California Bar Examination

Performance Tests and Selected Answers

February 2009

THE STATE BAR OF CALIFORNIA
OFFICE OF ADMISSIONS
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PERFORMANCE TESTS AND SELECTED ANSWERS

FEBRUARY 2009 CALIFORNIA BAR EXAMINATION

This publication contains two performance test from the February 2009 California Bar Examination and two selected answers to each test.

The answers received good grades and were written by applicants who passed the examination. The answers were produced as submitted, except that minor corrections in spelling and punctuation were made for ease in reading. The answers are reproduced here with the consent of the authors.

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FEBRUARY 2009

California Bar Examination

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PANNINE v. DRESLIN, et al.

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.

4. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Morris, McIntosh, Coleman & Quick, PA
East Plantation, Columbia 11113

MEMORANDUM

To: Applicant

From: Gerry Morris

Date: February 24, 2009

Re: **Pannine v. Dreslin, et al.**

We represent Ralph Pannine in a federal court diversity contract action against Rene Dreslin ("Dreslin"), a French citizen, living in London, England, and two foreign corporations, one of Gibraltar and the other of Luxembourg, each controlled by Dreslin. All three defendants have been properly served and have made appearances in the action. We allege that the defendants breached the contract by (1) refusing to pay Pannine after he performed the work he committed to do; and by (2) transferring the asset that was the subject of the contract. We conducted extensive discovery that establishes the absence of meaningful business records and that Dreslin and the two corporations took steps to hide their only asset, four U.S. patents that cover a valuable technology called Perception Processing ("PP"). The actions of the defendants demonstrate that they are likely to sell or otherwise transfer their United States patents to avoid their being subject to post-judgment execution.

We need to convince the court to grant the plaintiff a preliminary injunction to prevent the defendants from selling or transferring the PP patents. If the defendants sell or transfer the patents to someone beyond the jurisdiction of the court, we will lose any chance of satisfying our client's probable judgment. Following our firm's guidelines, which are attached, please draft a persuasive memorandum of points and authorities in support of our client Pannine's motion for a preliminary injunction. Be sure to argue that the record supports a conclusion that each of the elements necessary for a preliminary injunction is clearly present.

Morris, McIntosh, Coleman & Quick, PA
East Plantation, Columbia 11113

MEMORANDUM

TO: Attorneys

RE: Persuasive Briefs and Memoranda

To clarify the expectations of the office and to provide guidance to attorneys, all persuasive briefs or memoranda, such as memoranda of points and authorities to be filed in court, shall conform to the following guidelines.

All of these documents shall contain a Statement of Facts. Select carefully the facts that are pertinent to the legal arguments. The facts must be stated briefly, cogently, and accurately, although emphasis is not improper. The aim of the Statement of Facts is to persuade the tribunal that the facts support our client's position.

Following the Statement of Facts, the Argument should begin. This firm follows the practice of writing carefully crafted subject headings that illustrate the arguments they cover. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or statement of an abstract principle. For example, **IMPROPER**: DEFENDANT HAD SUFFICIENT MINIMUM CONTACTS TO ESTABLISH PERSONAL JURISDICTION. **PROPER**: A RADIO STATION LOCATED IN THE STATE OF FRANKLIN THAT BROADCASTS INTO THE STATE OF COLUMBIA, RECEIVES REVENUE FROM ADVERTISERS LOCATED IN THE STATE OF COLUMBIA, AND HOLDS ITS ANNUAL MEETING IN THE STATE OF COLUMBIA HAS SUFFICIENT MINIMUM CONTACTS TO ALLOW COLUMBIA COURTS TO ASSERT PERSONAL JURISDICTION.

The body of each argument should analyze applicable legal authority and persuasively argue how the facts support our position. Authority supportive of our client's position should be emphasized, but contrary authority should generally be cited, addressed in the argument, and explained or distinguished. Do not reserve arguments for reply or supplemental briefs.

Finally, there should be a short conclusion stating why our client should prevail.

Attorneys should not prepare a table of contents, a table of cases, or the index. These will be prepared after the draft is approved.

Morris, McIntosh, Coleman & Quick, PA
East Plantation, Columbia
(555)711-1985
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF COLUMBIA

RALPH PANNINE,
Plaintiff,

v. CASE NO. 08-61674-Civ-Cohn

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

RENE DRESLIN, B.E.V. HOLDING, S.A., and CARLOS MAGNUS LIMITED,
Defendants.
_____/

Plaintiff Ralph Pannine asks the Court to exercise its inherent equitable powers and issue a preliminary injunction to prevent the sale or other transfer of Defendants Rene Dreslin, B.E.V. Holding, S.A., and Carlos Magnus Limited's (collectively "Defendants") assets, four United States patents that cover the Perception Processing ("PP") technology, in order to ensure that the patents are available to satisfy the Plaintiff's probable judgment for damages.

Plaintiff has reason to believe Defendants will sell or otherwise transfer the patents for the PP technology beyond the jurisdiction of this Court unless the Court grants the relief requested.

The facts that give rise to the Plaintiff's concerns about the disposition of Defendants' assets are set out in the attached Declaration of William Brown. The facts establish that the assets (the patents covering the PP technology) are extremely valuable and the only assets known to the Plaintiff that are owned and controlled by the Defendants.

In this breach of contract action, this Court has the authority to grant the requested equitable relief pursuant to Columbia Business Code § 77.1 et seq.

Dated: February 24, 2009

Respectfully submitted,
Morris, McIntosh, Coleman & Quick, PA

Gerry Morris

by: Gerry Morris, Esq.
Attorneys for Plaintiff

Morris, McIntosh, Coleman & Quick, PA
East Plantation, Columbia
(555)711-1985
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF COLUMBIA

RALPH PANNINE,
Plaintiff,

v.

RENE DRESLIN, B.E.V. HOLDING, S.A., and CARLOS MAGNUS LIMITED,
Defendants.
_____/

CASE NO. 08-61674-Civ-Cohn

DECLARATION OF GERRY MORRIS IN SUPPORT OF PLAINTIFF'S REQUEST FOR EQUITABLE RELIEF

1. I, Gerry Morris, am an attorney for Plaintiff Ralph Pannine ("Plaintiff"), and I make this declaration on my personal knowledge in support of Plaintiff's Motion for a Preliminary Injunction. All of the facts recited herein are supported by the exhibits filed separately as an appendix to this declaration. 2. Defendant Rene Dreslin ("Dreslin") is an individual, and the controlling shareholder, and managing director of Defendants Carlos Magnus Limited, a Gibraltar corporation ("Carlos Magnus"), and B.E.V. Holding, S.A. ("B.E.V. Holding"), a Luxembourg corporation.

3. On November 9, 2004, Plaintiff entered into a written agreement ("Agreement") with the Defendants to provide consulting services in connection with Defendants' desire to sell, license, or otherwise transfer a unique technology known as

Perception Processing ("PP"). The Agreement is one of the exhibits in the appendix. At the time of contracting, the four (4) U.S. patents covering the PP technology were owned by Carlos Magnus. 4. The Agreement provides that Plaintiff would identify and negotiate with potential buyers, licensees, and transferees of the PP technology with the object of effecting a sale, licensing arrangement or other transfer of the technology and that either Defendant Carlos Magnus and/or Defendant Dreslin would, in the aggregate, pay Plaintiff one percent of the total gross proceeds of any deal concluded with Plaintiff's participation, up to US $13.5 billion in gross proceeds. 5. The agreement also provides that Plaintiff is entitled to payment upon the occurrence of any of the following events: (a) the sale of the patents covering the PP technology; (b) the sale of any shares in Carlos Magnus; or (c) the licensing of PP. 6. As conceded by the Defendant Dreslin in his deposition testimony, Plaintiff fully performed his side of the Agreement by identifying and negotiating with potential buyers, licensees and transferees of the PP technology, to the point of obtaining commitments to acquire the PP technology, all within the price range set forth in the Agreement. 7. In his deposition testimony, Defendant Dreslin affirmatively acknowledged that the PP technology is worth many millions, perhaps billions, of dollars on the technology market. 8. Between 2004 and 2007, Defendants, without informing Plaintiff, transferred ownership or other interests, including the right to use the PP technology, to various entities without adequate consideration and with the object of delaying or otherwise impeding the rights of creditors. In all cases, the transferor did not receive any consideration, nor did the transferee pay any consideration for the transfer. Discovery to date has revealed the following: (a) In July 2004, GABFI, Ltd., a Luxembourg corporation, which was owned and controlled by Defendant Dreslin and which, at the time, owned all of the rights to the four US patents covering the PP technology, transferred all of its interest in PP to Carlos Magnus.

(b) In October 2005, Dreslin caused all of the stock in Carlos Magnus to be transferred to B.E.V. Holding.

(c) In October 2008, while this action was pending (this action was filed in August 2008), B.E.V. Holding granted an exclusive license of the PP technology to Tech Development, S.A., yet another Luxembourg corporation owned by Defendant Dreslin.

This licensing agreement recited that it "comes into effect retroactively on January 1, 2008," a date prior to the initiation of this action.

(d) Although the patents themselves remain in the hands of B.E.V. Holding, the effect of the exclusive license granted to Tech Development, S.A. is to transfer the entire economic value of the patents to Tech Development, S.A. because no other person or entity can deal with the PP technology in any way that will produce revenues.

9. Defendants have admitted in various discovery requests by Plaintiff that Defendants have failed to maintain, and are therefore unable to produce, any meaningful business and financial records, even such elemental documents as stock ledgers, lists of stockholders, financial statements, and records relating to the PP technology.

10. It is undisputed that in the past 10 years, Defendants have invested in excess of US $15 million in the development and perfection of the PP technology.

11. The only known or reported asset of Defendants and the transferee entities referred to above is the PP technology represented by four US patents.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 24th day of February, 2009 in East Plantation, Columbia.

Gerry Morris

Gerry Morris

Morris, McIntosh, Coleman & Quick, PA
East Plantation, Columbia
(555)711-1985
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF COLUMBIA

RALPH PANNINE,
Plaintiff,

v.

RENE DRESLIN, B.E.V. HOLDING, S.A., and CARLOS MAGNUS LIMITED,
Defendants.
_____/

CASE NO. 08-61674-Civ-Cohn

PLAINTIFF'S NOTICE OF INTENT TO RAISE ISSUES CONCERNING FOREIGN LAW IN CONJUNCTION WITH MOTION FOR PRELIMINARY INJUNCTION

Under Rule 44.1 Columbia Rules of Civil Procedure, in conjunction with his contemporaneous filing of his Motion for Preliminary Injunction, Plaintiff Ralph Pannine ("Plaintiff") gives notice that he intends to raise issues concerning the law of Gibraltar and Luxembourg regarding the legal requirements of companies established and operated under the laws of each country to maintain books, records, accounts, audits and other business records as well as the general business laws of each country. Such laws are relevant to establish Defendants' transfers of economic rights in the four U.S. patents were fraudulent and that, unless enjoined, Defendants are likely to put the patents and their value out of the Court's reach, making it impossible for Plaintiff eventually to satisfy any judgment.

Plaintiff intends to offer expert testimony, documents and other relevant material or sources to the Court to determine the foreign law at issue.

Dated: February 24, 2009

Respectfully submitted,

Morris, McIntosh, Coleman & Quick, PA

Gerry Morris

by: Gerry Morris, Esq.

Attorneys for Plaintiff

COLUMBIA STATE UNIVERSITY
COLLEGE OF LAW

W.L. JIMETS
MARTIN PRESS PROFESSOR OF INTERNATIONAL LAW

February 17, 2009

Gerry Morris, Esq.
Morris, McIntosh, Coleman & Quick, PA
Columbia Trust Tower – Suite 1100
East Plantation, Columbia 11113

Dear Mr. Morris:

I have reviewed the standard books and treatises in international company law printed in English and available in the United States. I also reviewed the published statutes and regulations dealing with the company law of Gibraltar and Luxembourg (the latter in the original French) and will testify that they support the conclusions provided below.

As to Gibraltar, a British Commonwealth nation, an outside auditor must certify annually that the provisions of the Gibraltar corporation law are being observed. An annual meeting must be held to approve the accounts although the annual meeting does not have to be held in Gibraltar. An annual tax return must be filed with details about the share capital and names of registered directors and shareholders. The annual return also must show the amount called up on each share as well as the total amount of indebtedness with regard to mortgages and other contracts that evidence an obligation in excess of US $25,000. Under Gibraltar law, all companies, with the exception of private United Kingdom companies, must file annual accounts with the Registrar of Companies, the Gibraltar Commissioner of Income Tax, or with any relevant Government department or agency. Insurance companies can send their accounts in confidence to the Financial Secretary.

Gibraltar has adopted the 7th European Union company directive requiring annual publication of a corporation's audited consolidated financial statements in a newspaper of general circulation. Gibraltar also has adopted the 4th European Union company directive applying generally accepted accounting principles to both public and private companies.

In Luxembourg, all companies must maintain regular books of account regarding the operations of the company or branches in accordance with the *Code de Commerce.* All companies must engage, at a minimum, a statutory auditor*.* Under the *Code de Commerce*, the books that must be prepared and made available include: (1) a journal for the entry of the day-to-day transactions; (2) a record for the annual registration of the inventory of assets and liabilities (balance sheet and supporting details, profit and loss account). Intellectual property, including patents, is to be included as an asset.

A Luxembourg company must maintain all books necessary to track incoming and outgoing invoices to permit an evaluation or "control" of the statements relative to the Value Added Tax (VAT). These statements are required to be filed periodically with the government and accompany the quarterly payment of the VAT.

Under Section 209 of the Companies Act of 10 August 1915, as amended in 1929, a Luxembourg holding company is required to provide extensive information in its annual accounts, including a full listing of all assets, including unpaid subscribed capital, formation expenses, fixed assets, current assets, prepaid expenses, and all liabilities, including share equity, provisions for contingencies and expenses, all debts and all deferred income. In addition, holding companies are required to provide, *inter alia,* the details of all commitments and guarantees, and any loans to directors.

Luxembourg Social Security regulations also require that all companies maintain a number of records, including a register for each staff member with information regarding identity, family status, address and date of employment. The Luxembourg Tax Department requires that all companies file an annual tax return, even if the company has not realized a profit. The tax returns must be supported by a copy of the company's trial balance and by a detailed balance sheet and profit and loss account, or income statement, and details of fixed assets and depreciation of such assets, and of all items that are placed on or removed from reserve. In addition, Luxembourg law requires all companies to provide tax authorities with annexes showing all remunerations paid by the company and certain data relative to the beneficiaries.

Finally, both Gibraltar and Luxembourg require all companies to report, on an annual basis, any transaction that would affect the value of any of its assets, including intellectual property. While both countries, as well-known “tax havens,” maintain confidentiality of most if not all of the corporate documents mentioned above, they each require that the companies and their directors retain copies of the filed documents.

I have included an abbreviated résumé for your use in qualifying me as an expert in the event I am called to testify. If you have additional questions, please contact me.

Sincerely,

W. L. Jimets

W.L. Jimets

W.L. JIMETS

EDUCATION

YALE UNIVERSITY, LL.M. (International Law) (1994)
Editor, Yale Journal of International Law; Sterling Honors fellowship

COLUMBIA UNIVERSITY SCHOOL OF LAW, J.D. (1987)
Harlan Fiske Stone Scholar (Honors)

UNIVERSITY OF WASHINGTON**,** B.A. *cum laude* (Political Science) (1982)
Academic Achievement Scholarship

INTERNATIONAL AND LAW PRACTICE

INTERNATIONAL HUMAN RIGHTS LAW GROUP (1992-1993)

Attorney, Bucharest, Romania
Developed and trained a network of attorneys to address human rights and election law violations in Romania.

SIMMER EUROPE (1989-1992)

Corporate Counsel, Amsterdam, The Netherlands
Served as European corporate counsel for international company, handling legal and business issues including: European Union antitrust law, food and drug law, corporate reorganization, intellectual property and labor law. Supervised outside legal counsel in Germany, The Netherlands, Belgium, France, and the United Kingdom.

AVERY AND HILL (1984-1989)

Attorney, Hampton Office
Intensive corporate, real estate, banking and transactional work.
Representative clients: PepsiCo; Fuji Bank; City of Tacoma (bonds); and numerous other corporate and banking clients.

L'UNION JUIVE INTERNATIONALE POUR LA PAIX (1982-1983)

Head Secretariat, Paris, France

LEGAL EDUCATOR

COLUMBIA STATE UNIVERSITY COLLEGE OF LAW (1994-present)

Professor of Law (tenured)

Courses taught: European Union Law; Comparative Law; International Trade and Investment; International Business Transactions; Sales (U.C.C.); International Law; International Practice Clinic; International Human Rights.

UNIVERSITY OF FRANKLIN SCHOOL OF LAW (1994-1997)

Assistant and Associate Professor (untenured)

Courses taught: International Business Transactions: Legal Aspects of Foreign Investment; Advanced International Human Rights; Appellate Advocacy.

YALE UNIVERSITY LAW SCHOOL (1993-1994)

Teaching Fellow

Team-taught International Human Rights

LANGUAGES

Fluent in English, French, Spanish and Romanian

PUBLICATIONS (last three years)

BOOKS and CHAPTERS

THE GREENBOOK: MANUAL OF INTERNATIONAL. AND FOREIGN LEGAL CITATION (Jimets & Goldman, eds., Hein Publishers, publication expected fall, 2010)

ENCYCLOPEDIA OF FOREIGN BUSINESS RECORDS (Elvier Publishing, 2009)

LAW REVIEWS AND OTHER PUBLICATIONS

Introduccion: *Los Pilares Fundamentales Para El Reconociniento de los Derechos Ilumanos y la Democracia: la Reconciliation, el Estado de Derecho y la Paz Nacional e Internacional*, ILSA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 731 (2006) [English Translation: Introduction: *The Fundamental Pillars for the Recognition of Human Rights and Democracy: The Reconciliation, and the State of Right and the National and International Peace*]

Lessons from Kosovo: Towards a Multiple Track System of Human Rights Protection, ILSA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 645 (2007)

The Demise of the Nation-State: Towards a New Meaning of the State Under International Law, BERKELEY JOURNAL OF INT'L LAW 193 (2008)

BAR ADMISSIONS

Columbia, California and the European Union (International Law Practice)

FEBRUARY 2009

California Bar Examination

Performance Test A

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PANNINE v. DRESLIN, et al.

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SELECTED PROVISIONS OF THE COLUMBIA RULES OF CIVIL PROCEDURE

§44.1 Proof of Foreign Law

A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Columbia Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

Comment: Because Columbia and the federal rules expressly permit the court to make a determination of foreign law without being bound by the rules of evidence, the trial court has very broad discretion. For example, the court may consider direct testimony or a declaration from a lawyer who is a member of the bar of the foreign jurisdiction, a law professor familiar with the law of the other jurisdiction, and a declaration of an expert in the other jurisdiction's law (including testimony or a declaration from a non-lawyer). An individual is qualified to testify on the law of a particular jurisdiction if the education or occupation of the witness indicates he has acquired a practical working knowledge of the foreign law. Of course, the ability to understand the language of the foreign country is helpful in qualifying a witness, but the inability to understand the language may not be fatal.

SELECTED PROVISIONS OF THE COLUMBIA BUSINESS CODE

§77 Fraudulent Transfer Act

§77.1 Definitions

As used in §§77.1 – 77.12:

* * *

(2) "Asset" means property of a debtor, but the term does not include:
(a) Property to the extent it is encumbered by a valid lien;
(b) Property to the extent it is generally exempt under nonbankruptcy law; or
(c) An interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant.

(3) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(4) "Creditor" means a person who has a claim.

(5) "Debt" means liability on a claim.

(6) "Debtor" means a person who is liable on a claim.

(7) "Insider" includes:
(a) If the debtor is an individual:

1. A relative of the debtor or of a general partner of the debtor;
2. A partnership in which the debtor is a general partner;
3. A corporation of which the debtor is a director, officer, or person in

control;

(b) If the debtor is a corporation:

1. A director of the debtor;
2. An officer of the debtor;
3. A person in control of the debtor.

(8) "Person" means an individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.

(9) "Property" means anything that may be the subject of ownership.

(10) "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.

* * *

§77.5 Transfers fraudulent as to present and future creditors

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(a) With actual intent to hinder, delay, or defraud any creditor of the debtor; or

(b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

1. Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
2. Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

(2) In determining actual intent under paragraph (1)(a), consideration may be given, among other factors, to whether:

(a) The transfer or obligation was to an insider.

(b) The debtor retained possession or control of the property transferred after the transfer.

(c) The transfer or obligation was undisclosed or concealed.

(d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.

(e) The transfer was of substantially all the debtor's assets.

(f) The debtor absconded.

§77.6 Transfers fraudulent as to present creditors

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(2) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

§77.7 When transfer made or obligation incurred

For the purposes of §§77.1 – 77.12:

(1) A transfer is made:

*** * ***

(b) With respect to an asset that is not real property or that is a fixture, when

the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under §§77.1 – 77.12 that is superior to the interest of the transferee.

§77.8 Remedies of creditors

(1) In an action for relief against a transfer or obligation under §§77.1 – 77.12, a creditor may obtain:

(a) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

(b) An attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with applicable law;

(c) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure:

1. An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

2. Appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

3. Any other relief the circumstances may require.

(2) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

Abraham v. Yoram
Columbia Supreme Court (2007)

Abraham and Yoram are business partners and shareholders in a foreign corporation known as "Nitro Plastic Technologies, Ltd." The corporation maintained a bank account at the Bank of London, on which both Abraham and Yoram were authorized signers. Yoram filed a verified complaint against Abraham alleging that Abraham withdrew $760,000 from the corporate account without Yoram's authorization by forging Yoram's signature on the withdrawal authorization form. Yoram further alleged that Abraham deposited the money in newly-opened bank accounts at NationsBank, N.A. and Washington Mutual Bank. The trial court entered an *ex parte* injunction prohibiting the two banks from allowing withdrawal of those monies.

Abraham appealed the injunction, arguing that the complaint failed to state a cause of action for injunctive relief in that it did not set forth a showing of irreparable harm, a clear legal right, an inadequate remedy at law, or that an injunction would serve the public interest. The Court of Appeals reversed holding that the trial court erred in enjoining Abraham from removing assets because Yoram had an adequate remedy at law in the form of money damages.

The court below reached the correct result based on an abundance of authority. The holding harmonizes with legal precepts that had their beginnings in the fourteenth century. However, at the beginning of a new century, we must reexamine these principles to be certain a trial judge can fashion a remedy that does justice in this and similar cases.

Yoram's complaint alleged that Abraham, "by the artful use of a copy and facsimile machine," caused the "wrongful withdrawal of $760,000" from a business account. The complaint also alleged that there was a "substantial likelihood that Abraham will abscond with whatever monies are not restrained" and "that there is a great likelihood that the Defendant will be a candidate for flight to a foreign jurisdiction." Here and

below, Yoram emphasized that without an injunction, he will be left with an empty "piece of paper entitled ‘judgment’."

Yoram's complaint contained two counts, conversion and unjust enrichment, both actions at law. In a motion for preliminary injunction, Yoram sought to freeze Abraham’s bank accounts. (See Columbia Business Code, §77.5 Fraudulent Transfer Act, for the “badges of fraud” Yoram is required to prove to establish his right to such relief.) Many Columbia cases have held that a court may not grant the equitable relief of an injunction incident to an action at law, such as conversion, because “an action for equitable relief, such as an injunction, cannot be maintained unless it falls within some acknowledged basis of equity jurisprudence.” *Messina v. Cole* (Col. S. Ct., 1931).

Many Columbia cases explain that a party seeking an injunction must demonstrate: 1) irreparable harm; 2) a clear legal right; 3) an inadequate remedy at law; and 4) consideration of the public interest. We have held that the loss of money from a corporate bank account does not constitute irreparable harm because the loss can be compensated for by money damages. The test of the inadequacy of a remedy at law is whether a judgment can be obtained, not whether, once obtained, it will be collectible.

The decisions that form the basis of this rule predate the 1967 Columbia merger of the law and equity courts.[1] With the merger of the law and equity courts, the historical reasons for equity's deference to common law courts and remedies disappeared. The pre-merger Columbia cases reflect the need to preserve the structural distinction between law and equity in the court system. Post-merger cases are hamstrung by the language of the older, binding authority and are therefore prevented from looking behind the irreparable injury rule to consider its logic and justice.

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[1] In 1967, Columbia adopted rules of civil procedure which gave the trial courts jurisdiction to hear cases in which counts at law and counts in equity were pleaded in the same complaint as alternative grounds for relief. Prior to that time Columbia's courts of law were separate from its courts of equity.

To modern lawyers, the choice between legal and equitable remedies is historical and almost wholly dysfunctional. Prior to the merger of the courts, lawyers had to be skilled at drawing the distinction between legal and equitable remedies. The penalty for bringing a case in the wrong court was dismissal or transfer to the correct side of the docket.

Under modern pleading rules, equitable and legal causes of action may travel in the same complaint. Legal scholars have made a compelling argument that a preliminary injunction should be available to a plaintiff in an action at law who demonstrates that a defendant will dissipate or hide assets unless restrained by the court. Until now, to obtain a preliminary injunction, a plaintiff had to prove that: (1) he will suffer irreparable harm unless the status quo is maintained; (2) he has no adequate remedy at law; (3) he has a clear right to the relief requested and a substantial likelihood of success on the merits; and (4) a preliminary injunction will serve the public interest.

As to the irreparable harm/inadequate remedy aspects of the showing necessary for a preliminary injunction, we conclude that when the plaintiff sues to collect money damages and can demonstrate that the defendant is about to dissipate assets to frustrate the potential money judgment, the plaintiff's harm should be considered irreparable. The most compelling reason in favor of entering a preliminary injunction is the need to prevent the judicial process from being rendered futile by defendant's action or refusal to act.

This approach is contrary to our earlier decisions, but, if the plaintiff can prove that the defendant is about to dissipate assets to render herself judgment-proof, it is difficult to see how the potential money judgment will be an adequate remedy for the plaintiff. Decisions such as those rendered earlier by this Court are incorrect to the extent they hold that a money judgment is an adequate remedy regardless of whether the defendant is engaged in conduct designed to render the judgment unenforceable.

If the inadequate remedy portion of the preliminary injunction equation is eliminated, the other prerequisites to such relief would create a workable legal framework for ruling on the issuance of a preliminary injunction that balances the interests of a defendant with those of the plaintiff and the public. To decide whether a preliminary injunction should issue, a trial court must balance the hardships between the plaintiff and the defendant. There are two ways to mitigate the hardship on the defendant. One is to require the plaintiff to post a monetary surety to protect the defendant in the event defendant prevails. The other is that the court can fashion a flexible preliminary injunction that gives the defendant some access to funds. During the pendency of a preliminary injunction, a defendant may seek modification to obtain funds for specified uses.

Finally, a preliminary injunction preventing a defendant from rendering himself judgment-proof serves the public interest in five ways: 1) the injunction protects the integrity of the judicial process; 2) the injunction reduces any incentive the defendant would have to delay the litigation; 3) a preliminary injunction reduces the likelihood that other creditors of the defendant will rush to file claims against her or even force her into involuntary bankruptcy; 4) a preliminary injunction is less likely to affect the rights of innocent third parties who may be in possession of a defendant's property than prejudgment attachment or garnishment; and 5) because of the geographical limitations of attachment, an injunction, which operates *in personam* on a defendant, eliminates the need for duplicative actions in multiple states.

Columbia has tied itself to a rule of law firmly rooted in history, but for which the original justification has evaporated. A reconsideration of the rule compels the conclusion that, assuming the other prerequisites are met, a preliminary injunction may issue where the plaintiff has proven a demonstrable risk that the defendant will transfer, hide, or dissipate her assets, even if the plaintiff's claim is based on an action at law.

The decision of the Court of Appeals is reversed with the thanks of the Court for certifying a question of great public importance. The preliminary injunction issued by the trial court is reinstated.

The Columbia Trust Company v. Foster and Wentz

United States District Court for the Northern District of Columbia (2008)

The Columbia Trust Company, a Columbia corporation, filed suit in the district court against defendant Foster, a citizen of Ohio, alleging breach of contract. At the time of service of process upon Foster, he was the owner of certain real estate in Doral County, Columbia. One week after service, a deed was filed in Doral County conveying title to the property to Wentz.

While the lawsuit was pending and early in the discovery process, Columbia Trust joined Wentz and sought, in the alternative, prejudgment equitable relief: a preliminary injunction against Wentz forbidding further transfer of the property; a writ of attachment against the property itself; and an order setting aside the conveyance as fraudulent. In support of its request for equitable relief, Columbia Trust submitted the declaration of its attorney that included the following claims of fact: Foster was the owner of the property at the time the suit was filed; the telephone listed for the property was and had been for at least 10 years in the name of Foster; the property was valued at more than $1 million; and the transfer of the property to Wentz was without consideration.

Based on this information, the Court ordered immediate depositions of Foster and Wentz on the question of the transfer of the property. Depositions were taken and additional declarations were filed. On the basis of the pleadings, declarations and depositions, the Court has made findings of fact as follows.

Foster and Wentz have been very close friends for more than 35 years. Each was familiar with the business affairs of the other, and Wentz knew of Foster's indebtedness to Columbia Trust. Foster was served in the law action on January 20, 2007. That evening, Foster advised Wentz of the service of process and they fully discussed the matter. Within the next three days, as fast as they could take care of it, the two of them consulted a close friend, a certified public accountant, and then an attorney who prepared a deed conveying the property to Wentz. This deed was recorded one week after Foster was served. Wentz does not remember seeing the deed or receiving it, or

the circumstances regarding its execution. Wentz admits that he gave Foster no money for the deed and that there were no discussions as to money or other consideration. There were no other papers, such as a contract of sale or closing statement, relating to the transaction. Wentz frankly admitted that the purpose of the deed was to avoid the possibility of the property being sold under any judgment in favor of the Columbia Trust Company against Foster. Wentz further testified that he executed a will in which he devised the property to Foster, to the exclusion of his own relatives. Wentz asserted, however, that he held the property in trust for Foster as the beneficiary.

Foster continues to pay the utility bills for the property. The property was leased for seasonal periods and produced income. The income tax returns of Foster, including one filed after the transfer, disclose that he filed such returns as the owner of the property, and reported the income received as his own income, taking deductions for interest, taxes, depreciation and other allowable items. Foster had sole charge of the property, received and deposited the income from it in his bank account, and disbursed funds from his account for the payment of expenses in connection with the property. Foster maintained complete insurance on the property, paid the premiums thereon, and continued to carry this insurance, even after the conveyance of the property to Wentz, and in all of such policies Foster was named as insured. Foster has no other property in Columbia which could be levied upon to satisfy a judgment in favor of Columbia Trust. Foster has continued in full use and possession of the premises in the manner and to the extent as that which existed prior to the conveyance.

Discussion

This diversity case will be decided by applying the law of Columbia. *Hanna v. Plume*, 380 U.S. 460 (1965). The recent decision of the Columbia Supreme Court in *Abraham v. Yoram* (Col. S. Ct., 2007), dramatically altered how trial courts should address requests for equitable relief in the context of an action at law such as Columbia Trust's breach of contract claim. By dispensing with the "adequate remedy at law" bar to addressing equitable remedies in a

contract case, the Supreme Court granted trial courts the power to fashion rational orders that meet the needs of the litigants.

Columbia Trust's request for equitable relief must be measured, therefore, against the standard set out in *Abraham*. To obtain a temporary injunction, Columbia Trust must prove that: (1) it will suffer irreparable harm unless the status quo is maintained; (2) it has a clear legal right to the relief requested and a substantial likelihood of success on the merits; and (3) a temporary injunction will serve the public interest.

The first element of the standard – irreparable harm – requires Columbia Trust to establish that Foster's conveyance of the property to Wentz was fraudulent. Section 77 of the Columbia Business Code is the state's codification of the Uniform Fraudulent Transfer Act and §77.5 sets out actions by a party that will result in a fraudulent conveyance, the so-called "badges of fraud." The Fraudulent Transfer Act expands available remedies. It does not in and of itself confer a cause of action. However, the Act does inform the analysis of whether there will be irreparable harm.

The Court notes that every one of the indicia of fraud set out in the statute are present in the instant case, with the exception of secrecy or concealment, since the conveyance was recorded. Indeed, on the facts we have outlined above, this is a classic case of fraudulent conveyance. It also is noted that the property that is the subject of this equitable action is Foster's only asset of value in Columbia.

As to the second element, the pleadings make it clear that Columbia Trust has presented a *prima facie* case that it is likely to succeed on the merits of the underlying breach of contract claims alleged in the complaint. The well-pleaded facts plus references to the depositions thus far completed make it clear that the parties contracted and that Foster assumed an obligation to compensate Columbia Trust. Although Foster has asserted affirmative defenses, the Court finds Columbia Trust has met its burden, according to Columbia law, at this stage of the proceedings.

Finally, a temporary injunction certainly will serve the public interest. As the Court noted in *Abraham*, "a preliminary injunction preventing a defendant from rendering himself judgment-proof serves the public interest" in several ways. Here, an injunction will protect the integrity of the judicial process by preventing Foster and Wentz from conveying the property to innocent third parties who would become unnecessarily embroiled in this dispute; an injunction will reduce any incentive defendants would have to delay the litigation; and an injunction will reduce the likelihood that other creditors of Foster will rush to file claims against him or even force him into involuntary bankruptcy.

Therefore, Foster and Wentz are temporarily enjoined from further conveying the property in question and are mandated to preserve the value of the property. The Court will determine at the conclusion of the litigation the necessity of setting aside the conveyance and making the property available to satisfy any judgment in favor of Columbia Trust.

SO ORDERED.

Answer 1 to Performance Test A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF COLUMBIA

RALPH PANNINE
V.
RENE DRESLIN, BEV HOLDING, SA, AND CARLOS MAGNUS, LIMITED

MEMORANDUM OF POINTS AND AUTHOIRITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

STATEMENT OF FACTS

On November 9, 2004, Plaintiff entered into a written agreement ("Agreement") with the Defendants to provide consulting services for identifying and negotiating with potential buyers, licensees and transferees of defendants' patents in Perception Processing ("PP") in return for one percent of the total gross proceeds of any deal procured by plaintiffs, or any sale or licenses in the patents of PP or sale of shares in Defendant's corporation, Carlos Magnus, Limited. Plaintiff fully performed their side of the agreement by identifying and negotiating with potential buyers, licensees, and transferees of defendant's patents in PP. Also, after the agreement was in place, defendants have transferred ownership or other interests of the PP patents to various entities without consideration, and have transferred all of the shares of Carlos Magnus, Limited to BEV Holding, without notifying plaintiff, or providing compensation in accordance with the agreement in any form.

This action was filed in August 2008, and the parties have conducted discovery in preparation of the trial date. Plaintiffs have discovered that, in October 2008, while the action was pending, defendant BEV Holding granted an exclusive license of PP technology to Tech Development, SA, another corporation owned by defendant Dreslin.

This agreement recited that it "comes into effect retroactively on January 1, 2008," which is a date prior to the initiation of this action. This agreement transfers the entire economic value of the patents to Tech Development because no other person or entity can deal with the PP technology represented by four U.S. patents. This transfer was done after the defendants were served with notices of the action, and have all made appearances in the action.

Furthermore, during discovery, defendants have refused to produce any meaningful business or financial records, such as stock ledgers, lists of shareholders, financial statements, and other records relating to PP technology for [the] reason that they failed to maintain such records. This is despite the fact that the Defendants have spent 10 years and in excess of U.S. $5million in the development of PP technology.

ARGUMENT

A preliminary injunction will be used when a plaintiff can prove that: (1) he will suffer irreparable harm unless the status quo is maintained; (2) he has a clear right to the relief requested and a substantial likelihood of success on the merits, and (3) a preliminary injunction will serve the public interest. Columbia Trust Co. The following discussion and the facts on the record support a conclusion that each of the elements necessary for a preliminary injunction is clearly present.

I. PLAINTIFF WILL SUFFER IRREPARABLE HARM BECAUSE DEFENDANTS' ONLY ASSETS ARE THE PP PATENTS WHICH WERE FRAUDULENTLY TRANSFERRED TO FRUSTRATE A POTENTIAL JUDGMENT AGAINST THEM.

The Columbia Supreme Court has held that irreparable harm is shown when plaintiff can show that the defendant is about to dissipate assets to frustrate a potential money judgment. The court states that the most compelling reason in favor of entering a preliminary injunction is the need to prevent the judicial process from being rendered

futile by defendant's action or refusal to act. Abraham, Plaintiff must establish that defendant's conveyance of property was fraudulent. Columbia Trust Co.

Section 77 of the Columbia Business Code is the state's codification of the Uniform Fraudulent Transfer Act, and section 77.5 sets out actions by a party that will result in a fraudulent conveyance. Columbia Trust Co. Under that section, a transfer made is fraudulent if the debtor made the transfer: (a) with the actual intent to hinder, delay, or defraud any creditor of the debtor; or (b) without receiving a reasonably equivalent value in exchange for the transfer and the debtor was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were reasonably small in relation to the business or transaction; or intended to incur or believed or reasonably should have believed that they would incur debts beyond their ability to pay as they became due.

A. DEFENDANT TRANSFERRED THE PATENTS WITH ACTUAL INTENT TO HINDER, DELAY OR DEFRAUD PLAINTIFF BECAUSE THE TRANSFER MEETS ALL OF THE FACTORS UNDER SECTION 77.5

In detriment actual intent to hinder, delay or defraud, section 77.5 lists factors for the courts to consider: (a) the transfer of obligation was to an insider, (b) the debtor retained possession or control of the property transferred after the transfer, (c) the transfer or obligation was undisclosed or concealed, (d) before the transfer was made the debtor had been sued or threatened with suit, (e) the transfer was of substantially all the debtor's assets, and (f) the debtor absconded. The debtor is a person, which includes individual, and corporations and other commercial entities, who is liable on a claim, which is a right to payment whether or not the right is reduced to a judgment. Here, the debtors are Defendants, and the claim is the pending breach of contract suit.

1. The transfer or obligation was to an insider.

Under section 77, an "insider" includes, if the debtor is an individual, a corporation of which the debtor is a director, officer, or person in control; and if the debtor is a corporation, a director, an officer, or a person in control of the corporation.

In our case, in October 2005, Defendant Dreslin, who, controlling shareholder and managing director of Carlos Magnus, caused all of the stock in Carlos Magnus to be transferred to BEV Holding. BEV Holding then transferred an exclusive license of PP Patents to Tech Development, a corporation owned by Defendant Dreslin. Thus, because the transfer involved an exclusive license to the patents, where no other person or entity can deal with the technology, and was a corporation owed by Dreslin, this transfer was from Dreslin, back to Dreslin, who is considered an insider.

2. The debtor retained possession or control of the property transferred after the transfer.

Defendant Dreslin, who is a debtor because of plaintiff's claim against him in the present suit, retained control of the patents because he transferred all of the patent interests to Carlos Magnus, Limited, who then transferred all of their interest to BEV Holding, who then transferred an exclusive license of the patents back to Dreslin by way of granting the license to Tech Development. Because Dreslin retains exclusive use and value of the patents, this factor is met.

3. The transfer was undisclosed or concealed.

All of the transferred that occurred between 2005 and 2008 were made by defendants without informing plaintiff. Defendant Dreslin and Carlos Magnus had an obligation to notify plaintiff upon any sale in the patents, sale in shares of Carlos Magnus, or any licensing of the patents after November 9, 2004, when the defendants entered into a

written agreement with plaintiff. Because defendants did not notify plaintiff of the transfers made between 2004 and 2007, they are considered undisclosed.

Also, the transfer made by BEV Holding to Dreslin, the agreement recited that "it comes into effect retroactively on January 1, 2008." This is a date prior to when this action was commenced. This shows that Dreslin acted in bad faith in order to conceal and cover up the extent of their assets which can be reached by judgment of plaintiff's claim.

In addition, the defendants have admitted in various discovery requests by plaintiff that they have failed to maintain and [are] unable to produce significant business and financial records, including stock ledgers, lists of stockholders, financial statements, and records relating to the patents. A reasonably prudent corporation or individual, with interest in valuable patent technology, would keep records of such elemental documents in relation to the technology. In fact, the defendants have acknowledged that the PP technology is worth many millions, perhaps billions, of dollars on the technology market.

Under Columbia Rule of Civil Procedure section 44.1, the court may consider any relevant material of source including testimony, whether or not admissible under the Columbia Rules of Evidence, in determining foreign law. This gives the court broad discretion, and the court may consider direct testimony from a lawyer who is a member of the foreign jurisdiction, or a law professor familiar with the law of the jurisdiction, or a declaration of an expert in the other jurisdiction's law.

Plaintiffs have presented a declaration from Gerry Morris, [referencing] a current professor of law teaching European Union Law, International Business Transactions, and International Law. He is familiar with the laws of Gibraltar and Luxembourg, and is fluent in their respective languages.

Gibraltar law requires that all corporations must file an annual tax return with the share capital and names of registered shareholders. Corporations must publish annual

audited financial statements. Luxembourg law requires all companies maintain regular books of account regarding the operations of the company, and must engage at minimum a statutory auditor. Books [that] must be prepared and made available include a journal of day-to-day transactions, annual records of assets and liabilities, including any patents.

Not having any records on file is a clear violation of both Gibraltar and Luxembourg laws. This further shows that defendants acted in bad faith in order to conceal their transfers and assets.

4. Before the transfer was made the debtor had been sued or threatened with suit.

As above, the transfer by Dreslin of the patents from Carlos Magnus to BEV Holding, then back to Dreslin by way of Tech Development were all made between 2005 and 2008, and made after entering into the agreement with plaintiff, and after plaintiff performed their side of the bargain. The transfer made from BEV to Tech Development was made after the suit was filed. Thus, Dreslin knew that he had to pay plaintiff after he performed or would be threatened with breach of the agreement. And after the suit was filed, BEV Holding transferred the rights to the patents back to Dreslin. Thus, this factor is met.

5. The transfer was of substantially all the debtor's assets.

According to plaintiff's discovery up to this point, the only known or reported asset of Defendants is the PP technology represented by four U.S. patents. Thus, Dreslin's transfer of his interests back and forth [and] back to him was actually all of his assets.

Because five of the factors are met, this shows that the defendants made the transfers fraudulently, and thus plaintiff meets the element of irreparable injury.

B. DEFENDANT'S TRANSFER WAS FRAUDULENT BECAUSE DEFENDANT TRANSFERRED THE PATENTS WITHOUT RECEIVING REASONABLY EQUIVALENT VALUE IN EXCHANGE AND SHOULD HAVE KNOWN THAT THEY WOULD INCUR JUDGMENTS BEYOND THEIR ABILITY TO PAY.

Even if the factors are not sufficiently met, plaintiff can show that defendants' remaining assets after transfer were unreasonably small in relation to the debts they would incur. As mentioned above, plaintiffs were entitled to compensation under the agreement with defendants, as they performed, or due to the conduct of defendants. Plaintiff was entitled to compensation after identifying and negotiating with potential buyers, licensees, and transferees, as well as whenever defendants sold or licensed the patents or sold shares in Carlos Magnus. Defendants did cause their interests in the patents to be transferred without any evidence of compensation. Also, even if there was some form of compensation in exchange for the patents, the defendants acknowledged that the technology is worth many millions, even billions, of dollars. There is no evidence that Defendants hold any assets other than the patents themselves; thus, there is no evidence of equivalent value. Because the only assets reported or known of the defendants are the patents themselves, transferring their interest in the patients via outright sale or selling all of the shares in Carlos Magnus, who held the rights to the patents, amounted to leaving essentially no assets to compensate plaintiff or any other creditor as debts become due.

Because both options can be satisfied, plaintiff can show irreparable injury in regards to the transfer of defendants' patents.

II. PLAINTIFF HAS A CLEAR RIGHT TO RELIEF REQUESTED AND A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS BECAUSE HE HAS PRESENTED A PRIMA FACIE CASE OF BREACH OF CONTRACT.

The Court in Columbia Trust Co. held that plaintiff must show in their pleadings that the facts plus references to the depositions thus far completed make it clear that the parties contracted and that defendants assumed an obligation to compensate plaintiff.

In our case, Plaintiff's pleading includes facts that there was a written agreement, and plaintiff has fully performed their part of the agreement. Plaintiff fully performed their side of the agreement by identifying and negotiating with potential buyers, licensees, and transferees of defendants' patents in PP. Also, after the agreement was in place, defendants have transferred ownership or other interests of the PP patents to various entities without consideration, and have transferred all of the shares of Carlos Magnus Limited to BEV Holding, without notifying plaintiff, or providing compensation in accordance with the agreement in any form. The agreement provided that the defendants shall compensate plaintiff when the plaintiff has identified and negotiated with potential buyers, licensees, and transferees of defendants' patents, and defendants will provide further compensation whenever there is a transfer of ownership or other interests in their patents or in Carlos Magnus Limited.

Defendants have conceded in their depositions that plaintiff fully performed his side of the agreement in accordance with the terms set forth in Agreement. Discovery has revealed that defendants, in fact, have transferred their patents and interest in Carlos Magnus to BEV Holding in October 2005, after the agreement was in place.

Thus, because there was a valid written contract, full performance, and conduct that gave rise to compensation due to plaintiff, there are sufficient facts in the pleadings and depositions thus far completed to show a prima facie case of breach of contract.

III. A PRELIMINARY INJUNCTION WILL SERVE THE PUBLIC INTEREST BECAUSE IT PREVENTS DEFENDANT FROM RENDERING HIMSELF JUDGMENT PROOF.

The court in Abraham noted that a preliminary injunction preventing a defendant from rendering himself judgment proof serves the public interest in several ways.

A) The injunction protects the integrity of the judicial process.

Injunction will protect the integrity of the judicial process by preventing defendants from conveying the property, which is their only known asset, to innocent third parties who would become unnecessarily embroiled in this dispute. As shown, the defendants have made several transfers, including a transfer after the suit was filed, and are likely to transfer the interests of the patents again. Currently, the patent interests are being held by BEV Holding and Tech, which is owned by Dreslin. These are parties in the current suit. This injunction would prevent additional transfers, and prevent other innocent third parties from being joined because of their interest in acquiring the valuable technology.

B) A preliminary injunction reduces any incentive the defendant would have to delay the litigation.

This injunction would decrease the chance that defendants would delay the litigation, because the only valuable assets they have are in the patents. If the patents are rendered nontransferable, they would have no choice [other] than to complete the litigation in order to receive any value from the patents.

C) A preliminary injunction reduces the likelihood that other creditors of the defendant will rush to file claims against him or force him into involuntary bankruptcy.

If the patents are enjoined from transfers, other creditors of defendants would not have to rush to file claims before the defendants can render the value of the patents unattachable by creditors.

D) Because of the geographical limitations or attachment, an injunction, which operates in personam on a defendant, eliminates the need for duplicative actions in multiple states.

The defendants are in other countries, and because the attachment would serve to enjoin the defendants from transferring the patents in other countries, this would prevent innocent third parties and the plaintiff from suing defendants over and over in different jurisdictions.

IV. PRELIMINARY INJUNCTION SHOULD BE ISSUED BECAUSE PLAINTIFF'S AND PUBLIC'S INTERESTS OUTWEIGH DEFENDANTS' INTEREST.

To decide whether the preliminary injunction should issue, a court must balance the hardships between the plaintiff and the public, and those of the defendants. There are two ways to mitigate the hardship on the defendants. As shown above, plaintiff will suffer irreparable harm, and the public's interests are served. Even if the defendants claim significant harm on their part, a court can mitigate the hardship on the defendants. A court can require the plaintiff to post a monetary surety to protect the defendants in the event defendants prevail. Also, the court can fashion a flexible preliminary injunction that gives the defendants some access to funds, where the defendants can seek modification of the injunction to obtain funds for specified uses.

V. CONCLUSION

Because all of the elements necessary for a preliminary injunction are clearly present, and the balance of hardships weigh in plaintiff's and public's favor, the court should grant plaintiff's motion for preliminary injunction.

Answer 2 to Performance Test A

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

The Agreement at Issue

On November 9, 2004, Plaintiff entered into a written agreement (the "Agreement") with Defendants to provide consulting services in connection with Defendants' desire to sell, license, or otherwise transfer a unique technology known as Perception Processing ("PP"). See Declaration of Gerry Morris. At the time of contracting, the four (4) U.S. patents covering the PP technology were owned by Carlos Magnus, Limited, a Gibraltar corporation ("Carlos Magnus"). Id.

The Agreement provides that Plaintiff would identify and negotiate with potential buyers, licensees, and transferees of the PP technology, with the object of effecting a sale, licensing arrangement or other transfer of the technology and that either Defendant Carlos Magnus and/or Defendant Rene Dreslin ("Dreslin") would pay Plaintiff one percent of the total gross proceeds of any deal concluded with Plaintiff's participation, up to U.S. $13.5 billion in gross proceeds. Id.

The Agreement also provides that Plaintiff is entitled to payment upon the occurrence of any of the following events:

(a) the sale of the patents covering the PP technology;

(b) the sale of any shares in Carlos Magnus; or

(c) the licensing of PP.

Id.

Undisputed Deposition Testimony

In his deposition testimony, Defendant Dreslin conceded that Plaintiff fully performed his side of the Agreement by identifying and negotiating with potential buyers, licensees and transferees of the PP technology. Id. Defendant Dreslin admitted that Plaintiff fully performed, to the point of obtaining commitments to acquire the PP technology, all within the price range set forth in the Agreement. Id.

Defendant Dreslin also affirmatively acknowledged that the PP technology is worth many millions, if not billions, of dollars on the technology market. Id.

Fraudulent Transfer of PP Technology

Between 2004 and 2007, Defendants, without informing Plaintiff, transferred ownership or other interests, including the right to use the PP technology, to various entities without adequate consideration and with the obvious object of delaying or otherwise impeding Plaintiff and other creditors' rights. Id. Tellingly, in all cases, the transferor did not receive any consideration nor did the transferee pay any consideration for the transfer. Id. Specifically, the following transactions occurred and are not disputed:

(a) In July 2004, GABFI, Ltd., a Luxembourg corporation which was owned and controlled by Defendant Dreslin, owned all of the rights to the four U.S. patents covering the PP technology. GABFI transferred all of its interest in PP to Defendant Carlos Magnus.

(b) In October 2005, Defendant Dreslin caused all of the stock in Defendant Carlos Magnus to be transferred to Defendant B.E.V. Holding.

(c) In October 2008, while this action was pending (this action was filed in August 2008), Defendant B.E.V. Holding granted an exclusive license of the PP technology to Tech Development, S.A., yet another Luxembourg corporation owned by

Defendant Dreslin. Ironically, the licensing agreement recited that it "comes into effect retroactively on January 1, 2008," a date prior to the initiation of this action. The effect of the exclusive license granted to Tech Development is to transfer the entire economic value of the patents to Tech Development, since no other person or entity will be able to deal with the PP technology in any way that will produce revenues given the exclusive nature of the agreement. Id.

Defendants' Failure to Maintain/Produce any Business Records

Plaintiff has made various discovery requests to Defendant, requesting Defendants' business and financial records. Id. Defendants have produced nothing, and have admitted that they have failed to maintain, and are therefore unable to produce, any meaningful business and financial records, including such elemental documents as stock ledgers, lists of stockholders, financial statements, and records relating to the PP technology. Id.

Although Defendants have invested in excess of U.S. $15 million in the development and perfection of the PP technology, their and their transferee entities' only known or reported asset is the PP technology, represented by the four U.S. patents.

II. ARGUMENT

To obtain preliminary injunction, a plaintiff must prove (1) he will suffer irreparable harm unless the status quo is maintained; (2) he has a clear right to the relief requested and a substantial likelihood of success on the merits; and (3) a preliminary injunction will serve the public interest. *See* Abraham v. Yoram, Columbia Supreme Court (2007). Previously a plaintiff was also required to prove that he had no adequate remedy at law; however, that requirement was wholly dispensed by the Supreme Court's recent holding in Abraham.

As set forth fully below:

A. Plaintiff will Suffer Irreparable Harm Unless the Status Quo is Maintained Because Plaintiff Can Demonstrate That Defendants Fraudulently Transferred the PP Technology With the Intent to Defraud Plaintiff and Defendants' Actions Consist of all the "Badges of Fraud."

In order to establish irreparable harm, the Plaintiff must establish that a conveyance was fraudulent. *Columbia Trust*. Further, when a plaintiff sues to collect money damages and can demonstrate that the defendant is about to dissipate assets to frustrate the potential money judgment, the plaintiff's harm should be considered irreparable. *Abraham.*

Fraudulent Conveyance

Section 77.5 of the Columbia Business Code sets out the actions by a party that will result in a fraudulent conveyance, otherwise commonly referred to as the "badges of fraud." Also, see Columbian Trust v. Foster and Wentz, USDC, DC (2008). Under this section, a transfer made by a debtor is fraudulent as to a creditor if the debtor made the transfer (a) with actual intent to hinder, delay or defraud any creditor of the debtor; or (b) without receiving a reasonably equivalent value in exchange for the transfer, the debtor was engaged (or about to engage) in a business.

In determining the intent required under this provision, the court should consider the following, commonly referred to as the "badges of fraud":

(a) whether the transfer of obligation was to an insider;

(b) whether the debtor retained possession or control of the property transferred after the transfer;

(c) whether the transfer or obligation was undisclosed or concealed;

(d) whether before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(e) whether the transfer was of substantially all the debtor's assets; and

(f) whether the debtor absconded.

A "transfer" is defined as "every mode, direct or indirect, absolute or conditional …of disposing of or parting with an asset or an interest in an asset…." See 77.1. With respect to an asset that is not real property, a transfer occurs when a transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under the provisions of the Fraudulent Transfer Act that is superior to the interest of the transferee. See 77.7.

Plaintiff has established that the transfer of the PP technology to Defendant Carlos Magnus, which then transferred its stock to Defendant B.E.V., which then granted an exclusive license to Tech Development, was fraudulent.

Inside Transaction

First, it is quite likely that all of the transfers were to insiders. GABFI, a Luxembourg corporation and the original owner of the U.S. patents, was owned and controlled by Defendant Dreslin. Dreslin, the managing director and controlling shareholder of Carlos Magnus, caused all of the stock of Carlos Magnus to be transferred to Defendant BEV Holding, a Luxembourg corporation, which granted the exclusivity to Tech Development, a Luxembourg corporation.

GABFI, BEV Holdings and Tech Development are all Luxembourg corporations. As such, they are required to maintain regular books and records.

Carlos Magnus is a Gibraltar corporation, and must also file specific documents, as well as include the share capital and names of registered directors and shareholders. See Letter from Professor W. L. Jimets. The Court is entitled to consider this fact based

upon Professor Jimet's letter and Plaintiffs Notice of Intent to Raise Issues Concerning Foreign Law, per CRCP 44.1. Mr. Jimet's résumé (attached to his letter) demonstrates his extensive qualifications and knowledge of the foreign law at issue.

Defendants' undisputed refusal to keep these records and provide any of them (to the extent that they exist) can only logically be construed as an admission that these entities are essentially all one in the same and their transactions are inside transactions.

Retaining Control of the Property

Defendants are liable on Plaintiff's claim for breach of contract. Defendant BEV has retained control of the patents; however, the transfer to Tech Development transferred the entire economic value of the patents to Tech Development. It has been impossible to obtain information regarding the ownership and control of Tech Development given the failure to maintain business records; however, based upon the previous transfers amongst defendants, it is presumed that Tech Development is controlled by Defendants and therefore Defendants have retained control of the property after the exclusivity license.

Undisclosed/Concealed

The series of transactions were not disclosed as they were required to be in accordance with both Luxembourg and Gibraltar laws. The laws of both countries require the companies to report, on an annual basis, any transaction that would affect the value of any of its assets, including intellectual property. Such corporate documents must also be retained by the directors of the company. See Letter from W.L. Jimets. Certainly, GABFI's transfer of its interest in PP to Defendant Carlos, a transaction worth several million dollars (if not billions) is required to be reported. Similarly, the stock transfer by Carlos Magnus to BEV is required to be reported, as well as BEV's license agreement with Tech Development. All of these transactions had a substantial effect on the value

of each corporation's assets, and were required to be disclosed, but were instead concealed, further portraying Defendants' fraudulent intent.

There is further concealment given that the licensing agreement was "retroactive" as of January 1, 2008, the date of the initiation of this action.

Transfer Made After Suit Filed

The most critical transfer made was the transfer that occurred when BEV granted the exclusive license of the PP technology to Tech Development. This constituted a transfer because it indirectly disposed of the asset of the patent by rendering it worthless given Tech Development's exclusivity. Tech Development is not a party to this action, and Defendants, as creditors, will not be able to perfect on the Agreement because it's possible that Tech Development is a BFP. The transfer was made in October of 2008, but stated that it would be retroactive to January 1, 2008, prior to the date of the initiation of this action. This portrays a clear intent to circumvent the rules regarding fraudulent conveyance.

Transfer was all of Defendants' Assets

As discussed at length above, per Gibraltar and Luxemburg law, Defendants are required to report their assets. The only reported asset of Defendants and the transferee entities is the PP technology, represented by the four U.S. patents. Therefore, the transfer was substantially all of the debtor Defendants' assets.

Whether the Debtor Has Absconded

While there is not evidence at this point that Defendants have absconded, they are all foreign defendants, and although they have been properly served, it would not be difficult for them to abscond, in the event they have not done so already.

Similar facts in Columbia Trust, where the court noted that "every one of the indicia of fraud set out in the statute are present in the instant case, with the exception of secrecy or concealment, since the conveyance was recorded," this is a case of classic fraud. The property that is the subject of this equitable action is Defendants' only known asset. Based upon the foregoing, Plaintiff has clearly established that a conveyance was fraudulent, thus satisfying the irreparable harm element to obtain a preliminary injunction. Further, Plaintiff is suing for money damages and has demonstrated, via Defendants' conduct set forth above, that Defendants are about to dissipate assets to frustrate the potential judgment, thereby making Plaintiff's harm irreparable.

Fraudulent Conveyance Under 77.6

Additionally, Section 77.6 of the Columbia Business Code provides that a transfer made is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or became insolvent as a result of the transfer. Under each of the transactions at issue that occurred in connection with Defendants' fraudulent conveyance, no consideration was ever paid. Plaintiff is a creditor of Defendants, and Defendants made the transfer to Tech Development after suit commenced. These facts alone establish a fraudulent conveyance, in addition to the fraudulent conveyance factors set forth above.

Dissipation of Assets

When a plaintiff sues to collect money damages and can demonstrate that the defendant is about to dissipate assets to frustrate the potential money judgment, the plaintiff's harm should be considered irreparable. *Abraham*. As set forth in detail in the factors above, Defendants have no qualms about dissipating their assets. Despite the value of the PP technology, Defendants have transferred, via directly or directly, the assets not once, not twice, not three, but four times, the last transfer rendering the PP

technology such that no other person or entity can deal with the PP technology in any way that will produce revenues. Plaintiff engaged in the last transfer after the commencement of the instant litigation, which evidences that it did so in order to frustrate a potential money judgment in favor of Plaintiff. Given the foregoing, Plaintiff's harm should be considered irreparable.

B. Plaintiff Has a Clear Legal Right to the Relief Requested and a Substantial Likelihood of Success on the Merits Because He has Established a Prima Facie Case for Breach of Contract Based on Defendants' Own Admission That Plaintiff Fully Performed and the Fact That Defendants Transferred the Asset That Was the Subject of the Agreement.

As to the second element, the pleadings make it clear that Plaintiff has presented a prima facie case that he is likely to succeed on the merits of the underlying breach of contract claims alleged in the complaint. Plaintiff has alleged that Defendants breached the Agreement by (1) refusing to pay Plaintiff after he performed the work he committed to do; and (2) transferring the asset that was the subject of the Agreement.

Failing to Pay

As admitted by Defendants, Plaintiff fully performed his side of the Agreement by identifying and negotiating with potential buyers, licensees and transferees of the PP technology. According to Defendant Dreslin's own deposition testimony, Plaintiff's full performance allowed Defendants to obtain commitments to acquire the PP technology, all within the price range set forth in the Agreement. Thus, the well-plead facts and uncontroverted testimony establish that Defendants breach[ed] the Agreement by refusing to pay Plaintiff after he fully performed.

Transferring the Asset That is the Subject of the Agreement

As set forth in detail above, Defendants transferred the asset that was the subject of the Agreement -- the PP technology. Although Defendants did not transfer the patents themselves to a non-party defendant, their exclusive license to Tech Development rendered it impossible for any other person or entity to deal with the PP technology in any way that will produce revenues. This act constituted a transfer under the business code because BEV essentially disposed of the asset with the exclusive licensing agreement. This transfer makes it impossible for Plaintiff to further perform per the Agreement, and constitutes a breach by Defendants.

Despite any affirmative defenses that Defendants have asserted, the Court should find that Plaintiff has met his burden, according to Columbia law, at this state of the proceedings.

C. The Court's Granting of a Temporary Injunction Will Serve the Public Interest by Protecting the Integrity of the Judicial Process, Reducing Delay, Protecting Defendants, Protecting Third Parties, and Eliminating the Need for Duplicate Actions.

A preliminary injunction preventing a defendant from rendering himself judgment-proof serves the public interest in several ways. See Abraham; also see Columbia Trust. Specifically, (1) the injunction protects the integrity of the judicial process; (2) the injunction reduces any incentive the defendant would have to delay the litigation; (3) a preliminary injunction reduces the likelihood that other creditors of the defendant will rush to file claims against it or force it into involuntary bankruptcy; (4) a preliminary injunction is less likely to affect the rights of innocent third parties who may be in possession of a defendant's property than prejudgment attachment or garnishment; and (5) because of the geographical limitations of attachment, and injunction, which operates in personam on a defendant, eliminates the need for duplicative actions in multiple states. *See Abraham and Columbia Trust.*

Identical to Columbia Trust, here an injunction will protect the integrity of the judicial process by preventing Defendants from conveying the patents to innocent third parties who would become unnecessarily embroiled in this dispute. A third-party—Tech Development—has already unnecessarily become embroiled in the dispute given the exclusivity agreement. If the patents are conveyed to innocent third parties who could likely be BFP's, they will also become entrenched in this already complicated dispute.

The injunction will reduce any incentive Defendants have to delay the litigation, as the patents are their only known asset and they have spent in excess of $15 million in developing and perfecting them. If they are prohibited from transferring them, they will have an incentive to participate diligently in the litigation and resolve the dispute in order to move forward.

Knowing that the patents are safe and secure given the injunction order, other creditors of Defendants will not be so inclined to rush to file claims against Defendants. Such creditors know that there is value in the PP technology, and provided the patents are safe, the creditors can wait until the appropriate time to seek payment.

It is unknown at this time whether Tech Development is an insider and deserves any type of protection, but to the extent that it does, entering a preliminary injunction order halting the transfer of the patents protects Tech Development pending resolution of these matters in a better way than ordering attachment of the patents or possibly a constructive trust over the licensing agreement.

Last, it is undisputed that Defendants are all foreign residents. Although the patents are U.S. patents, they currently belong to foreign corporations, and an attachment action would require the need for duplicative actions in foreign countries, an extensive and costly process.

Therefore, all of the public interests as delineated by the Columbia Supreme Court will be served if the Court grants Plaintiff's request for a preliminary injunction.

III. CONCLUSION

The record amply supports that each of the elements necessary for a preliminary injunction is clearly present. Plaintiff has demonstrated, given the undisputed and relevant facts, that he will suffer irreparable harm unless the status quo is maintained because Defendants have engaged in fraudulent transfers and are about to dissipate with the patents unless restrained by the court. Plaintiff has demonstrated that he has a clear right to the relief requested and a substantial likelihood of success on the merits. Lastly, Plaintiff has explained how a preliminary injunction will substantially serve the public interest. Therefore, Plaintiff respectfully requests that the Court grant his request for a Preliminary Injunction.

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PHOENIX TOWERS v. PORTER
INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
5. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
6. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

FOLGER & DeWINE, LLP
648 Mercantile Exchange, 16th Floor
Rushmore, Columbia 99999
(555) 876-5432

To: Applicant

From: George Randall

Date: February 26, 2009

Re: **Phoenix Towers v. Porter**

Our clients, Richard and Cathy Porter, who recently had a baby, are long-time tenants at the Phoenix Towers. Phoenix Towers has a rule that limits occupancy of one-bedroom units to two people. Last week, they received a thirty-day notice of termination of tenancy, and the landlord said they would be served with an unlawful detainer action if they did not move out. The question is whether the eviction constitutes unlawful discrimination based on familial status.

I conducted an interview with the Porters last week after they received the thirty-day notice from the Phoenix Towers. The Porters have an appointment with me tomorrow to discuss their options. It is clear that the landlord will not agree to a settlement in this matter.

As I see it now, there are several options we might pursue. We could defend the imminent unlawful detainer action. We could file a lawsuit in state court. We might also file an administrative complaint. It is unclear to me whether it would be better for the Porters to stay in the premises or move out while pursuing any or all of these options. I, however, need more analysis of the consequences of each option. Therefore, in order to help me prepare for this meeting, I would like you to draft a counseling memo in accordance with the guidelines set forth in our office policy, which is attached.

FOLGER & DeWINE, LLP
648 Mercantile Exchange, 16th Floor
Rushmore, Columbia 99999
(555) 876-5432

To: Attorneys

From: Jean Marcus

Re: **Requirements for Counseling Memos**

Members of the firm often conduct a counseling session with a client who is confronted with several significant and difficult choices. In such a situation, the attorney should prepare a counseling memo to the supervising attorney for use in the counseling session.

All counseling memos will use the following format:

- State your understanding of the client's goal or goals.
- Identify all options available to the client.
- For each option, identify the possible consequences or results, whether legal, economic, or personal. Be sure to explain the possible consequences or results, why they are possible, and how likely they are to occur. This will require a discussion of the interrelationship of the law and facts.

- Where a possible option, consequence, or result is unclear, identify what additional information we need, why we need it, and how it can be obtained

TRANSCRIPT OF FEBRUARY 19, 2009 INTERVIEW WITH

RICHARD AND CATHY PORTER

George Randall (Randall): Why don't you have a seat over here? I want to make sure the microphone is able to pick up all of our voices.

Cathy Porter (Cathy): Okay. Thanks so much for seeing us over the lunch hour. We are concerned about this notice and want to get your help right away.

Randall: No problem. I just want to reiterate that you've agreed that I can record this interview so that I can concentrate better on what you're saying.

Richard Porter (Richard): That's fine.

Randall: So, you said something about a notice?

Cathy: Yes, it's from our landlord. We live in a one-bedroom unit at the Phoenix Towers. We moved in about ten years ago. We originally signed a one-year lease. After the expiration of the lease, I guess it converted to a month-to-month lease. Here's the original lease.

Randall: I see that Phoenix Towers limits occupancy to two persons in a one-bedroom unit.

Richard: That's right, and since we've just had a baby, we're now in violation of the lease.

Randall: Does Phoenix Towers have any two-bedroom units?

Cathy: Yes, there are two-bedroom units in the complex, but none are available now, and anyway we're not in a position financially to pay the higher rent, which may be as much as $500 more a month. I'm taking six months off to stay home with the baby, and we'll only have one income during most of that time. This is very upsetting. As I said, we've lived here for ten years. We know a lot of our neighbors, and we feel part of the community. And it is an easy commute to work for Richard. The housing market is so tight right now. It's pretty hard to find affordable housing in this part of town and our one-bedroom unit is very spacious. We've probably spent 20 hours between the two of us over the last week looking at ads, calling real estate agents, and looking at vacant apartments just in case we have to move. Nothing is available at our current rent rate in this neighborhood.

Randall: Do you think you've exhausted all other possibilities?

Cathy: Yes, we've discussed it, and can't think of any other options for a place to live that we can afford.

Randall: How would you like things to work out?

Richard: We really need to stay in our apartment for now. But, that's why we're here. We don't know whether there's any way we can fight this, and whether we want to fight even if there is. It just seems so unfair.

Randall: I'm guessing that you're feeling pretty overwhelmed right now. Being new parents is hard enough, but it's so much harder if you're anxious about your living situation at the same time.

Cathy: You've got it. Neither of us has been sleeping very well and I feel on edge all the time wondering what's going to happen.

Richard: I broke out in hives after our last meeting with the manager. He came to see us as soon as we came home from the hospital with the baby. He told us that we are in violation of the lease. I told him that I couldn't believe they would make us move. He said that the owner was adamant about enforcing the occupancy limit in all cases.

Randall: Here's what I'd recommend. I believe you may have a claim for housing discrimination based on this occupancy standard, but before proceeding, I need to do some research, ask you a few more questions, get your authorization to hire a housing expert to do a preliminary investigation, and set an appointment with you next week to discuss your options. How's that sound?

Richard: That sounds okay, but how much is all this going to cost? We can't afford to spend very much on this.

Randall: Some of the options may involve what are called "attorney's fee provisions" that will require the landlord to pay our fees if you win. In other words, we wouldn't be paid unless you win. I will advise you more fully about costs of various options when we meet again.

Richard: That would be great. And then we can give serious thought to whether this is worth it to us. You said you had more questions?

Randall: I'm wondering, do you recall anything about how you found out about the Phoenix Towers before you moved in? Was it a newspaper ad? Did someone tell you about it?

Cathy: I think we heard about it from friends. The manager seemed nice when we called to ask about vacancies.

Randall: Anything else you remember?

Cathy: Not really.

Randall: Do you remember seeing any children when you visited the apartments?

Cathy: I don't recall specifically. There are definitely a few children who live there, but I have no idea whether they live in one- or two-bedroom units.

Randall: Has anyone ever said anything about children living at Phoenix Towers?

Cathy: No, but I would say that the vast majority of people who live there are singles or couples. There aren't very many amenities that would attract families – no play areas, no equipment. Come to think of it, I don't even see that many children at the pool.

Randall: So, do you have the feeling that the Towers is considered an adults-only complex?

Cathy: You know, I have no idea.

Richard: I don't either.

Randall: Any idea how large the complex is?

Cathy: I think it's around 200 apartments. There are four multi-story towers. There's an adjoining parking lot, and there's a swimming pool in a courtyard between the towers. It's a very nicely maintained complex, and we love living there.

Randall: Well, this has been very helpful. I will get a housing expert on this right away and we'll see you next week, okay?

Richard: Thanks so much. We'll see you then.

END OF INTERVIEW

LEASE AGREEMENT

THIS LEASE AGREEMENT (hereinafter referred to as the "Agreement") is made and entered into this 15th day of January, 1999, by and between Phoenix Towers (hereinafter referred to as "Landlord") and Richard and Cathy Porter (hereinafter referred to as "Tenant"). This lease covers the premises known as 475 Phoenix Drive, Unit A-75, Rushmore, Columbia (the "Premises").

1. TERM. This Agreement shall commence on January 15, 1999. The termination date shall be on (date) January 14, 2000 at 11:59 PM. Upon termination date, this Agreement will continue on a month-to-month basis on the same terms. Any term may be modified upon proper notice by the Landlord.

2. RENT. Tenant shall pay to Landlord Eight hundred fifty DOLLARS ($ 850) per month as Rent for the Term of the Agreement. Due date for Rent payment shall be the 1st day of each calendar month and shall be considered advance payment for that month. If not remitted on the 1st, Rent shall be considered overdue and delinquent on the 2nd day of each calendar month.

3. DAMAGE DEPOSIT. Upon the due execution of this Agreement, Tenant shall deposit with Landlord the sum of Seventeen hundred DOLLARS ($ 1700), receipt of which is hereby acknowledged by Landlord, as security for any damage caused to the Premises during the term hereof. Such deposit shall be returned to Tenant, without interest, and less any setoff for damages to the Premises upon the termination of this Agreement.

4. USE OF PREMISES. The Premises shall be used and occupied by Tenants, exclusively, as a private single family dwelling, and no part of the Premises shall be used at any time during the term of this Agreement by Tenant for the purpose of carrying on any business, profession, or trade of any kind, or for any purpose other than as a private single family dwelling. Tenants agree that the occupancy of this:

Xone-bedroom unit shall be limited to two permanent occupants at all times.

□ two-bedroom unit shall be limited to four permanent occupants at all times.

* * *

12. ATTORNEYS' FEES. Should it become necessary for Landlord to employ an attorney to enforce any of the conditions or covenants hereof, including the collection of rentals or gaining possession of the Premises, Tenant agrees to pay all expenses so incurred, including a reasonable attorneys' fee.

* * *

Rachel Simone _____ Richard Porter _____

Phoenix Towers, Landlord
Printed Name: Rachel Simone

Tenant
Printed Name: Richard Porter

Cathy Porter _____

Tenant
Printed Name: Cathy Porter

THIRTY-DAY NOTICE OF TERMINATION OF TENANCY

TO: [name(s) of the tenant(s)] ____Richard and Cathy Porter_____

AND TO ALL PERSONS IN POSSESSION OF THE PREMISES COMMONLY KNOWN AS [address of the property] _____475 Phoenix Drive, Unit A-75_____,

_____Rushmore, Columbia_____:

NOTICE IS HEREBY GIVEN that within thirty (30) days after service of this Notice on you, you are hereby required to quit the above-described premises and deliver up the possession of same to the Lessor or Lessor's agent if specified below.

FURTHER NOTICE IS HEREBY GIVEN that said lessor hereby elects to terminate your month-to-month tenancy of the above-described premises and that if, within thirty (30) days after service of this Notice upon you, you have not quit the above-described premises, the undersigned will institute legal proceedings for Unlawful Detainer against you to recover damages and possession of the premises from you.

DATED: February 18, 2009

___Rachel Simone_____

Phoenix Towers, Landlord

Printed Name: Rachel Simone

FOLGER & DeWINE, LLP
648 Mercantile Exchange, 16th Floor
Rushmore, Columbia 99999
(555) 876-5432

MEMORANDUM

To: File

From: George Randall

Date: February 23, 2009

Re: **Summary of Columbia Department of Fair Housing (DFH) Administrative Complaint Process**

1. Intake -- Complainants are first interviewed to collect facts about possible discrimination.

2. Filing -- If the complaint is accepted for investigation, formal complaint is drafted, signed and served on the Respondent by DFH. The Respondent is required to answer the complaint and is given the opportunity to voluntarily resolve it. A no-fault resolution can be negotiated at any time during the complaint process.

3. Investigation -- DFH investigates every case and has the authority to take depositions, issue subpoenas and interrogatories and seek Temporary Restraining Orders when appropriate. If the investigative findings do not show a violation of the law, DFH will close the case.

4. Conciliation -- Formal conciliation conferences are scheduled when the investigative findings show a violation of the law. If formal conciliation fails, litigation may be recommended.

5. Litigation -- After issuing an accusation, DFH legal staff litigates the case before the Fair Housing Commission (FHC).

6. Remedies -- The FHC may order remedies for out-of-pocket losses, injunctive relief, access to the housing previously denied, additional damages for emotional distress, and civil penalties up to $10,000 for the first violation. Attorney's fees are also awardable by the FHC.

7. FHC rarely grants preliminary injunctive relief, and this was confirmed by my friend who works as a staff attorney at DFH. FHC determinations typically take at least one year to be issued from the time the complaint is filed.

8. There is no requirement to exhaust administrative remedies under state law. Statutes of limitations for court actions are tolled while administrative proceedings are pending.

9. If, as an alternative, the case is initially filed in civil court, DFH will not accept an administrative complaint based on the same allegations of discrimination.

Ralph Frankel, Ph.D.
2525 Lookout Street
Rushmore, Columbia 99999
Tel. (555)888-2525

To: George Randall, Esq.
From: Ralph Frankel, Ph.D.
Date: February 23, 2009
RE: Phoenix Towers

This report is prepared pursuant to my retention agreement to serve as your housing expert.

Summary of demographic data:

Census data for the year 2000 establishes that in the Standard Metropolitan Statistical Area in which the Phoenix Towers is located, 50% of renter households have children.

On-site observation

I spent two mornings and two afternoons watching ingress and egress from the parking structure at Phoenix Towers. I observed approximately 125 different cars coming and going from the premises. I observed very few people who appeared to be walking to school or work. None of the pedestrians were children. Of the 125 cars, I observed only two cars with children. One adult and one child rode in each of those cars. I managed to interview both adults and was told by each that there are only five families with children at Phoenix Towers. Three of them are in two-bedroom units, and two are in one-bedroom units.

Public records research

Property tax records indicate that there are 200 units at the Towers, 180 one-bedroom units, and 20 two-bedroom units.

A review of court records showed that there have been five unlawful detainer actions filed by the owners in the past two years. In reviewing the defenses raised by tenants in these actions, none raised discrimination as an affirmative defense. One of the unlawful detainers by the owners was against a two-person family in a one-bedroom unit who had an elderly parent move in. There were no lawsuits on record filed against the landlords.

Columbia's Department of Fair Housing reveals no complaints filed against the owners.

A review of print ads in the local newspaper reveals that up until the early 1980's the Phoenix Towers advertised itself as an "adults-only" complex.

Conclusion

Assuming for purposes of this analysis that there are at most five families with children residing at Phoenix Towers, there is an extremely low probability that this proportion of families with children would have occurred by chance. That is, the proportion of families with children should be much higher, given the much higher incidence of families with children in the nearby neighborhoods. Since the proportion of renter households with children is 50%, the census data would predict that at least 100 families with children would reside at Phoenix Towers.

FOLGER & DeWINE, LLP
648 Mercantile Exchange, 16th Floor
Rushmore, Columbia 99999
(555) 876-5432

MEMORANDUM

To: Porter File

From: George Randall

Date: February 23, 2009

Re: Estimate of Fees

My current rate is $200 per hour. Unlawful detainer defense for this matter will range from 5-20 hours ($1,000- $4,000), billed on an hourly basis.

Estimate of fees for affirmative discrimination case: $40,000

Estimate of fees for DFH administrative hearing: $5,000

I have confirmed that attorney's fees can be awarded to prevailing plaintiffs in successful, affirmative discrimination cases brought under the FHA. If it turns out that there is a good discrimination claim, the firm would be willing to represent the Porters without charge and take our chances on an award of statutory attorney's fees.

FEBRUARY 2009

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LIBRARY

PHOENIX TOWERS v. PORTER

LIBRARY

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Rowan v. Las Brisas Apartments
Columbia Supreme Court (1994)

This case interprets the 1988 amendments to the Columbia Fair Housing Act (FHA) that, *inter alia*, added a provision protecting familial status. Defendant appeals from the judgment below finding that it violated the FHA and awarded damages and injunctive relief. Defendant argues that the court erred in failing to require Plaintiff to prove an intention to discriminate and in imposing a "compelling business purpose" standard on Defendant's conduct. We hold that a showing of actual discriminatory intent is not necessary for plaintiffs to prevail in a case of housing discrimination based on familial status. We also hold that discrimination based on familial status can be proved by a showing of disparate impact, the only rebuttal to which is whether defendant can show that its action is the least restrictive means to achieve a compelling business purpose.

Defendant Las Brisas Apartments ("Las Brisas") is a condominium complex in Hunter Beach, Columbia. The complex consists of 76 identical two-bedroom, one-bathroom units of approximately 950 square feet each. Defendant enforces a numerical occupancy restriction of two persons per unit.

Plaintiffs, Colin and Valerie Rowan ("The Rowans"), were living at Las Brisas when Valerie Rowan became pregnant. The resident manager told the Rowans they would have to move following the birth of their child because of the occupancy restriction. After the Rowans' son was born, the resident manager told the Rowans that they would be evicted if they did not vacate their apartment voluntarily. The Rowans moved soon afterward.

The Rowans filed this lawsuit for monetary, declaratory and injunctive relief. They alleged violations of the Columbia FHA.

The FHA was adopted in 1968. The FHA initially prohibited discrimination on the basis of race, color, religion, or national origin. The legislature extended protection to familial status in the Fair Housing Amendments Act of 1988. The FHA now makes it unlawful:

> "to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin."

Discrimination is defined to include a refusal to rent after the making of a bona fide offer, or to refuse to negotiate for the rental of, or otherwise deny, a dwelling to any person because of familial status.

Familial status is defined as one or more persons under the age of 18 domiciled with one or more parents or other legal custodians. The protection also applies to pregnant women or persons in the process of securing legal custody of any individual who has not attained the age of 18.

Other courts have split on whether intent to discriminate must be proven. Recently, a Court of Appeal, in *Earle v. Mountain Side Mobile Estates*, squarely addressed whether a numerical occupancy restriction violates the FHA's family status provisions under a pure disparate impact theory, without proof of intent. In *Earle*, an unmarried couple and their three children were evicted from the Mountain Side Mobile Home Park for violating the park's three-person-per-trailer occupancy restriction. The court determined that national census data could be used to establish a showing of disparate impact against families with children, and the park's numerical occupancy restriction had a discriminatory effect in violation of the Act. We agree with and adopt the reasoning in *Earle* that plaintiff need not show defendant's intent to discriminate based on familial status.

Although in this case defendant's occupancy restriction is facially neutral because it treats adults and children similarly, and children in fact do reside at Las Brisas, the restriction has a disparate impact on intact families with children, i.e., two parents and child. By refusing to rent to families composed of three or more persons, defendant excludes a large percent of families with children from renting apartments at Las Brisas.

Plaintiffs supported their showing with U.S. Census family statistics. Thus, the policy has a disparate impact on the Rowans.

Here, Defendant Las Brisas' offered business justification is to prevent damage and destruction to the apartments from excessive wear and tear. Defendant argues that Las Brisas maintains an occupancy restriction policy to keep the property in good repair and to reduce ongoing maintenance and eventual resale costs.

Defendant has not cited authority to show that such economic judgments constitute a compelling necessity, nor has defendant produced evidence to demonstrate that the occupancy restriction is closely tailored to serve Las Brisas' goals. Defendant simply relies on defendant's own subjective judgment which, notwithstanding defendant's experience in the real estate industry, falls short of the necessary showing.

Even if defendant's damage prevention rationale were supported by independent evidence, it does not show the occupancy restriction is the least restrictive means to achieve defendant's purpose. Defendant does not deal with a number of less restrictive alternatives suggested by the Rowans that would appear to accomplish the same goals, such as detailed maintenance requirements, more frequent inspections, higher security deposits, or more careful tenant screening.

AFFIRMED.

Carter v. Brea

Columbia Supreme Court (1995**)**

Defendant Brea appeals from judgment following a jury trial finding that Defendant committed unfair housing practices by discriminating against persons with minor children in violation of state fair housing statutes. Defendant claims that (1) the jury's findings on disparate-treatment discrimination were unsupported because the evidence did not show any intent to discriminate, (2) the court erred in permitting the jury to award damages for emotional distress in the absence of expert medical testimony, and (3) the court awarded excessive attorney's fees to Plaintiff.

On May 1, 1981, Ernest Brea ("Brea") purchased Limehurst Apartments ("the Limehurst"). The complex consists of thirty-three one-bedroom apartments. When Brea purchased the Limehurst, the lease term on occupancy stated that residents "shall *not* be permitted to have *children under the age of 18* years."

In April 1989, the occupancy provision was revised to state:

> "Lessees who have entered into a lease agreement after July 1, 1988 shall *not* be permitted to have *more than two occupants* per lease premises . . . Lessees prior to July 1, 1988 who have more than two occupants shall be grandfathered, but the number of occupants cannot expand beyond what existed as of July 1, 1988." (Emphasis added.)

Currently, only one unit at the Limehurst houses a family with a minor child. This family moved into the Limehurst prior to 1982. No persons with minor children moved into the Limehurst after Brea purchased it, even after the occupancy provision was changed from adults-only to a two-occupant maximum.

Scott and Luanne Carter ("the Carters") moved into a unit in the Limehurst in August 1992. Brea sent them a letter on August 15, 1992 stating: "We remind you that the

Limehurst is an adult complex and if you should have children in the future you will be required to vacate the Limehurst prior to the arrival of said child."

Luanne Carter became pregnant in December 1993. The Carters' son was born September 18, 1994. When they returned home from the hospital, they found a letter from Brea informing them that they must vacate the premises "upon arrival of your third occupant." Following the letter, the Carters received telephone calls, visits, and additional letters from Brea telling them to vacate the Limehurst. On November 25, 1994, they received a 30-day notice of termination of tenancy. On December 28, 1994, the Carters were served with a summons and complaint for unlawful detainer brought by Brea.

The Carters sought legal representation. They brought the instant action seeking injunctive relief and damages. They alleged violations of Columbia's Fair Housing Act (FHA). The trial court granted a preliminary injunction enjoining the prosecution of the unlawful detainer action upon a showing of likelihood of the Carters' ultimate success on their discrimination claims, a balancing of the equities, and irreparable injury if the relief was not granted.

Prior to and during the pendency of this action, while continuing to live at the Limehurst, Luanne Carter felt humiliated by Brea's demands to vacate the premises. Consequently, she did not leave her home often. She was unable to sleep and had chest pains.

Plaintiff's theory of discrimination was that the occupancy standard was (1) adopted for the purpose of discriminating against persons with minor children by either limiting or eliminating them from occupancy in the Limehurst, and (2) although facially neutral, has an unlawful discriminatory impact because it excluded families with minor children in significant numbers. In order to prevail on an intentional discrimination theory under FHA, Plaintiffs must establish by a preponderance of the evidence that a causal connection existed between the familial status of plaintiffs and their being asked to

vacate by defendant. Plaintiffs' familial status need not have been the sole or even the dominant cause of the action. Discrimination is established if familial status was any part of the motivation for Defendant's conduct. Defendant maintained that the occupancy limit was necessary due to a limited water supply.

At trial, both parties presented expert testimony on the capacity of the water supply at the Limehurst. Defendant's expert testified that the water supply at the Limehurst was adequate to serve a maximum of sixty-six people. Plaintiffs' expert offered contrary testimony. The jury found that Defendant Brea had violated federal and state fair housing statutes and awarded $1,500 for the emotional distress and humiliation suffered as a result of Defendant's actions, and $3,000 in punitive damages. In subsequent orders, the court permanently enjoined Defendant from adopting or enforcing a two-person-per-unit occupancy limit at the Limehurst, and awarded the Carters $51,072 in attorney's fees, and $2,194.39 for costs. Defendant appealed.

FHA makes it unlawful for the owner of any housing accommodation to discriminate against any person because of, *inter alia*, the person's familial status. Familial status means "one or more individuals under 18 years of age who reside with, *inter alia*, a parent."

The Carters alleged violations of FHA under two theories of discrimination law: (1) intent to discriminate -- Defendant Brea intentionally discriminated against members of a statutorily protected category because of their membership in that group, and (2) disparate impact – Defendant's facially neutral policy has a disproportionate effect on a statutorily protected category. The jury found Defendant liable for housing discrimination under both theories. We do not address Defendant's challenges to the finding of disparate impact because we uphold the decision on the theory of intentional discrimination.

Defendant first claims that the jury could not have found disparate treatment or intent to discriminate in the absence of any direct evidence of discrimination against persons

with minor children. Intentional discrimination may be shown by circumstantial or direct evidence. Thus, the short answer to Defendant's challenge is that direct evidence is not necessary to prove an intentional discrimination claim. Indeed, direct evidence of unlawful discrimination is often difficult to obtain.

Evidence of a discriminatory practice prior to civil rights legislation, coupled with a post-legislation pattern of maintaining the status quo, may be sufficient to establish the intent to continue the discrimination through a neutral policy. In this case, there was evidence that Defendant clearly excluded minor children from the Limehurst prior to 1989. That year, apparently in response to changes in Columbia law prohibiting discrimination against familial status, Defendant changed the occupancy provision in their leases from adults-only to a two-person maximum. Although the new occupancy provision appears neutral on its face, Defendant has maintained the status quo at the Limehurst -- no minor children have moved into the Limehurst since Defendant purchased it. This evidence is sufficient to imply that the two-person occupancy limit was adopted for the purpose of eliminating or limiting persons with minor children from the Limehurst. Based on Defendant's actions against the Carters and Defendant's pattern and practice of excluding minor children from the Limehurst, we conclude that the jury properly found an intent to discriminate against persons intending to occupy a dwelling with one or more minor children.

At trial, Defendant presented evidence that his occupancy limit is based on legitimate water capacity considerations. He presented evidence on the limits of the Limehurst's water supply. The special verdict indicated that the jury did not believe the Defendant's rationale, finding that the limitations of the water system were a mere pretext for discriminating against persons with minor children.

Defendant argues that the trial court erred in permitting the jury to award damages for emotional distress. The law clearly provides for recovery of emotional distress damages, and the award here was supported by Carter's testimony.

Defendant also argues that the court awarded excessive attorney's fees. It is well settled that attorney's fees are awardable to victims of discrimination who prevail in affirmative discrimination actions. On the other hand, fees are not awardable to defendants who successfully defend against affirmative discrimination claims.

The initial estimate of a reasonable attorney's fee in state civil rights actions is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate. Once the court has determined the basic, "lodestar" amount, the court may adjust the fee up or down based on other factors. Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the trial court did not adopt each contention raised.

AFFIRMED.

Lavelle v. Hodges
Columbia Supreme Court (1977)

Plaintiff Nancy Lavelle ("Lavelle") brought this action to set aside a deed conveyance, alleging that defendant Everett R. Hodges ("Hodges") fraudulently induced her to convey title to him. The question that we consider is whether the present suit is precluded by the prior adjudication of the fraud issue in an unlawful detainer action between the parties.

An unlawful detainer action is a summary proceeding to determine the right to possession of real property and to provide for peaceable eviction. Typically, it arises when a tenant has violated a lease or unlawfully held over beyond the term of the lease. Following termination of the tenancy through service of a three-day or 30-day notice, an unlawful detainer may be commenced. The tenant has five days to answer the complaint, and the matter proceeds to trial on a very accelerated schedule, usually within a month. No, or very limited, discovery is allowed.

It is of foremost importance to note that unlawful detainer actions are limited in scope. Ordinarily, only claims bearing directly upon the right of immediate possession are cognizable. Affirmative defenses, legal or equitable, are permissible only insofar as they would, if successful, preclude removal of the tenant from the premises. If a tenant, for example, proves that the landlord had an improper motive in serving the notice of termination and bringing the unlawful detainer action, such as the tenant's exercise of a right under the law, the tenant will retain possession. It should be noted, however, that cross-complaints are not permitted in unlawful detainers. Thus, if a tenant has affirmative claims or claims for damages, she must seek them in a separately filed action.

The trial court here found that Lavelle, who originally owned the subject property, had for several years maintained a confidential and intimate relationship with Hodges. Lavelle encountered financial difficulty, so she agreed that Hodges would temporarily take title until she recovered financially. Thereafter, the parties quarreled, and Lavelle

demanded reconveyance and Hodges refused. The record indicates the property at that time had a fair market value in excess of $40,000.

Lavelle immediately filed the present suit, framed as an action for injunctive relief and for imposition of a constructive trust. Meanwhile, Hodges served Lavelle with a three-day notice to quit the premises and upon expiration of the notice immediately initiated unlawful detainer proceedings. In the unlawful detainer action Lavelle asserted as an affirmative defense the same allegations of fraud that form the basis for the present equity action that was then pending. As is typical in unlawful detainer actions, Lavelle's answer was due five days after service of the summons, discovery was limited, trial was set within 21 days of the filing of Lavelle's answer, and the matter was tried before the court in a trial lasting one hour. Judgment in the unlawful detainer suit was given for Hodges and Lavelle was evicted. That judgment is now final.

Hodges unsuccessfully urged the unlawful detainer judgment as a bar to the present action. His motion to strike the complaint was denied, and the cause proceeded to trial on the merits. After a four-day trial, the court, on the basis of detailed findings of fact, concluded that Lavelle's conveyance had been fraudulently induced by Hodges and ordered the property returned to Lavelle.

Both Lavelle and Hodges appealed, raising not only the res judicata issue that we consider herein, but various other unrelated issues. The Court of Appeal, without considering these other issues, reversed the trial court judgment solely on the ground that Lavelle's fraud claim had been conclusively adjudicated in the prior unlawful detainer proceeding, and that judgment for Hodges in that action cut off Lavelle's right to pursue an independent claim for equitable relief. We conclude that the unlawful detainer judgment was not res judicata under the circumstances, and consequently reverse.

A judgment in unlawful detainer usually has very limited res judicata effect and will not prevent one who is dispossessed from bringing a subsequent action to resolve questions of title or to adjudicate other legal and equitable claims between the parties. Recently, in *Wood v. Herson*, the Court of Appeal held that a suit for specific performance of a contract to convey was foreclosed by a prior unlawful detainer judgment that had decided all issues of fact material to the second action. Noting that the Woods' affirmative defense of fraud in the unlawful detainer action was virtually identical to the fraud allegations upon which their suit for specific performance was based, the court concluded that even though title normally is not a permissible issue in an unlawful detainer action, the essential issues had been fully and fairly disposed of in the earlier proceeding. The court cited in support of its ruling such varied factors as the unusual length of the "summary" unlawful detainer hearing (seven days), the scope of discovery by the parties ("extensive" and "complete"), the quality of the evidence ("detailed"), and the general character of the action ("clearly not the customary unlawful detainer proceeding"). A lengthy and comprehensive superior court record replete with precise findings of fact persuaded the *Wood* court that application of collateral estoppel to curtail further litigation would involve no miscarriage of justice, as “the Woods have had their day in court.”

We agree that "full and fair" litigation of an affirmative defense -- even one not ordinarily cognizable in unlawful detainer, if it is raised without objection, and if a fair opportunity to litigate is provided, will result in a judgment conclusive upon issues material to that defense. In a summary proceeding such circumstances are uncommon. *Wood*, however, appears to be an appropriate example. There, the parties apparently chose to waive speedy resolution of the issue of possession in favor of an extensive adjudication of their conflicting claims by a superior court invested with jurisdiction to deal with any issues the disputants agreed to try. The more usual situation is accurately characterized by this case wherein matters affecting the validity of a conveyance of title are neither properly raised in the unlawful detainer proceeding, a summary proceeding for possession, nor are they concluded by the unlawful detainer judgment.

The doctrine of res judicata, whether applied as a total bar to further litigation or as collateral estoppel, rests upon the sound policy of limiting litigation by preventing a party who has had one fair adversary hearing on an issue from again drawing it into controversy and subjecting the other party to further expense in its reexamination.

The record herein fails to disclose that Lavelle had the fair adversary hearing contemplated by the law. The municipal court, in Hodges' unlawful detainer action, was empowered to consider whatever equitable defenses Lavelle might have raised insofar as they pertained directly to the right of possession. The court had no jurisdiction, however, to adjudicate title to property worth considerably more than its $5,000 jurisdictional limit, nor could its judgment on the issue of possession foreclose relitigation of matters material to a determination of title except to the extent that the summary proceeding afforded Lavelle a full and fair opportunity to litigate such matters. The burden of proving that the requirements for application of res judicata have been met is upon the party seeking to assert it as a bar or estoppel. In the matter before us Hodges has failed to sustain that burden.

We are of the further opinion that a defendant in an unlawful detainer is not required to litigate, in a summary action within the statutory time constraints, a complex fraud claim. In the absence of a record establishing that the claim was asserted and that the legal and factual issues therein were fully litigated, we conclude that the question of fraudulent acquisition of title was not foreclosed by the adverse judgment in the earlier summary proceeding.

We do not envision that our holding will impose any unwarranted burden on the plaintiff in an unlawful detainer action. In return for speedy determination of his right to possession, plaintiff sacrifices the comprehensive finality that characterizes judgments in non-summary actions. Moreover, he has adequate protection against multiple litigation, for ordinarily he can prevent the introduction of extrinsic issues by making appropriate objections to the defendant's pleadings or proof.

Lavelle appealed the trial court's denial of her attorney's fee motion. The deed of conveyance contained a clause providing that Lavelle would pay Hodges' attorney's fees in the event that he incurred fees in enforcing the deed of conveyance. Columbia Civil Code section 1717 provides that:

> "in any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded . . . to one of the parties, . . . then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees. . . ."

The court erred in denying Lavelle's motion for attorney's fees.

REVERSED.

Answer 1 to Performance Test B

To: George Randall

From: Applicant

Date: February 26, 2009

Re: Phoenix Towers v. Porter - - Counseling Memorandum

Richard and Cathy Porter recently had a baby and were subsequently and immediately served with a thirty-day notice of termination of tenancy from their landlord. They currently reside at the Phoenix Towers ("The Towers"), and, as residents of the Towers for ten years, desire to remain at the Towers. At issue is whether the landlord's threatened eviction of Richard and Cathy constitutes unlawful discrimination under the Columbia Fair Housing Act ("FHA") based on familial status. This memorandum will serve as a memo for your use during the counseling session with the Porters tomorrow.

I. Richard and Cathy Porter's goals

The Porters have enjoyed living at The Towers for ten years, have established a significant community there, and Cathy very recently gave birth to their first child and just brought the baby home last week. Therefore, the Porters' primary goal is to remain in their apartment at The Towers. Additionally, Cathy is taking time off from work to take care of their new baby, and as a result they are living on one income, Richard's. Thus, the Porters' secondary goal is to spend as little money as possible in their attempt to remain at The Towers. While this goal is secondary, if the costs of remaining in the apartment become prohibitively expensive, the Porters will reconsider their decision to remain.

II. Options available to Richard and Cathy Porter

There are three primary options available to the Porters: (1) defend the unlawful detainer action that the landlord is likely to bring at the end of their thirty-day notice of termination, (2) file a lawsuit in state court alleging a violation of the FHA, and (3) file an administrative complaint with the Columbia Department of Fair Housing ("DFH").

III. Analysis of options available to Richard and Cathy Porter

A. Defend unlawful detainer action

An unlawful detainer is defined by the Court in Lavelle v. Hodges as "a summary proceeding to determine the right to possession of real property and to provide for a peaceable eviction." It is initiated by a landlord after the termination of a tenancy, which occurs after the expiration of either a three or thirty-day notice given be the landlord. Lavelle.

Possible consequences or results

An unlawful detainer action is the fastest way a court can determine whether the termination of a tenancy (and the resulting eviction) is lawful. It is a very quick proceeding. After the landlord files a complaint at the close of the thirty-day termination notice period, the tenant has five days to answer, and the matter will usually proceed to trial within a month. Levelle. For example, in Lavelle, the plaintiff served a summons of an unlawful detainer action against the plaintiff, the plaintiff answered five days later, the trial was held 21 days later, and the trial only an hour.

Because of the very rapid nature of these proceedings, the Porters would have their rights determined within approximately two months from the time the landlord served the notice on them. If the court rules in their favor, they would be secure in their tenancy in about two months. If the court does not rule in their favor, they would have

to vacate the premises, but would not have to do so until the close of the unlawful detainer proceedings. The likelihood of quick resolution in an unlawful detainer action is great. This option will not drag on. Even if the Porters lose, they will meet their goal of not having to move immediately, but also, it they lose, they would have to move after the close of the two months.

Another result of the rapid nature of the proceedings is that this option is not as expensive as one other. Your work on the case will range form 5-20 hours, resulting in a $1,000 to $4,000 fee at the rate of $200 per hour. There is a chance, however, that the Porters would also be forced to pay for the landlord's attorney's fees and costs in this action. According to Lavelle, which relied on Columbia Civil Code Section 1717, in an action on a contract where the contract provides for attorney's fees and costs, the party that prevails on the contract is entitled to reasonable attorney's fees and costs from the other party. The lease in question here contains a provision for attorney's fees and costs. The provision specifically states that if the landlord employs an attorney to enforce the lease, that tenant will pay all expenses incurred, including attorney's fees. Thus, if the landlord prevails in the unlawful detainer action, the Porters would have to pay the landlord's attorney's fees. However, if the Porters prevail, CCC section 1717 also provides (as quoted in Lavelle) that the prevailing party on the contract is entitled to attorney's fees and costs whether or not that person is the party that is specified to receive the fees in the contract. Therefore, if the Porters win, this is a very economical situation for them because they will not have to put too much money up front since your fees are not very high for this action, and they would have their fees and costs reimbursed. However, if they lose, they would have to pay their own attorney's fees and costs in addition to the landlord's attorney's fees and costs.

Another issue with unlawful detainers is the limited relief afforded to the Porters. Because cross-complaints are not permitted in unlawful detainer actions, see Lavelle, the tenant cannot seek damages. The only relief that the Porters could get from this action is the ability to remain in their apartment. This is the Porter's highest goal, so this option may meet their needs. However, your interview with the Porters also revealed

that the Porters have not been sleeping well and are on edge and that Richard broke out in hives after the last meeting with the manager. It is possible (as will be discussed below) that the Porters have a viable claim for damages based on emotional distress, and it would not be possible to raise such a claim in an unlawful detainer action.

The biggest question is what the chances are of prevailing in a defense of the unlawful detainer action. While the Porters cannot cross-claim for damages, they are free to raise any defense that would, "if successful, preclude removal of the tenant from the premises." Lavelle. In this case, the Porters are in violation of the terms of lease because they have three occupants in their apartment, and the lease specifically states that they can only have two occupants. However, the Porters can raise an affirmative defense of discrimination under the FHA because, as shown by Carter v Brea, if successful, a remedy under the FHA is continued occupation of the unit because the landlord may be enjoined from enforcing an unlawful occupancy limit.

Thus, if the Porters can prevail on an FHA claim (which will be discussed below), they can successfully defend the unlawful detainer action. However, there is one caveat to that conclusion. It will be more difficult for the Porters to prevail on their FHA claim in defending the unlawful detainer for two reasons. First, the trial will be very quick. The trial in Lavelle lasted only one hour. In such a short time, it may be difficult to convince the judge that the Porters have established a defense under the FHA, particularly when our defense will likely require expert opinion. Adding to this difficulty is the fact that, according to Lavelle, discovery is limited in unlawful detainer actions. Therefore, we would likely not be able to get all the information that would be helpful to have in defending the case.

If we were to fail on the FHA claim, according to Lavelle, the landlord would not be able to use our failure in the unlawful detainer as a defense against a subsequent case by applying the doctrine or res judicata if, as made clear in Lavelle, the trial is short. However, Lavelle also described a scenario in which res judicata could apply: if the defense was raised and litigated in the prior proceeding in a less summary fashion. If

we were to go this route, it might make sense to ensure that the trail was short just so that we could preserve the ability to raise the FHA claim in a subsequent state action, should the Porters choose.

In sum, the likely consequence of the Porters choosing this action is quick adjudication of their rights. However, it is a costly route if they lose because they would have to pay the landlord's fees. But, if they win, it is a cost saving option because the landlord would have to pay their fees. Additionally, the Porters would definitely be able to stay in their apartment for the next two months, which might give them at least a little bit of peace in this hectic time. It is more likely than not that the Porters will prevail on their FHA claim (as seen below), though their chances are slightly diminished here due to the hurried nature of the proceeding and the lack of discovery available.

2. Additional information needed

In order to determine how important it might be to be able to get damages for emotional distress, we need to get more information about the distress that the Porters have suffered. Have they experienced any other physical manifestations of stress beyond the lack of sleep, general anxiety, and Richard's hives? Has the baby manifested any symptoms of stress due to the stress in the household? Have they gone to see any doctors for their conditions? We can get this information by further interviewing Richard and Cathy and asking them to bring any relevant doctors' bills or any receipts for medications they have purchased to deal with their symptoms.

We also do not know how much the landlord will spend in attorney's fees. We [can] call the landlord or send him a letter, asking if he has retained counsel. If he has, we can ask around to see what their standard billing rate is and perhaps locate records of other unlawful detainers they have prosecuted to get an idea of how much time they will spend on the case.

B. File a lawsuit in state court alleging violation of the FHA

The Porters' second option is to file a lawsuit in state court alleging violation of the FHA.

1. Possible consequences or results

The first consequence of such an action could be the staying of the unlawful detainer proceeding. In Carter, a couple sued under the FHA after their landlord initiated an unlawful detainer action, threatening to evict them for violating an occupancy provision in a lease after the birth of their son. The court below granted a preliminary injunction that enjoined the unlawful detainer during the pendency of the FHA litigation because the couple was able to show that they had a likelihood of success on their FHA claim, the harm to them outweighed the harm to the landlord, and the couple would be irreparably injured if the relief was not granted. If the Porters could also show these three elements, the unlawful detainer would be stayed throughout the pendency of the FHA suit.

Such a result would meet the Porters' goal of remaining in the apartment better than defending an unlawful detainer. There still remains a risk that the Porters would ultimately lose the FHA case, but if they can at least prevail on the preliminary injunction, they would be able to remain in their apartment during the entire action, which would likely take much longer than three months.

There is also a very high likelihood that the Porters would be able to get a preliminary injunction. Skipping over the likelihood of success for now, but still relying on the elements from Carter, the injury to them far outweighs any injury to the landlord. The landlord would receive rent if the Porters remain, which is what he would receive if he rented it to another party that met the occupancy requirement. Additionally, if the Porters stayed, the landlord would not be deprived of any rent he would have lost while the apartment was vacant during a time when the landlord was looking for another tenant. On the other hand, the Porters will be forced to look for alternative housing at a

time when they have a newborn baby. Additionally, their options for other apartments, according to Richard, look like they might be as much as $500 more per month. The harm to the Porters would also be irreparable because the time of peace with a newborn cannot be replaced. Being thrown into a state of anxiety during such a unique time would cause irreparable harm that could not be fixed with money. Thus, if the Porters can show a likelihood of success on the FHA claim, they are likely to get a preliminary injunction, allowing them to stay in their apartment during the pendency of the litigation.

The main question, then, is the likelihood of succeeding on the FHA claim. The plaintiffs in Carter alleged a violation of the FHA using two different theories, which were affirmed by the court: (1) intent to discriminate and (2) disparate impact. The Carter court noted that, in order to prevail on an intent to discriminate theory, a plaintiff must establish, under a preponderance of the evidence standard, that "a causal connection existed between the familial status of plaintiff and their being asked to vacate by defendant." The court explained that the familial status did not need to be the sole cause of the decision to evict, but it had to play some part.

In Carter, the plaintiff proved intent to discriminate by using only circumstantial evidence. That evidence showed that the landlord specifically excluded minor children from its housing prior to the adoption of the FHA law, but that once the law changed the defendant maintained the status quo in the housing even though the leases were changed to conform to the FHA on their face. The leases changed from requiring adults only to requiring a two-person maximum. However, even with the change no minor children moved in. The court found that the evidence was sufficient to show a "pattern and practice" of excluding children from housing, and that showed an intent to discriminate, in violation of the FHA.

In this case, our housing expert has turned up advertisements in which The Towers was advertised as an "adults-only" complex until the early 1980s. Additionally, our housing expert has determined that is it likely that there are only five families with children in five

units of the 200-unit complex. So, it is possible that although some children have made it into the complex, the circumstantial evidence shows at least an attempt to maintain the status quo. Without more specific information about what the lease said prior to the FHA and what the tenancy trends have been after the FHA, however, it will be difficult to prevail with an intentional discrimination claim. We simply cannot show, as the plaintiffs did in Carter, that no families have moved in since the FHA and that the lease was explicitly restrictive prior to the FHA and was changed only in response.

However, the plaintiffs in Rowan v. Las Brisas prevailed using the disparate impact theory. The Court in Rowan made it clear that a plaintiff does not have to show actual intent to discriminate to prevail on an FHA claim. Rather, the plaintiff can show disparate impact. The Rowan plaintiffs also claimed discrimination by a landlord on the basis of familial status, and showed disparate impact by showing that the occupancy provision in their lease served to exclude a large percentage of families with children in the area. The plaintiffs used data from the U.S. Census to make this showing. In this case, the Porters can also claim discrimination on the basis of familial status because, as defined in Rowan, they are being discriminated on the basis of their status as a unit of "one or more persons under the age of 18 domiciled with one or more parents." They qualify because they are two people living with one baby, who is their child. The Towers appears to only rent out five of the 200 units to families. According to the research of our housing expert, the proportion of renting families with children is 50%. Therefore, if The Towers rented indiscriminately, The Towers would also be renting at 50% to families, for a total of 100 units instead of five. This is likely a strong enough showing to prevail on the FHA claim. Additionally, it is even more likely that the Porters would be able to get a preliminary injunction because this data definitely shows a likelihood that they will succeed on the merits of their claim.

The Rowan court also noted that a defendant can defend against the showing of disparate impact by proving that its action is "the least restrictive means to achieve a compelling business purpose." The Rowan plaintiffs suggested several less restrictive alternatives to their defendant's rationale which was that the occupancy requirement

prevented wear and tear and kept the resale value high. The Rowan plaintiffs suggested that detailed maintenance requirements, frequent inspections, higher security deposits, and tenant screening could reach the same goal. We do not yet know what the landlord will claim is the motive for the occupancy requirement as Las Brisas. If it is the same as that in Rowan, we will easily be able to show that there are less restrictive means of achieving the same purpose by proposing the same alternatives as in Rowan. If the landlord, however, has a different rationale, we will need to develop ideas of less restrictive means of the landlord achieving this purpose. The plausibility of those means will affect the likelihood of success on this claim.

Legal success would also translate into personal success for the Porters. They would be able to stay in The Towers indefinitely, and because the landlord would not be able to enforce the occupancy claim against others, per Carter, there would likely be more families moving into The Towers, perhaps providing an even better living situation for the Porters. Additionally, if the Porters can achieve a preliminary injunction, which appears likely, they can be assured of not having to move for the near future and can have peace that they will not be disturbed during this time with their newborn.

The economic consequences of the suit are also limited, which would meet another of the Porters' goals. Because attorney's fees are awarded to prevailing plaintiffs under the FHA, and because we will likely succeed on the claims, if our firm agrees to accept Porters' case on contingency, the Porters will not have to pay anything, and we will receive our $40,000 in attorney's fees from the landlord if we win. Additionally, there is not a risk of the Porters having to pay for the landlord's attorney's fees or costs if we lose because defendant's attorney's fees are not awarded even if they prevail, per Carter.

Additionally, in a suit under the FHA, the Carter court makes clear that the Porters would also be able to recover for damages for emotional distress if they can prove such damages, which they likely can because of Richard's hives and the humiliation they experienced by being served the moment they got home from the hospital with the

baby, just as the plaintiffs in Carter were, and for which they were awarded $1,500. The jury in Carter also awarded $3,000 in punitive damages, which the Porters may also be entitled to should they show that their landlord's actions were more than negligent. Thus, there are more damage options available to the Porters with this option, and, given their financial situation, they could be eager to go for an option with such a big financial upside.

2. Additionally information needed

We need more information to show that the harm to the Porters would be great and irreparable if the permanent injunction is not granted. We need to determine what the average rent is for a one-bedroom apartment and how much higher that is than the rent they're paying now. Our housing expert could likely find that for us. We should also ask the Porters if the baby has any special needs that would be disrupted by a move. Is their pediatrician or hospital close to The Towers? Is the baby receiving any special treatments currently? Is Cathy receiving any treatments currently?

We also need more information to determine whether The Towers discriminated on the basis of family before the FHA. We can ask our housing expert to look into more newspapers to see if the advertisements changed immediately after the implementation of the FHA. We should also request production of documents during the course of litigation to get leases that were signed prior to the implementation of the FHA and those immediately after.

We also need more information to show that the status quo has been maintained through a pattern and practice of discrimination. Through discovery, we should request a tenancy list for the two or three years prior to the FHA and then to date to see the number of apartments that have been rented to families. We should also interview the people who were evicted by the landlord to determine whether the practice of keeping children out played any role in the eviction. The information from the housing expert makes this unlikely, but we should still pursue this path just to be sure. We should also

interview all of the families with children to determine when they started renting, if they had children when they began renting, and what their relationship with the manager and landlord has been like.

We need to determine what the landlord's rationale of the occupancy restriction. We can attempt to find that out now through a strongly worded letter and see what his response is to determine the viability of his defense. If he does not respond to such a letter, during litigation, we can ask an interrogatory to this effect.

We need more information about the possible claim for damages due to emotional distress. See above for ideas of what to gather and how.

W\e need more information to support a punitive damages claim. We should further interview the Porters and ask if they can give us copies of any communications they've received from the landlord or the manager to see if there is evidence of malice or intentional infliction of distress on the Porters. We should also ask them to make a log with the dates and content of any conversations they have from this point on with the manager or the landlord. We should also ask them for more detail of their initial meeting with the manager, to determine whether he said anything particularly upsetting to them.

C. Filing and administrative complaint

The Porters could file an administrative complaint with the DFH.

1. Possible consequences or results

Unfortunately, the process of filing an administrative complaint is lengthy, and the Porters would likely not be able to stay in their apartment during the pendency of the administrative action. That is because the Fair Housing Commission, which oversees the case as a judge, rarely grants preliminary injunctions and their determinations

usually take a year. Thus, this option would not meet the Porters' primary goal of being able to stay in their apartment. If they were to take this option and not defend the unlawful detainer, they would likely be evicted within a month after the 30-day notice expires. While the DFH can seek a temporary restraining order, that order would buy the Porters little time.

The actual process, however, would give the Porters a greater likelihood of success than defending the unlawful detainer. That is because it is a much more in-depth investigation than the unlawful detainer. The Porters will be interviewed and, after they file a complaint, the DFH would investigate. It has the authority to take depositions, issue subpoenas and interrogatories. Thus, the possibility for discovery is much greater than in the unlawful detainer action though more limited than the state FHA action because the DFH would be conducting it rather than a retained attorney with greater resources.

If the DFH finds that there is a violation, which it likely would, as explained above with regard to the FHC, then the DFH legal staff would litigate the case before the FHC. If the FHC finds for the Porters, they would also be entitled to a broad range of remedies: out-of-pocket costs, injunctive relief, they would be able to go back to their housing, get damages for emotion[al] distress. Additionally, civil penalties of $10,000 will be imposed on the landlord, though it is not clear whether those would go to the Porters or to DFH. Thus, financially it is a good option for the Porters. Also, because attorney's fees are awarded by the FHC, the Porters would be reimbursed for the $5,000 in fees that we would charge for your services.

Finally, I should note that this option is only available to the Porters if a civil suit is not filed. Thus, they can take this option if they lose on the unlawful detainer action, but they cannot take this option if they choose to file a state suit. However, if they choose this option and lose, they can still go back and file the state claim because the statute of limitations will be tolled. It is not clear, however, what the legal effect of the decision of the FHC would be.

2. Additional information needed

We need to know whether the $10,000 civil penalties would go to the Porters or to DFH. We can look on the DFH web site for information or call a DHF representative; perhaps [contact] your friend who works as a staff attorney there, and ask her.

We need more information on emotional damages, and we can take the same path as described previously.

We need to know if there is a res judicata effect of the administrative action to see if it would in fact be possible to succeed on a state claim filed after losing before the FHC. Further legal research should be undertaken on this point.

Answer 2 to Performance Test B

COUNSELING MEMORANDUM

To: George Randall

From: Applicant

Re: Phoenix Towers v. Porter

I. ISSUE AND CLIENT GOALS:

Our clients Richard and Cathy Porter ("Porters") received a Thirty-Day Notice of Termination of Tenancy ("Notice") demanding that they terminate their occupancy at the Phoenix Towers, where they have leased a one-bedroom unit for the past ten years. The Notice advises that Porters that if they do not vacate the apartment, Phoenix will institute legal proceedings for Unlawful Detainer against the Porters to recover damages and possession of the apartment. The Porters received the Notice after Cathy gave birth to their first child, due to the Porters' failure to comply with the numerical occupancy provision contained in their Lease Agreement, which provides that a "one-bedroom unit shall be limited to two permanent occupants at all times."

Our clients' most immediate goal is to retain possession of the apartment, as they have been unable to find a suitable or affordable living alternative despite extensive diligence. In addition, our clients desire a speedy resolution of this issue, which has taken an emotional and physical toll on their well being, particularly given that they are new parents. However, our clients have limited resources to pursue or defend litigation and are unable to front significant costs for litigation. Although the Porters view Phoenix Tower's numerical occupancy as unfair and would likely support relief that applies broadly to all tenants of Phoenix Towers, their principal motivation is to resolve this issue and keep their apartment, rather than to pursue this litigation to maximize "impact" to tenants more broadly.

I have researched the pros and cons of pursuing various options to achieve these goals for our clients, and have outlined and analyzed each below.

II. ANALYSIS OF AVAILABLE OPTIONS:

A. Defense of Unlawful Detainer Action:

One course of action to consider is to simply defend the imminent unlawful detainer action to be filed against our clients, without filing any affirmative litigation or administrative complaint. Phoenix's claims in an unlawful detainer action would be fairly straightforward, and would arise from the plain language of the Lease Agreement, which on its face prohibits the Porters from occupying a one-bedroom apartment with a family of three members. The Porters would be entitled to assert violations of the Fair Housing Act's ("FHA") prohibition on discrimination on the basis of familial status as an affirmative defense in any unlawful detainer action, since that defense, "if successful, [would] preclude removal of the tenant from the premises*." Lavelle v. Hodges*, Columbia Supreme Court (1977) p.9. However, the Porters could not file a cross-complaint against Phoenix for discrimination under the FHA in that proceeding, and the court's determination of the Porters' affirmative defense would be limited to assessing the right of the Porters to remain in the apartment, and would not attempt to address or resolve the more complex analysis that would be required in connection with the Porters' affirmative discrimination claims. *Id*.

1. Advantages:

Mere defense of the unlawful detainer action presents certain advantages to our clients, although I ultimately conclude that these advantages are outweighed by the disadvantages of pursuing this course. One chief advantage of this option is that unlawful detainer actions present an extremely efficient and speedy mechanism for resolution of this issue. The entire time required to adjudicate an unlawful detainer case is typically less than one month from the date the Notice is served, and only extremely limited discovery is available. As our clients are seeking a quick (albeit favorable) resolution of this issue, a successful defense of the unlawful detainer action would give our clients finality within a short time frame on their living situation.

Likewise, and in part because of the truncated nature of the proceedings, defense of the unlawful detainer option would present the cheapest option for our clients, with attorneys fees of approximately $1,000-$4,000. More significantly, because this is the only option that would arise under the parties' Lease Agreement (as opposed to the affirmative litigation and administrative options set forth below, which arise under the FHA), defense of the unlawful detainer action would be the only means by which our clients could recover their attorneys' fees under the contract. Although the Lease Agreement as drafted contains a one-sided fee clause (which purports to provide fees only to Phoenix in the event that it is required to enforce any of the covenants in the Lease Agreement), under Columbia Civil Code Section 1717, our clients would be entitled to collect reasonable attorneys' fees if it prevails in defending against Phoenix's breach of contract claims, but only in an action arising under the Lease Agreement (although, as discussed below, the FHA does permit the prevailing party to recover attorneys' fees).

2. Disadvantages:

Despite these advantages, there are numerous disadvantages of relying solely on a defense of the unlawful detainer action without simultaneously filing affirmative proceedings.

First, the unavailability of meaningful discovery would weigh against our client and could easily result in their affirmative defense being rejected. As discussed above, it will not be difficult for Phoenix to show that our clients are violating the facially neutral terms of the Lease Agreement, as it is not disputed that they and their baby exceed the numerical occupancy limitations set forth in the lease. Whereas no discovery is required to make a prima facie showing of breach, our clients would benefit from additional discovery that could establish either the discriminatory impact of the policy or that Phoenix specifically intended to discriminate against the Porters based on their family status (a more complete discussion of discovery that would be helpful is set forth below). Our clients could fare poorly were this complex issue to be determined without

the benefit of discovery, and by a court that is not suited or experienced at resolving complex questions of discrimination.

Moreover, there is at least some risk that an adverse determination of our client's affirmative defense would have a preclusive effect on any simultaneous or future litigation against Phoenix asserting discrimination under the FHA. This risk is slight in view of the Columbia Supreme Court's decision in *Lavelle*, which held that due to the limited nature of the proceedings in an unlawful detainer action, "a judgment in unlawful detainer effect usually has very limited res judicata effect and will not prevent one who is dispossessed from bringing a subsequent action to …resolve other legal and equitable claims between the parties." Although an affirmative claim of discrimination based on FHA encompasses different remedies than a simple affirmative defense based on violation of the FHA, which would focus on the mere right of possession, there is sufficient overlap in the issues to be decided (whether this issue is presented defensively or affirmatively) that a court could certainly deem our client precluded from relitigating this issue as an affirmative claim. Indeed, the Columbia Supreme Court's opinion in *Lavelle* explicitly acknowledged that in certain idiosyncratic instances involving a more "extensive adjudication" of disputed issues in an unlawful detainer action than is typical, the judgment is entitled to preclusive effect where, under the circumstances, the parties had a "full and fair opportunity" to litigate the issue. Thus, the *Lavelle* court left a sufficient opening to reach a different result in a different case, and this possibility is increased by the fact that the *Lavelle* decision is almost forty years old and may no longer reflect the view of the current Court. It would be devastating for our clients were they precluded from litigating their affirmative claims due to a finding that an adverse judgment in the unlawful detainer action has res judicata effect, and this is not a risk that we should take absent compelling need to do so.

Additionally, the speed of decision in an unlawful detainer action, while advantageous in the event of a successful outcome, would be equally devastating to our clients in the event they lose. This could result in our clients being evicted until such time as they are able to litigate their affirmative claims in court or before the FHA, which could take more

than one year, depending on the course of action we choose. Thus, as discussed below, I recommend that we file affirmative litigation asserting violation of the FHA, and that we seek an immediate preliminary injunction to enjoin the unlawful detainer proceeding pending the adjudication of that case.

Finally, our clients would only be entitled to limited relief in the event that they prevail in an unlawful detainer action, as they would not be entitled to recover punitive damages for emotional distress. Although they could recover attorneys' fees under the contract (as applied under Columbia Civil Code Section 1717) if they prevail, they also can recover attorneys' fees under the FHA. Conversely, there is a risk that they could be required to pay Phoenix's attorneys' fees if they lose in an unlawful detainer proceeding, whereas they would not be required to do so in litigation under the FHA.

For these reasons, and as discussed below, I recommend that we seek to enjoin the unlawful detainer action in connection with filing affirmative litigation in court.

B. Filing Affirmative Litigation:

Our clients also could file affirmative litigation in federal court asserting unlawful discrimination based on familial status under the FHA. Under binding authority in Columbia, our clients have an extremely strong case on the merits of this claim. The FHA was amended in 1988 to protect familial status, defined as "one or more persons under the age of 18 domiciled with one or more parents or other legal custodians." Under the FHA, it is unlawful to discriminate (which includes a refusal to rent or any action to deny a dwelling) because of familial status. *See, e.g., Rowan v. Las Brisas Apartments, Columbia Supreme Court (1994) p. 2*.

Significantly, the Columbia Supreme Court has held in two leading cases that a party alleging discrimination based on familial status under the FHA need not demonstrate actual discriminatory intent in order to prevail on claims arising from a neutral occupancy limitation. *Rowan; Carter v. Brea*, Columbia Supreme Court (1995).

Instead, a party can demonstrate either: (1) that a facially neutral limitation on occupancy has discriminatory impact on persons with minor children; or (2) intentional discrimination. *Id*. Our clients have a strong likelihood of prevailing under either theory. The Columbia Supreme Court has held that national census data demonstrating a discriminatory impact on families with children is sufficient to establish discrimination based on familial status. *Rowan*. Our housing expert, Ralph Frankel, has analyzed census data, which reveals that less than three percent of the occupants of Phoenix Towers (and less than two percent of occupants of one-bedroom apartments) have children, even though census data confirms that 50% of renting households in the relevant metropolitan area have children. These statistics, on their face, establish a strong and compelling showing of disparate impact under Phoenix's occupancy limitation provisions. Moreover, with the benefit of additional discovery, our clients also would be likely to establish a case of intentional discrimination, which requires only that they demonstrate that their familial status was "any part of the motivation" for the Notice. Certainly, the fact that the Porters were contacted by the manager and informed of the lease violation immediately after they came home from the hospital with their new baby suggests that their familial status was a significant part of the decision to proceed to evict them. Moreover, the fact that Phoenix's historical advertisements through the 1980s expressly proclaimed that it was an "adults-only" complex (which would be clear evidence of intentional discrimination under current FHA laws), and that Phoenix has continued to maintain its limited occupancy rules since that time, also can form sufficient evidence to establish discriminatory intent. *See, e.g., Carter* (finding discriminatory intent where neutral occupancy provision was implemented in response to changes in FHA law and followed an express policy of prohibiting children). With limited additional discovery, including copies of communications and internal documents by FHA concerning its occupancy limitation policy and its decision to serve the Notice on the Porters, and depositions of other current and prospective tenants, we almost certainly could bolster the case for intentional discrimination.

Given that a defendant can only rebut a showing of disparate impact or intentional discrimination by showing that the policy is the least restrictive means to combat a

compelling business purpose, it is almost certain that Phoenix could not overcome an initial showing of discrimination. Indeed, the Columbia Supreme Court has rejected claims that such restrictions were needed to minimize "wear and tear" or conserve water resources, and it is difficult to imagine that Phoenix could come up with a greater rationale for its policy. *Rowan; Carter*.

1. **Advantages:** There are numerous advantages to filing affirmative claims in court for the Porters asserting violations of the FHA.

First, such litigation would afford the Porters a full opportunity to obtain discovery on their claims, which could include evidence necessary to bolster the case for intentional discrimination and historical statistics that could bolster the showing of disparate impact.

In addition, the Porters would be entitled to a jury trial, and a jury is likely to be extremely sympathetic to the Porters given their status as new parents.

Significantly, this route also would permit us to file for a preliminary injunction seeking to enjoin the unlawful detainer action. The Porters can make a strong showing for a PI, as the census data establishes a showing that they are likely to succeed on the merits, as the balance of hardships clearly favors the Porters (who have a new baby and who have nowhere else to live) over the Phoenix, a commercial landlord, and as the public has an interest in avoiding violation of the FHA, and because the Porters will face irreparable harm if they are evicted with a young child and [have] nowhere else to live. *Compare Carter*. A preliminary injunction proceeding also would enable the Carters to stay in their apartment while their cases is litigated, and would afford them the temporary relief that they are seeking.

Finally, although affirmative litigation (especially with a PI) is the most expensive option to our clients, this also would permit the broadest range of recovery, as determined by a jury likely to be sympathetic. Specifically, the Porters would be entitled to recover punitive damages and emotional damages in addition to obtaining compensatory

damages and injunctive relief, as well as recovery of reasonable attorneys' fees. *See Carter*. Given the strength of the Porters' claims, our firm can afford to take on the risk that we will prevail in this action, particularly as Phoenix appears to have sufficient resources to satisfy a judgment.

2. **Disadvantages:** One disadvantage to filing an affirmative case at this stage is that it is more expensive than other options, but this is mitigated by the strength of the case, greater relief available, and ability to recover attorneys' fees.

In addition, if our client ultimately was not successful in court, it would be precluded from filing an administrative complaint (whereas the converse is not true) but, as discussed below, I do not think the administrative route ultimately is an attractive one for our client.

C. **Filing Administrative Complaint with DFH:**

Finally, our client could consider filing an administrative complaint with the DFH, which could lead the DFH to issue an accusation against Phoenix and to pursue litigation on behalf of the Porters before the Fair Housing Commission. Given the strength of the Porter's FHA claims (discussed above), it is likely that the DFH would conclude that their dispute is worth litigating. Ultimately, the discovery available to the DFH appears to be comparable to that available to our clients in direct litigation.

1. **Advantages:** Filing an administrative complaint would have a few advantages for the Porters.

First, because the DFH and Fair Housing Commission (FHC) are specialized administrative bodies, they are likely to be sympathetic to the Porters' claims and to possess the necessary expertise to conduct a thoughtful and effective litigation.

In addition, because the DFH's staff would take the lead in litigating these claims before the FHC, this would reduce the costs of litigation for our client.

Moreover, the FHC is empowered to award civil penalties to $10,000 (which would not be available in other proceedings), in addition to damages, injunctive relief, emotional damages and attorney's fees.

Finally, if our client proceeded first with an administrative complaint and lost, it could still pursue an action in court, whereas the converse is not true.

2. **Disadvantages:** Ultimately, however, I feel that the advantages of proceeding administratively are not as strong as proceeding directly to court.

Most significantly, although the FHC is empowered to grant temporary injunctive relief, your investigation suggests that it rarely does so, and that the Porters could expect the determination by the FHC to take as much as one year from the time the complaint is issued (which itself follows a lengthy period of investigation, mediation, etc.) This time table is wholly unacceptable to our clients, who require an expedited determination of their claims and rights to stay in their apartment.

In addition, I am uncomfortable forfeiting control over the progress of any litigation to the DFH staff, and would prefer that we maintain our position as lead counsel in any action on behalf of the Porters.

Finally, an administrative proceeding would not permit our clients access to a jury, who is likely to be sympathetic to their claims, and they also could not recover punitive damages in an administrative action, which potentially could be significant.

III. Conclusion and Recommendation

Thus, for each of the reasons set forth above, I propose that we file affirmative litigation asserting violations of the FHA on behalf of the Porters and seek an immediate preliminary injunction to enjoin the unlawful detainer action pending the outcome of that proceeding.