enacted a statute with criminal penalties, and the statute is designed to protect against the harm caused, and the injured plaintiff is of the class that the statute was intended to protect, then the statute replaces the duty of care standard. If the defendant breaches the statute, then the majority view is that that conclusively proves that the defendant had a duty and the defendant breached that duty.

Here, the legislator recently passed a section of the motor vehicle code that stated that no person shall operate a motor vehicle upon a public road while using a mobile phone to text while the vehicle was in motion. Here, D was driving down a busy street, which was presumably public, while texting. Therefore, H violated the statute.

The statute will only replace the duty if H can prove that it was intended to protect against the harm caused and that H was part of the class of people intended to be protected by the statute. The legislator passed the law because they were concerned about the dangers of texting while driving. Presumably, the dangers of texting while driving include the distracted driver hitting a pedestrian, or hitting something and causing property damage. H will try to argue that D hit the pole, which then caused the fire, and this was within the property damage the legislator intended to protect. However, D will argue that although the statute was probably intended to protect property damage such as hitting the pole, it was not enacted to protect against fires caused by faulty wiring of a pole. D's argument will probably prevail because it was not likely that the legislator intended to protect homeowners from fires when they enacted the statute.

Even if H could prove that the fire to his home was the type of damage the legislator intended to protect, he also needs to prove that he was of the class of people the statute was designed to protect. H will argue that as a homeowner on a busy street, he

is of the protected class because the statute was designed to protect against property damage by distracted drivers. On the other hand, D will argue that the statute is designed to protect pedestrians who might be hit, or maybe owners or passengers of vehicles struck by distracted drivers. Again, D will probably prevail on this point, because the statute was probably not designed to protect homeowners.

Therefore, H will not be able to establish negligence per se. However, as discussed above, even without negligence per se, H can prove that D had a duty and breached the duty.

Actual Cause

A defendant is the actual cause of a plaintiff's actions if but for the defendant's conduct, the plaintiff would not have suffered the harm. Here, D was the actual cause of H's damage. If D had not been distracted while driving, he would not have hit the utility pole, and the wires would not have sparked when they hit the ground, and the paper would not have lit on fire and therefore H's house would not have lit on fire.

Proximate Cause

A defendant is liable for all foreseeable incidents of his actions. If a defendant's actions combine with another force and then cause the damage, the defendant's action is only the proximate cause of the result if the intervening force was foreseeable. A dependent intervening force is a force that is foreseeable. For example, it is foreseeable that injury invites rescue, and therefore it is a dependent intervening force if someone tries to rescue someone injured by the defendant. On the other hand, an independent intervening force is one that is not foreseeable, and it cuts off liability of the defendant because the defendant was not the proximate cause of the injury.

Here, D will argue that Electric Company (EC)'s utility pole had old wiring, and that old wiring is not safe, and it was the old wiring that caused the fire. D will argue that the old wiring should be considered an independent intervening force, because it is not foreseeable that a company would use old wiring that would sent sparks flying

everywhere when it fell. He will argue that it is not foreseeable that the sparks would then light a piece of paper on fire, and then that paper would land on Harry's roof. However, D's argument will probably fail. H will argue that it is foreseeable that if you drive distracted and hit an electric company's pole that sparks would fly. H will point to the fact that the new Wire Blitz Fuse (WBF) systems have yet to gain widespread acceptance in the industry, and therefore most electric poles probably have old wiring. Further, H will argue that D was on a busy street, so it was likely that if D hit the pole and there were sparks, it was likely something would catch fire. H is likely to win this argument and therefore D's distracted driving will be considered proximate cause of H's injuries.

Damages

H will be able to show damages because his house caught fire and burned down as a result of D's actions.

Conclusion

H will be able to successfully assert a negligence claim against D, and all of D's objections will fail.

2. H's claims against EC and EC's defenses

H will assert a negligence claim and a strict liability claim against EC.

Negligence

To successfully assert a negligence claim, the plaintiff must show that the defendant (i) had a duty, (ii) breached that duty, (iii) the breach of that duty was the actual and proximate cause of the plaintiff's injuries, and (iv) that the plaintiff suffered damages.

Duty

All defendants owe a duty of reasonable care to all foreseeable plaintiffs. The majority (Cardozo) view is that all plaintiffs are foreseeable if they are in the zone of danger. The minority (Andrews view) is that all plaintiffs are foreseeable.

Here, EC has a duty to provide and maintain utility poles as a reasonably prudent electrical company would do.

Breach

H will argue that EC breached their duty in not using the new WBF technology, which made it possible to string electrical wires that would not spark if downed. H will point to the fact that studies showed that utility companies that replaced their old wiring systems with a WBF system experienced vastly increased safety and reliability. H will argue that a reasonably prudent electrical company would have replaced their wiring with WBF since it is safer and more reliable, and because EC did not, they breached their duty.

On the other hand, EC will argue that they did not breach their duty. They will argue that many other utility companies had used the old wiring for years, and the WBF system had yet to gain widespread acceptance in the industry. Although evidence of other companies' actions and industry customs can be used to determine whether a duty has been breached, it is not dispositive. The court will apply a balancing test when deciding whether a company breached its duty in not implementing new technology. The court will look at the cost of the new technology, the amount the new technology would decrease the risk of harm to potential plaintiffs, and the magnitude of the harm suffered by potential plaintiffs. EC will argue that adopting the WBF systems would be expensive and therefore require a substantial increase in electrical rates. On the other hand, H will argue that the WBF systems would vastly increase safety and reliability, and the risk of harm by not replacing (more fires when people hit electrical poles) is great. This is a close call and the court could come out either way, although the court will probably determine that EC did breach its duty because although the WBF technology would be expensive, it would significantly increase safety.

Actual Cause

But for EC's replacement of the old wires with new WBF technology, the electrical wires would not have sparked if downed and therefore H's house would not have caught fire and burned down.

Proximate Cause

EC will argue that they were not the proximate cause of H's house burning down. They will argue that D's negligent driving is an independent intervening force, and therefore they were not the proximate cause. However, it is foreseeable that a driver would drive negligently and hit a pole. Therefore, D's negligent driving was foreseeable, and D's actions do not cut off EC's liability.

Damages

H suffered damages when his house burnt down.

Conclusion

If the court determines that EC breached their duty in not using the new WBF technology, then H will be able to successfully assert a claim for negligence against EC.

Strict Liability

H will try to claim that EC was conducting an ultrahazardous activity, and H was harmed as a result. A company is strictly liable if the company is conducting an ultrahazardous activity and a plaintiff is injured by the dangerous propensity of that activity.

Here, H will argue EC was operating an electric company, which included stringing live electrical wires on poles, and electrical wires are dangerous because they can start fires. When the pole was hit by D's car, the wires fell and sparked and started a fire. Therefore, H's injury was caused by the dangerous propensity of EC's activity.

However, H's arguments will fail because the court will determine that EC was not conducting an ultrahazardous activity. An ultrahazardous activity is one that cannot be done safely, no matter how careful anyone is in conducting the operation, and it must not be of common usage. Here, every city has electrical companies that string electrical wires on poles. Therefore, the electric company's operation will be considered common usage and not an ultrahazardous activity. Therefore, H's strict liability claim will fail.

3. How damages should be apportioned

If actions by two different defendants combine to cause injury to a plaintiff, neither of which alone would have caused the injury, the defendants will be held jointly and severally liable. If defendants are held jointly and severally liable, then the plaintiff can recover the entire amount of damages from either or both defendants. (The plaintiff can only recover the damages once, but it can be from either defendant alone, or some from each defendant.) If the defendant pays more than their share of the damages, the defendant can recover that amount from the other defendant.

Here, D and EC's actions combined to cause H's injuries. H will be able to recover the damages for his burned down house from either D or EC or a combination of both. Depending on how the court rules, D and EC may be assigned different percentages of liability. D and EC will be responsible for paying the percentage of the damages proportional to their percentage of liability. If either D or EC pays H more than their share of the damages, the defendant who paid more can sue the other party for contribution.