
Remedies

1. On the baseball star's appeal from a jury verdict for the baseball star, and judgment thereon, awarding damages only of the $5,000 fee promised by the orchestra, the judgment will probably be

The trial court instructed the jury, in part, as follows: "If you find for the plaintiff, you may award damages for losses which at the time of contracting could reasonably have been foreseen by the defendant as a probable result of its breach. However, the law does not permit recovery for the loss of prospective profits of a new business caused by breach of contract." The baseball star sued the orchestra for breach of contract. His business agent testified without contradiction that the cancellation had resulted in the baseball star's not getting other contracts for performances and endorsements. The plaintiff, a baseball star, contracted with the Municipal Symphony Orchestra, Inc., to perform for $5,000 at a children's concert as the narrator of "Peter and the Wolf." Shortly before the concert, the baseball star became embroiled in a highly publicized controversy over whether he had cursed and assaulted a baseball fan. The orchestra canceled the contract out of concern that attendance might be adversely affected by the baseball star's appearance.

- Affirmed, because the trial court stated the law correctly
- Affirmed, because the issue of damages for breach of contract was solely a jury question
- Reversed, because the test for limiting damages is what the breaching party could reasonably have foreseen at the time of the breach
- **Reversed, because under the prevailing modern view, lost profits of a new business are recoverable if they are established with a reasonable certainty**

Note:
D is correct. According to Restatement (Second) of Contracts § 352 (1981), a party cannot recover damages for breach of a contract for loss beyond the amount that the evidence permits to be established with reasonable certainty. Thus, in order to recover lost profit damages, the plaintiff must prove the losses suffered were not simply speculative. Here, the plaintiff's business agent testified that the cancellation had resulted in the baseball star's not getting other contracts for performances and endorsements; even if the plaintiff was considered a new business, because the business agent testified without contradiction, this testimony is enough to establish reasonable certainty. Therefore, the judgment should be reversed because the jury instructions asked the jury to look at foreseeability rather than certainty.

A is incorrect. The trial court misstated the law. A new business can recover for the loss of prospective profits if the new business is able to establish its losses with reasonable certainty. The current law does not categorically prevent all new businesses from collecting lost profits caused by breach of contract.

B is incorrect. The issue of whether the plaintiff should recover and how much the plaintiff should recover is both an issue of law and fact. The judge must appropriately determine what law is at issue to deliver the appropriate jury instructions. After the instructions are read, the jury must apply the facts of the case to the law at issue. Here, the judge incorrectly gave instructions related to foreseeability rather than certainty and misstated the loss profits law. Thus, even though the jury ruled in the plaintiff's favor, the amount of damages was likely impacted by the judge's instructions.

C is incorrect. As stated above, the trial court's jury instructions asked the jury to focus on foreseeability; certainty, not foreseeability, is the proper limiting test in this situation.

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2. If the boater sues the retailer for restitution of the $4,000 advance payment, which of the following should the court decide?

A high-volume, pleasure-boat retailer entered into with a boater, a written contract signed by both parties, to sell the boater a power boat for $12,000. The manufacturer's price of the boat delivered to the retailer was $9,500. As the contract provided, the boater paid the retailer $4,000 in advance and promised to pay the full balance upon delivery of the boat. The contract contained no provision for liquidated damages. Prior to the agreed delivery date, the boater notified the retailer that he would be financially unable to conclude the purchase; the retailer thereupon resold the same boat that the boater had ordered to a third person for $12,000.

- The boater's claim should be denied, because, as the party in default, he is deemed to have lost any right to restitution of a benefit conferred on the retailer
- The boater's claim should be denied, because, but for his repudiation, the retailer would have made a profit on two boat-sales instead of one
- **The boater's claim should be upheld in the amount of $4,000 minus the amount of the retailer's lost profit under its contract with the boater**
- The boater's claims should be upheld in the amount of $3,500 ($4,000 minus $500 as statutory damages under the UCC)

Note:
Under the Uniform Commercial Code (UCC), when a buyer has breached a contract for the sale of goods, the seller may recover the difference between the contract price and the re-sale price or lost profits. When a buyer repudiates before the goods are shipped, the seller will typically re-sell them to a third party. If the re-sale is "made in good faith and in a commercially reasonable manner," the seller may recover "the difference between the resale price and the contract price together with any incidental damages . . . but less expenses saved in consequence of the buyer's breach." UCC § 2-706(1). This puts the seller in approximately the same position he would have been in had the buyer performed under the original contract. If the buyer paid a deposit, a typical seller can keep it up to a maximum of 20% of the original contract price or $500, whichever is less, even without a showing of actual damages, but must return the balance to the buyer. UCC § 2-718(2)(b).

A special situation arises when, in the course of business, a seller makes or acquires enough supply to meet all foreseeable demand, deeming him a "lost volume" seller. Someone who has a large volume of supply will typically be able to re-sell an item to another customer promptly and at the same price. However, as a result of the breach, the seller loses a customer (i.e., only sells one item instead of the two items he would have sold had the original contract been performed). As such, when a buyer breaches a contract with a lost volume seller, the seller will be entitled to damages in the amount of that lost sale. See UCC § 2-708(2).

C is correct. When the boater repudiated his duty to pay the remainder of the contract price, he breached the contract, which entitles the retailer to expectation damages. In the context of the sale of goods by a "lost volume" seller who re-sells the item at the same price to another customer, the seller will be entitled to the profits lost by selling one less item. As such, even though the retailer was able to sell the boat at the same price, he would be entitled to expectation damages in the amount of lost profit from selling one less boat. So, the boater would recover anything beyond that, meaning the $4,000 he paid as a deposit minus the lost profits.

A is incorrect. This is a misapplication of the law. The seller is entitled to lost profits in the course of selling a large volume of products, but any enrichment beyond that would be unjust. Furthermore, the UCC allows a normal buyer of goods to recover a percentage of a deposit in certain situations. This demonstrates that even buyers who have breached may be entitled to restitution. Here, denying any recovery to the buyer would unjustly enrich the seller, who is entitled only to lost profits, as explained above.

B is incorrect. This answer reaches the incorrect answer with the correct reasoning. It is true that without the buyer's repudiation, the seller would have made a profit from two boat sales rather than one, and he is entitled to those lost profits. However, the seller is not entitled to damages beyond that, with the remaining amount going to the boater.

D is incorrect. Although the UCC does generally allow for a buyer to recover a deposit less 20% of the original contract price or $500, whichever is less, this case is a special situation involving a "lost volume" seller. As explained above, this entitles the seller to lost profits from selling one less boat, with the remaining amount awarded to the boater as restitution.

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3. Will the sister succeed in an action against the brother in which she asks the court to order the brother to continue to make his payments to their mother under the terms of the sibling's contract?

There is a valid contract between the siblings, but their mother has declined to sue the brother. The siblings made the agreed payments in January, February, and March. In April, however, the brother refused to make any payment and notified his sister and their mother that he would make no further payments. The aged mother of a sister and brother, both adults, wished to employ a live-in companion so that she might continue to live in her own home. The mother, however, had only enough income to pay one-half of the companion's $2,000 monthly salary. Learning of their mother's plight, the sister and brother agreed with each other in a signed writing that on the last day of January and each succeeding month during their mother's lifetime, each would give their mother $500. Their mother then hired the companion.

- **Yes, because the sister's remedy at law is inadequate**
- Yes, because the sister's burden of supporting her mother will be increased if her brother does not contribute his share
- No, because a court will not grant specific performance of a promise to pay money
- No, because the brother's breach of contract has caused no economic harm to the sister

Note:
According to the Restatement (First) of Contracts § 133 (1932), a person who is neither a promisor nor promisee in a contractual agreement, but stands to benefit from the contract's performance, is considered an intended beneficiary. A third-party, intended beneficiary may legally enforce the contract, but only after his or her rights have already been vested (either by the contracting parties' assent or by justifiable reliance on the promise).

Specific performance will be granted if (a) there is a valid contract, (b) there is an inadequate remedy at law, (c) the enforcement of the performance is feasible, and (d) no defenses apply; whether there is an inadequate remedy at law is the most important consideration. Restatement (Second) of Contracts §§ 359, 362 (1981). A legal remedy is normally inadequate if the damages are unique, difficult to calculate, impossible to collect, or the breaching party is insolvent.

A is correct. Here, there is a valid contract because the brother and sister entered into a signed agreement to give the mother $500 every month. It would also be difficult to calculate the monetary damages because the court cannot predict how many months the mother will live. Thus, the sister is entitled to specific performance.

B is incorrect. Here, the mother is an intended beneficiary of the contract made between the sister and the brother and can enforce her rights for the $500 monthly payment from each child. However, the mother's decision not to sue the brother will not impose a legal duty on the sister to pay the difference.

C is incorrect because it misstates the law; the court will not grant specific performance of service contracts, but can grant specific performance of a promise to pay money. The brother's promise to pay the mother $500 a month is not considered a service contract.

D is incorrect. As discussed above, the absence of economic harm to the sister does not preclude recovery for breach of contract because the mother was the intended beneficiary of their contract. Thus, because the siblings had a valid contract to pay the mother $500, the sister has a cause of action against the brother for breach of contract.

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4. Which of the following is an accurate statement?

Assume the following facts. The painter commenced work on Saturday morning and had finished half the painting by the time he quit work for the day. That night, without the fault of either party, the office building was destroyed by fire. A business owner entered into a contract with a painter, by the terms of which the painter was to paint the owner's office for $1,000 and was required to do all of the work over the following weekend so as to avoid disruption of the owner's business.

- Both parties' contractual duties are discharged, and the painter can recover nothing from the owner
- **Both parties' contractual duties are discharged, but the painter can recover in quasi-contract from the owner**
- Only the painter's contractual duty is discharged, because the owner's performance (payment of the agreed price) is not impossible
- Only the painter's contractual duty is discharged, and the painter can recover his reliance damages from the owner

Note:
Often, the fact that there are periodic payments will suggest that each payment is an agreed equivalent for some performance by the other party, However, this does not automatically create a divisible contract. In most construction contracts, the owner is required to make progress payments, but this does not normally mean that the contract is divisible into a number of components.

When the existence of a specific thing is necessary for the performance of a contractual obligation, the destruction of that thing is a supervening event that relates to a basic assumption of the contract; this effectively discharges any obligation of either party under that contract. However, any benefit conferred under the contract prior to the supervening event may be recovered in restitution.

Impracticability is a kind of impossibility that prevents the performance of a contract because it would be extremely costly, time-consuming, or otherwise impracticable, though not literally impossible to complete a full performance. According to courts, if, due to changed circumstances, performance would be infeasible from a commercial viewpoint, the promisor is excused just as he would be if performance were literally impossible.

If an event occurs during the performance of a contract that is unexpected by either of the parties at the time of the contract and which affects the feasibility of even performing the contract, both parties will be discharged by the doctrine of impossibility.

If part performance has been rendered by either party before the impossible event occurred, that party will have a right to recover in quasi-contract for the reasonable value of their partial performance. This type of recovery is permitted when contractual duties are discharged by impossibility, impracticability, or frustration of purpose.

B is correct. When the owner's office was destroyed by fire, this was a supervening event that was related to a basic assumption of the contract (that the office existed in order to be painted). As a result, the destruction of the office discharged the painter's obligation to paint and the owner's obligation to pay for the work. However, payment for the work already done is recoverable in restitution or quasi-contract.

A is incorrect. This fact pattern does not implicate impossibility, which would entirely discharge both parties' duties. As stated above, the painter can recover in restitution.

C is incorrect. Both parties' further obligations were discharged by impracticability, not an impossibility. However, the painter still has an action for restitution due to his substantial performance.

D is incorrect. Reliance damages are not recoverable by the painter because the contract was discharged due to the supervening event destroying the office. Rather, damages are recoverable in restitution or quasi-contract, as explained above.

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5. In which of the following is the remedy of reformation most appropriate?

A seller and a buyer, standing on Greenacre, orally agreed to its sale and purchase for $5,000 and orally marked its bounds as "that line of trees down there, the ditch that intersects them, the fence on the other side, and that street on the fourth side."

- **<u>As later reduced to writing, the agreement by clerical mistake included two acres that are actually beyond the fence</u>**
- The buyer reasonably thought that two acres beyond the fence were included in the oral agreement but the seller did not. As later reduced to writing, the agreement included the two acres
- The buyer reasonably thought that the price orally agreed upon was $4,500, but the seller did not. As later reduced to writing, the agreement said $5,000
- The buyer reasonably thought that a dilapidated shed backed up against the fence was to be torn down and removed as part of the agreement, but the seller did not. As later reduced to writing, the agreement said nothing about the shed

Note:
When parties orally agree on a deal, they may then reduce the agreement to writing. When that writing incorrectly reflects the oral agreement they made, either party may seek reformation from the court. This is essentially a re-writing so that the document correctly reflects the oral agreement they made originally.

Reformation is NOT a remedy for an underlying disagreement about the deal itself that results in a document reflecting only the understanding of one party. In that scenario, the court will often find that no contract exists at all due to the mutual mistake preventing assent.

The parol evidence rule does not bar the introduction of evidence to show the mistake that forms the basis for reformation.

A is correct. Reformation is a proper remedy ONLY when the writing incorrectly summarizes the parties' shared understanding, not when they fundamentally disagree on terms of the deal to begin with. Where a clerical error has been made in reducing an agreement to writing, a party may bring an action for reformation. This will allow the writing to be corrected or include an omitted provision. Because the seller and the buyer verbally agreed that the boundary of Greenacre was the fence, the writing may be reformed if it mistakenly includes a reference to the two acres beyond the fence.

B is incorrect. In this scenario, the parties disagree about what was included in the boundary of the land (i.e., two acres beyond the fence). Reformation is not available here because this is a fundamental disagreement about the original terms.

C is incorrect. Similarly, reformation is only available when the parties were clear on their original agreement, which was incorrectly reduced to writing. That is not the case where the buyer and the seller had different beliefs about the price.

D is incorrect. As explained above, a misunderstanding of terms before an agreement is formed (i.e., whether the shed would be torn down as part of the original agreement) cannot be reformed.

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6. Will the landowner probably succeed in an action against the farmer for specific performance?

A landowner contracted in a signed writing to sell Greenacre, a 500-acre tract of farmland, to a farmer. The contract provided for exchange of the deed and purchase price of $500,000 in cash on January 15. Possession was to be given to the farmer on the same date. On January 15, the landowner notified the farmer that because the tenant on Greenacre wrongfully refused to quit the premises until January 30, the landowner would be unable to deliver possession of Greenacre until then, but he assured the farmer that he would tender the deed and possession on that date. When the landowner tendered the deed and possession on January 30, the farmer refused to accept either, and refused to pay the $500,000. Throughout the month of January, the market value of Greenacre was $510,000, and its fair monthly rental value was $5,000.

- Yes, because the court will excuse the delay in tender on the ground that there was a temporary impossibility caused by the tenant's holding over
- **Yes, because time is ordinarily not of the essence in a land-sale contract**
- No, because the landowner breached by failing to tender the deed and possession on January 15
- No, because the landowner's remedy at law for monetary relief is adequate

Note:
A proper remedy for breach in a contract for land is specific performance. Regarding land, the rule that specific performance is an extraordinary remedy is suspended. All land is considered unique, and barring special equitable circumstances, a court will require specific performance on a land contract under common law. Further, to balance the equities, a seller is offered specific performance as a remedy just the same as the buyer, even though they are receiving payment instead of land.

Under common law, less than perfect performance, or a minor breach, by one party does not excuse performance in the other party. Barring a "time is of the essence" clause in a contract for land, failure to perform by the time stated in the contract is neither a substantial nor material breach. Further, because the landowner gave a specific time that the land would be available, the farmer cannot even claim insecurity. Therefore, the farmer has a duty to perform (purchase the land).

B is correct. The landowner will succeed in an action for specific performance because the farmer had no legal excuse to breach, and the land is unique. As explained above, when a party has committed only a partial breach of a contract, the other party to the contract remains obligated to perform, and refusal to perform is a substantial breach and will give the partially-breaching party the right to either specific performance or money damages. Because the facts suggest that there is no "time is of the essence" clause in the contract, the two-week delay is only a partial breach. Therefore, the farmer's refusal to pay the purchase price was a repudiation of the contract, which justified an action by the landowner for specific performance.

A is incorrect. The facts do not suggest excuse on grounds of impossibility. Impossibility requires that performance of a duty required by the contract is objectively impossible. Impossibility is commonly seen in the destruction of the subject matter of the contract, a change in law that makes the transaction impossible (perhaps a government actor seizes the land), or death of a party to the contract.

C is incorrect. Although the landowner's failure to deliver possession was a breach, it was only a partial breach. The only time that a failure to perform at a certain time is a material breach is if the contract explicitly includes a "time is of the essence" clause. The facts do not indicate that such a clause exists, so the landowner's breach is minor, and the farmer can only recover money damages if such damages exist.

D is incorrect. Contracts involving the sale of land have historically been regarded as unique, and therefore, specific performance is typically allowed even where the breaching party is the buyer. This allowance is to balance the equities of relief between buyer and seller. Judges will heavily weigh whether a remedy of specific performance can be properly and realistically supervised and enforced by the court. In the case of unique goods, it is straight-forward enough to see that the sheriff oversees the transfer of the unique property. Contrast this with a contract for services, say of an architect designing a home, and compelling that architect to perform, and to perform properly, becomes much more impracticable for the court.

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7. In an action by the farmer against the landowner for damages, the farmer is entitled to recover

On January 30, the farmer accepted a conveyance and possession of Greenacre and paid the $500,000 purchase price, but notified the landowner that he was reserving any rights he might have to damages caused by the landowner's breach. The farmer intended to use the land for raising cattle and had entered into a contract for the purchase of 500 head of cattle to be delivered to Greenacre on January 15. Because he did not have possession of Greenacre on that date, he had to rent another pasture at a cost of $2,000 to graze the cattle for 15 days. The landowner had no reason to know that the farmer intended to use Greenacre for raising cattle or that he was purchasing cattle to be grazed on Greenacre. A landowner contracted in a signed writing to sell Greenacre, a 500-acre tract of farmland, to a farmer. The contract provided for exchange of the deed and purchase price of $500,000 in cash on January 15. Possession was to be given to the farmer on the same date. On January 15, landowner notified the farmer that because the tenant on Greenacre wrongfully refused to quit the premises until January 30, the landowner would be unable to deliver possession of Greenacre until then, but he assured the farmer that he would tender the deed and possession on that date. Throughout the month of January, the market value of Greenacre was $510,000, and its fair monthly rental value was $5,000.

- Nothing, because by paying the purchase price on January 30, he waived whatever cause of action he may have had
- Nominal damages only, because the market value of the land exceeded the contract price
- **$2,500 only (the fair rental value of Greenacre for 15 days)**
- $2,500 (the fair rental value of Greenacre for 15 days), plus $2,000 (the cost of grazing the cattle elsewhere for 15 days)

Note:
A breach occurs when one party fails to perform its duty under the contract. A material breach occurs when the breaching party fails to perform, and the non-breaching party fails to receive the substantial benefit of the bargain. If a material breach occurs, the non-breaching party does not have to perform. A minor breach occurs if the breaching party has substantially performed, and the non-breaching party will receive the substantial benefit of the bargain. In a minor breach, the non-breaching party is still obligated to perform, but can still sue for damages.

Here, the landowner committed a minor breach against the farmer. The farmer was still obligated to perform, but still suffered damages for which he can potentially recover (lost rents). Therefore, since landowner only committed a minor breach, the farmer can only seek his expectation damages. The farmer can recover his expectation damages, but no other damages. This question is a common law contract question, that asks what remedies are available for breach.

C is correct. The farmer is only going to be able to seek expectation damages as a remedy. Expectation damages provide that the non-breaching party receives the benefit of the bargain – that is, everything he reasonably expected from the agreement. Here, the farmer reasonably expected to get the property on the 15th and could reasonably expect to get the benefit of all the profit from the land starting on the 15th. Since the property was not delivered until the 30th, the farmer was entitled to all the profit realized by the land from the 15th to the 30th: $2,500 in rent.

The farmer will not be able to recover for having to rent the land to graze his cattle. The farmer expected another benefit from the contract: the ability to graze the cattle he had ordered on the land. These types of damages are called consequential damages. Consequential damages can be recovered on a contract if the damages were the natural and probable consequences of the breach. In order for consequential damages to be recoverable, they have to be "…in the contemplation of the parties at the time the contract was made" or otherwise foreseeable, the original standard from Hadley v. Baxendale under English common law.

Here, the facts state the landowner had no reason to know that the farmer intended to use the land to graze cattle, so it was not a result that was contemplated by both parties in the event of a breach. Therefore, the farmer is entitled to the $2500, his expectation damages, and cannot recover for having to rent space to graze his newly purchased cattle.

A is incorrect. The farmer reserved his rights to claim damages for partial breach, although it was unnecessary. The landowner caused insecurity in the farmer regarding his performance of the contract by failing to deliver the deed and control of the land. Under common law, the farmer is allowed to suspend performance – his payment – until the landowner is ready to perform. There was no need for the farmer to "reserve his rights," although this is a very good hint that the farmer had not waived said rights.

B is incorrect. The market value of Greenacre relative to the contract price is not relevant to determining damages for delay in delivery of possession. The difference in price between the contract price and the estimated value of the land may be important if the seller had not delivered the land. However, in the current question, this answer is a red herring. The difference in value sounds like it might be important, but it is not.

D is incorrect. The $2,000 cost of renting another pasture was not reasonably foreseeable to the landowner as a result of his breach, and therefore, not recoverable as consequential damages. As discussed above, consequential damages are indirect losses that are foreseeable as a result of the breach. In this case, the farmer certainly suffered indirect loss, however, it was not foreseeable to the landowner, per the wording of the question. Therefore, consequential damages are not recoverable.

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8. If the construction company sues the warehouse owner for monetary relief, what is the maximum amount that the construction company is entitled to recover?

Upon encountering the rock formation, the construction company, instead of incurring additional costs to remove it, built the access driveway over the rock with a steep grade down to the highway. The warehouse owner, who was out of town for several days, was unaware of this nonconformity until the driveway had been finished. As built, it is too steep to be used safely by trucks or cars, particularly in the wet or icy weather frequently occurring in the area. It would cost $30,000 to tear out and rebuild the driveway at highway level. As built, the warehouse, including the driveway, has a fair market value of $550,000. The warehouse owner has paid $470,000 to the construction company, but refuses to pay more because of the nonconforming driveway, which the construction company has refused to tear out and rebuild. A construction company contracted with a warehouse owner to construct for $500,000 a warehouse and an access driveway at highway level. Shortly after commencing work on the driveway, which required for the specified level some excavation and removal of surface material, the construction company unexpectedly encountered a large mass of solid rock.

- $30,000, because the fair market value of the warehouse and driveway "as is" exceeds the contract price by $50,000 (more than the cost of correcting the driveway)
- $30,000, because the construction company substantially performed and the cost of correcting the driveway would involve economic waste
- $30,000, minus whatever amount the construction company saved by not building the driveway at the specified level
- **Nothing, because the warehouse owner is entitled to damages for the cost of correcting the driveway**

Note:
When a builder breaches a construction contract by improperly performing, the owner is ordinarily entitled to the cost of fixing the defect. If the builder breaches after performance has begun, the owner will be entitled to the cost of completing the project PLUS reasonable compensation for any delay in the performance. However, if completion would involve "economic waste," damages will be the difference between the value of what the owner would have received if the builder had properly performed and the value of what the owner actually received.

When a builder in a construction contract has substantially, but not completely performed, he may recover as a plaintiff on the contract IF the owner received value from the partial performance. The builder will recover the value of the work done, even if that work does not amount to substantial performance of the contract.

D is correct. The general damages rule for measuring loss to an owner for breach of a construction contract is that the owner is entitled to damages in an amount equivalent to the cost of completing the work as promised (i.e., fixing the problem). Although the fair market value of the constructed warehouse and the defective driveway ($550,000) exceeds the contract price ($500,000), the warehouse owner nonetheless is entitled to the cost of fixing the defect ($30,000) because these damages fairly reflect his loss resulting from the defective construction. The warehouse owner, therefore, was justified paying only $470,000 to the construction company (of the original $500,000 agreed upon) and withholding that $30,000 from the contract price.

A is incorrect. Even though the fair market value of the newly-constructed warehouse and driveway ($550,000) exceeds the original contract price ($500,000) by $50,000, the owner is still entitled to deduct the $30,000 cost to remedy the defect from the contract price, as this will avoid unfairly enriching the breaching builder.

B is incorrect. The warehouse owner can recover damages for breach regardless of whether the construction company substantially performed the contract. The cost of correcting the problem would not involve economic waste, which is where there is an "undue" level of economic waste. That situation is not applicable here.

C is incorrect. The warehouse owner is still entitled to complete damages for the breach of contract, as explained above. This means the owner can withhold the entire $30,000, and the company should receive nothing.

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9. If she sues him for monetary relief, what is the probable measure of her recovery?

Assume that the developer has a cause of action against the lender. A developer obtained a bid of $10,000 to tear down her old building and another bid of $90,000 to replace it with a new structure in which she planned to operate a sporting goods store. Having only limited cash available, the developer asked the lender for a $100,000 loan. After reviewing the plans for the project, the lender in a signed writing promised to lend the developer $100,000 secured by a mortgage on the property and repayable over 10 years in equal monthly installments at 10% annual interest. The developer promptly accepted the demolition bid and the old building was removed, but the lender thereafter refused to make the loan. Despite diligent efforts, the developer was unable to obtain a loan from any other source.

- Expectation damages, measured by the difference between the value of the new building and the old building, less the amount of the proposed loan ($100,000)
- Expectation damages, measured by the estimated profits from operating the proposed sporting goods store for 10 years, less the cost of repaying a $100,000 loan at 10% interest over 10 years
- **Reliance damages, measured by the $10,000 expense of removing the old building, adjusted by the decrease or increase in the market value of the developer's land immediately thereafter**
- Nominal damages only, because both expectation and reliance damages are speculative, and there is no legal or equitable basis for awarding restitution

Note:
Expectation damages aim to put parties in the position they would have been in if the contract had been properly performed, whereas reliance damages are designed to put the performing party in the same economic position they would have been in if the contract had never been formed. If the benefits of a bargain for a party to a contract are unclear or too speculative, reliance damages will be awarded instead of expectation damages. One way to overcome damages that are too speculative or unclear is for the contract to include a liquidated damages clause, but the amount must be reasonable and not punitive.

C is correct. Here, the expectation damages are too speculative, and there is no liquidated damages clause. Although the lender knew that the developer intended to install a sporting goods store in the new building, the earnings of a such a business, and the value of the building after construction (which never occurred), are too speculative to offer expectation damages. The value of the building after construction that has not even begun, and the value of a business in an economy that has not yet occurred, are just too speculative. However, the developer already spent $10,000 to tear down the building. The opportunity to fulfill the contract has been lost. In order to put the developer in the position she would have been in if the contract had not been formed the court will award the $10,000 expense of removing the old building, adjusted by the decrease or increase in the market value of the developer's land immediately thereafter.

A is incorrect. The value of the building that the developer wants to put there is too uncertain and would require a great deal of speculation on behalf of the court to determine those values. When the court finds itself in such a position, it will move from the typical "benefit of the bargain" or expectation damages, to reliance damages. Here, in order to put the developer in the position she would have been in if the contract had not been formed the court will award the $10,000 expense of removing the old building, adjusted by the decrease or increase in the market value of the developer's land immediately thereafter.

B is incorrect. The value of the prospective business that the developer wants to put in the future, unbuilt building, is too uncertain and would require a great deal of speculation on behalf of the court to determine those values. When the court finds itself in such a position, it will move from the typical expectation damages to reliance damages. As explained above, the court will award the $10,000 actually spent to remove the building.

D is incorrect. Here, it is not too speculative to come up with money damages that put the parties in the same position as if the contract had not been formed. The developer's reliance damages can be calculated with relative certainty. This is tricky, though, because literally the building cannot be rebuilt, so putting the parties in the same position as if the contract had never been formed is a legal fiction. Nonetheless, by awarding the $10,000 that the developer already spent, and adjusting the value of the land after the work, either up or down, it is possible to come up with a fair money value that acts as a substitute for the now-destroyed building.

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10. Which of the following is an accurate statement concerning the rights of the parties?

At the time of contracting, the woman told the father to be at the dock at 5 a.m. on May 15. The father and his family, however, did not show up on May 15 until noon. In the meantime, the owner of the boat agreed at 10 a.m. to take a second family out fishing for the rest of the day. The second family happened to come by and inquire about the possibility of such an outing. In view of the late hour, the owner of the boat charged the family $400 and stayed out two hours beyond the customary return time. The father's failure to appear until noon was due to the fact that he had been trying to charter another boat across the bay at a lower rate and had gotten lost after he was unsuccessful in getting such a charter. A woman owns an exceptionally seaworthy boat that she charters for sport fishing at a $500 daily rate. The fee includes the use of the boat with the woman as the captain, and one other crew member, as well as fishing tackle and bait. On May 1, a father agreed with the woman that the father would have the full-day use of the boat on May 15 for himself and his family for $500. The father paid an advance deposit of $200 and signed an agreement that the deposit could be retained by the woman as liquidated damages in the event the father canceled or failed to appear.

- **The woman can retain the $200 paid by the father, because it would be difficult for the woman to establish her actual damages and the sum appears to have been a reasonable forecast in light of anticipated loss of profit from the charter**
- The woman is entitled to retain only $50 (10% of the contract price) and must return $150 to the father
- The woman must return $100 to the father in order to avoid her own unjust enrichment at the father's expense
- The woman must return $100 to the father, because the liquidated-damage clause under the circumstances would operate as a penalty

Note:
The parties to a contract may stipulate what damages are to be paid in the event of a breach, called "liquidated damages." Liquidated damages must be in an amount that is reasonable in view of the actual or anticipated harm caused by the breach. A liquidated damages clause will be enforceable if: (i) damages for contractual breach were difficult to estimate or ascertain at the time the contract was formed; and (ii) the amount agreed upon was a reasonable forecast of compensatory damages in the event of a breach.

Liquidated damages will be found to be reasonable when compared to the compensatory damages incurred as a result of the breach. In other words, the court should compare the anticipated damages at the time the contract was formed against the liquidated damages number itself. If the liquidated damages amount is unreasonable, courts will determine that it amounts to a penalty and will not enforce the provision.

Unjust enrichment is when one party to a contract somehow receives an unfair level of benefit usually by mistake, chance, or the other party's general misfortune.

A is correct. The woman can keep the $200 as a proper amount of liquidated damages. Parties to a contract may include a liquidated damages clause that contains an amount recoverable in the event of a breach. Such a clause will be enforced if: (i) at the time the contract was entered into, the damages recoverable for a potential breach were difficult to determine; and (ii) the amount of damages is found to be reasonable. The reasonableness analysis involves examining the amount of liquidated damages in the contract compared to the prospective or actual compensatory damages from a breach.

Here, the parties agreed that the owner could keep the deposit in the event that the father canceled or failed to appear. This liquidated damages clause is enforceable because, at the time they contracted, it would have been difficult for the owner to determine potential damages from lost profits, and $200 is a reasonable amount given that it was less than half the total fee. Moreover, the second family paid only $400, which means the owner received a total of $600 between the two contracts. This is not unreasonable given that the amount for a daily charter is $500. Thus, the owner received $100 more than she would have received had the father shown up on time under his contract. Although the father could argue that the woman was unjustly enriched to the extent that the deposit exceeded her actual loss by $100, this is not unreasonable in light of the inconvenience of the owner waiting for the father to arrive, the uncertainty around whether a substitute customer would show up, and taking another family instead for two hours beyond the scheduled time frame.

B is incorrect. This answer choice implies that there is some sort of numerical cap or percentage restriction on recoverable liquidated damages. However, at common law, no such rule exists. The test, as stated above, involves an evaluation of the reasonableness of the figure based on the facts in a given case.

C is incorrect. Although the woman received $100 beyond what she would have received in the event that the father had performed under the contract, this does not amount to an unjust enrichment. When the father failed to show up at the specified time, the owner then experienced uncertainty around filling in for the father's family, as well as inconvenience for spending extra time out with the second family for the lesser fee. A $100 difference is therefore reasonable based on the circumstances and does not constitute an unjust enrichment.

D is incorrect. Although a court may find that a liquidated damages clause operates as a penalty where the number is unreasonable, that is not the case here. As explained above, the final $600 total the owner received was not unreasonable based on the facts. She would have received $500 had the father not breached, and the additional $100 reasonable accounts for the additional inconvenience and time expended when substituting with the second family.
