

**FEBRUARY 2000
PENNSYLVANIA BAR EXAMINATION**

Essay Questions and Examiners Analysis



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Question No. 1: Facts and Interrogatories

Frank owned and operated Franco, Inc. (“Franco”). To finance a plant expansion, Franco obtained a loan from Bank. Frank, under a personal guaranty of this loan, pledged to Bank all of his stock in Sonco, Inc. (“Sonco”), an unrelated company. Frank’s tax basis in his Sonco stock was \$50,000.

Frank also had a minority interest in Lenco, Inc. (“Lenco”), another unrelated company. Lenco has since merged into Newco, Inc. (“Newco”) and Frank’s Lenco shares have been replaced with comparable shares in Newco under the Plan of Merger.

After completion of the Franco plant expansion, Franco experienced severe financial losses. Bank was pressing Franco and Frank for past due payments. Bank had identified Bill as a potential buyer of Franco under a plan which, along with the liquidation of Frank’s pledged Sonco stock, would have made Bank whole. Frank, without the advice of or representation by any attorney, had repeatedly refused to accept Bill’s offer to buy Franco, which offer Bank had approved.

One Saturday morning, Attorney Able, on behalf of Bank and Bill, went with Bill to Frank’s home without prior announcement and informed Frank that Bill’s offer was going to be withdrawn unless accepted on the spot in the form of a writing prepared by Able. Frank had no counsel present and neither he nor Able discussed getting counsel for Frank. Able did make it clear to Frank that he represented Bank and Bill but not Frank. When Frank asked Able whether Bill’s proposal would mean the loss of his stock in Sonco in addition to losing Franco, Able explained that Bill’s proposal would require the liquidation of the Sonco stock with the proceeds being paid to Bank in order to make Bank whole. Able further warned Frank (as was the case) that if he did not accept Bill’s proposal, Frank would run the risk of there being a deficiency on the financing with Bank even after a forced liquidation of the Franco assets and the Sonco stock. Frank, being very fearful of losing more than Franco and his Sonco stock, thereupon reluctantly signed the contract with Bill and a consent to Bank’s liquidation of the Sonco stock.

Upon the transfer of the Franco assets to Bill, the proceeds therefrom were applied on Franco’s debt to Bank and Franco ceased to exist. Also, Frank’s Sonco stock was sold for \$150,000 and applied to the Bank debt by Bank and there was no further deficiency on the Bank debt. What Able had represented to Frank was accurate.

Thereafter Frank died. In his will he left his Sonco stock specifically to his son, Joe, and his Lenco stock specifically to his daughter, Darlene. The balance of his estate was left to his church in memory of his deceased wife. The will (which was valid) was drawn before the Sonco stock was sold by Bank and before the merger of Lenco into Newco.

1. What, if anything, does Joe receive from Frank’s estate?
2. What, if anything, does Darlene receive from Frank’s estate?
3. What are the Federal income tax consequences, if any, to Frank as a result of Bank’s sale of Frank’s Sonco stock?
4. What are the Federal income tax consequences, if any, to Frank as a result of the payment to Bank under his personal guaranty? Assume that any indemnity claim by Frank against Franco is worthless.

5. Did Able's conduct on Saturday morning with respect to Frank violate the Pennsylvania Rules of Professional Conduct?

Question No. 1: Examiner's Analysis

1. Joe takes nothing from Frank's estate because the Sonco stock which was specifically bequeathed to him has adeemed completely.

This question explores what happens to securities which are specifically bequeathed in a will but which are later not existent in the estate of the testator. The matter is addressed in the Pennsylvania Estates and Fiduciaries (PEF) Code, 20 Pa. C.S.A. §2514 (17)(i) as follows:

- (17) Change in securities. If the testator intended a specific bequest of securities owned by him at the time of the execution of his will, rather than the equivalent value thereof, the legatee is entitled only to:
- (i) as much of those securities as formed a part of the testator's estate at the time of his death;
 - (ii) any additional or other securities issued by the same entity thereon and owned by the testator by reason of a stock dividend, stock split or other action by the entity, excluding any acquired by exercise of purchase options for more than a fractional share; and
 - (iii) securities of another entity received thereon or in exchange therefor and owned by the testator as a result of a merger, consolidation or reorganization of the entity or other similar change.

Subparagraph (i) of the above applies to Joe because his bequest was a specific bequest of the Sonco stock which stock is no longer existent at Frank's death in his estate. Not only is the Sonco stock non-existent in Frank's estate but there also are no proceeds of the Sonco stock existent and traceable in Frank's estate. Thus, even if Frank had bequeathed to Joe the proceeds of the Sonco stock in the event it had been sold prior to his death, Joe would have received nothing at Frank's death because there are no proceeds. Thus, the specific bequest to Joe of the Sonco stock fails as a result of ademption or ademption by extinction.

If Frank in his will had made it clear that the ademption of the Sonco specific bequest should be restored with some other bequest of equivalent value, such a provision would be applicable. However, the facts do not disclose any such provision.

The Uniform Probate Code provides in Section 2-607(a)(1) the same result.

2. Darlene takes the Newco stock in place of the Lenco stock because a specifically bequeathed security which changes in form due to a merger does not adeem.

This question also explores the possible ademption of specifically bequeathed securities. The same PEF Code section as quoted above applies but in Darlene's instance subsection (iii) applies. Specifically, Darlene's specific bequest was of the Lenco stock but due to the merger of Lenco into

Newco the Lenco stock is traceable to assets existent in Frank's estate at his death. Darlene's specifically bequeathed Lenco stock is now by merger Newco stock and she is entitled under subsection (iii) to the shares which Frank received in Newco as a result of the merger of Lenco into Newco.

The same result would occur under the Uniform Probate Code in Section 2-607(a)(3).

3. The sale by Bank of Frank's Sonco stock at a gain is taxable to Frank for federal income tax purposes even though it is an involuntary sale.

The facts show that Bank sold Frank's Sonco stock at a gain since the proceeds were \$150,000 and Frank's basis was \$50,000. Thus, on the sale of Sonco stock Frank realized a \$100,000 gain. This gain must be reported. Internal Revenue Code of 1986 (IRC), 26 U.S.C.A. §61(a)(3). It is either long term (if the stock was held one year or more) or short term (held less than one year). IRC §1222.

The question then becomes whether Frank is excused from reporting this gain for federal income tax purposes because Bank sold Frank's stock pursuant to a pledge of that stock rather than if Frank personally and voluntarily had sold his Sonco stock. Although there are types of gains which are excluded under the Internal Revenue Code (including like-kind exchanges, involuntary conversions, sales of principal residences, transfers of property in a divorce, etc.), none of these exclusions apply to the execution sale of Frank's Sonco stock. This is in part explainable as discussed below by the fact that Frank will be entitled to an offsetting loss for having to pay Bank under his guaranty of Franco's debt to Bank. Nevertheless, Frank must report his gain for federal income tax purposes.

Frank's gain is not ordinary income but instead qualifies as gain from the sale of a capital asset (i.e. a capital gain) under IRC §1221 and is either a short-term or long-term gain under IRC §1222. If it is a long-term gain, it would qualify for rates of tax which are more favorable than short term gains or ordinary income. IRC §1(h). However, if Frank has offsetting capital losses, such as will be discussed in paragraph 4 following, Frank may not owe any tax on the Sonco stock gain under IRC §1222.

In summary, the federal income tax consequences to this particular phase of Frank's loss of Franco and his Sonco stock is that the Bank's sale at a gain of Frank's Sonco stock must be reported as income to Frank under Section 61(a)(3) of the Internal Revenue Code (IRC), the amount of the gain (i.e., the \$100,000) is as computed under IRC §1001(a) and the gain is either long term or short term under IRC §1222. Whether or not the gain is long term is not determinable from the facts given.

4. The federal income tax consequences to Frank of paying Bank under his personal guaranty of Franco's debt is that Frank is entitled to take a short-term capital loss thereon in his personal federal income tax return.

The federal income tax treatment for Frank's payment to Bank under his guaranty is set forth in IRC §166 in the form of allowing Frank to take a capital loss on his income tax return not for the fact that he paid Bank on his guaranty of the Franco debt but rather for the fact that his claim against Franco for paying its debt has become worthless. Upon paying the Franco debt to Bank, Frank by subrogation became entitled to Bank's claim against Franco. The facts state that this claim of Frank's against Franco was worthless and IRC §166 provides that this worthlessness entitles Frank to a short-term capital loss.

Specifically, IRC §166 of the Internal Revenue Code provides in subsection (a)(1) that a taxpayer shall be allowed as a deduction any debt which becomes worthless within the taxable year involved. Subsection (b) provides that the amount of the deduction is the basis of the property which

becomes worthless (which since Frank paid cash to Bank in payment of the Franco debt means that Frank's basis is the amount which he paid or the \$150,000 as stated in the facts). Subsection (d) goes on to state that the worthless debt shall be treated as a short-term capital loss.

It should be noted that subsection (d) makes a distinction between non-business and business debts and between corporate and non-corporate taxpayers. Non-corporate taxpayers such as Frank in this case do not receive an ordinary deduction for bad debts which are non-business bad debts. The issue then becomes whether Frank's payment under his guaranty of the Franco debt gave rise to a business debt or a non-business debt for Frank. The cases under IRC §166 hold generally that shareholders who guaranty the debt of their corporation and who are called upon to pay the debt have only a non-business debt from their corporation unless they can show that they are in the business of guarantying corporate debt or that they guarantied corporate debt to save an employment position at the corporation. The facts show that Frank controlled his corporation and thus presumably controlled any employment he had with his corporation. The facts do not disclose that Frank had any employment motive when guarantying the corporate debt. The facts further do not disclose that Frank was in the business of guarantying corporate debts. Although the facts do show that he was involved in three corporations, he only appeared to have guaranteed the debt of one corporation and thus the provisions under IRC §166 which allow a non-corporate guarantor of corporate debts to claim a business bad debt (ordinary deduction) rather than a non-business bad debt (short-term capital loss) do not apply.

See IRC Reg. 1.166-9 (losses of guarantors), 166-5 (non-business debts) and cases such as *U.S. v. Generes*, 405 U.S. 93, 31 L.Ed. 2nd 62 (1972) (employee guarantor does not succeed in getting business bad debt treatment) and *Whipple v. Com.*, 373 U.S. 193, 10 L.Ed. 2nd 288 (1963) (shareholder does not get business bad debt treatment for "protecting" his interest).

Thus Frank as a result of having his Sonco stock sold by Bank at a \$100,000 gain will have to report a \$100,000 gain but will get an offsetting short-term capital loss in the amount of the payment (which was \$150,000). His losses will exceed his gains and he should therefore have a loss carryover under IRC §1212(b) unless he had other gains in the same taxable year which would absorb his excess loss. The question does not ask but Frank probably also had a loss on his investment in Franco since the facts show that he lost Franco when Bank liquidated Franco's assets pursuant to the Bank's financing of the Franco plant expansion.

5. Able violated Rule 4.3(b) of the Pennsylvania Rules of Professional Conduct by recommending to Frank, who was not represented by counsel, that he ought to accept the Bank and Bill's offer.

Able violated Pa.R.P.C. Rule 4.3(b) concerning how he can interrelate with a person unrepresented by counsel in a matter which Able's client has an adverse interest. Specifically, Pa.R.P.C. Rule 4.3(b) provides:

During the course of a lawyer's representation of a client a lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client.

Able clearly falls within the purview of this Rule. First, Able was representing clients (Bank and Bill) when he communicated with Frank at his home. Second, the facts show that Frank was not represented by a lawyer at his home nor in the matter at issue. Third, Able's clients (Bank and Bill) had

interests adverse to Frank. Last, Able gave more advice than allowed under Rule 4.3 (i.e., he explained to Frank the consequences of accepting and not accepting his clients' proposal). Even though the facts indicate that Able's advice was accurate, it was more than the maximum advice allowable (i.e., the advice to seek counsel). Furthermore, Able did not suggest to Frank or provide him the opportunity to seek counsel but instead by his prescribed advice effectively coerced Frank into acting when he did not have counsel. Thus, Able's actions violated Rule 4.3.

Question No. 2: Facts and Interrogatories

Edna's Candy Co. ("ECCO") is a Pennsylvania corporation operating candy stores in the western Pennsylvania area. ECCO had 10,000 shares authorized, of which 1,000 had been issued. Edna, ECCO's chief executive officer, saw the television program "Kay's Chocolate Kitchen," and realized that with a franchise from Kay, she could greatly increase ECCO's sales. ECCO obtained a franchise from Kay covering any ECCO Pennsylvania stores. Without changing its name, ECCO registered as trading as "Kay's Pennsylvania Chocolate Kitchen."

Kay supplied ECCO, on credit, with many of the ingredients, kitchen utensils and finished products featured on her television show. On behalf of ECCO, Edna executed a note for this line of credit along with a security agreement giving Kay a security interest in the products she supplied. However, no financing statements were filed.

Edna then proposed to ECCO's board that ECCO should expand by buying up existing stores in strategic locations and converting them into "Kay's Pennsylvania Chocolate Kitchens." At a regularly called meeting of the Board, Edna revealed that she had had discussions to acquire Sweet Tooth, Inc.'s ten stores in strategic locations. This would be accomplished not by a merger, but by issuing a total of 3,000 new ECCO shares to Sweet Tooth, Inc. which would then dissolve and distribute the shares among its owners. After proper investigation, ECCO's board authorized the purchase of these stores and the issuance of the new shares as payment. Don, a shareholder director vigorously objected and dissented. The acquisition was consummated after a shareholder vote where Don was the only dissenter.

1. Don can prove that the acquisition transaction has diminished the value of his ECCO shares. What rights, if any, can Don assert regarding this diminished value and with what success?
2. Assume ECCO defaulted in repaying Kay's credit line, and Kay has filed a proper action to repossess the products she shipped to ECCO. What advice do you give ECCO as to whether it has a defense to Kay's action?

To pay off Kay and to finance inventory for additional stores, ECCO opened up a credit line with Sam. Sam's business was supplying, on credit, inventory items and providing business financing. Sam feared that ECCO had too little capital for the amount of inventory being purchased and requested a guarantor. Edna's husband, Henry, volunteered. Identifying "Kay's Pennsylvania Chocolate Kitchen" as the "Debtor" in the documents, Sam prepared a line of credit note and security agreement and financing statements covering "all of the Debtor's inventory." On behalf of the Debtor, Edna executed the documents as prepared by Sam. Sam filed the financing statements in the proper offices. Henry executed the guaranty portion of the security agreement which provided: "I guarantee Sam against any loss under the line of credit issued to the Debtor, but only after Sam has first made a reasonable effort to recover its indebtedness from the sale of the Debtor's inventory secured hereunder."

3. Assume ECCO later becomes hopelessly insolvent still owing Sam on the line of credit and has filed for protection under the Bankruptcy Act and Tom has been appointed trustee. Sam moved the Bankruptcy Court for permission to repossess all of the debtor's inventory. Tom objects to Sam's perfection on technical grounds and requests the Court to treat Sam as an unsecured creditor. How should the Court rule?

4. Assume the Court agreed with Tom and declared Sam to be an unsecured creditor. Sam then demands payment from Henry. As Henry's attorney, how would you advise him?

Question No. 2: Examiner's Analysis

1. Don can claim dissenter's rights but will be unsuccessful even though ECCO purchased the stores by issuing new shares sufficient to elect a majority of the board.

Dissenter's rights are generally given to a shareholder of a corporation that is a party to a merger if that shareholder objects to the merger and follows certain procedural requirements. For example, see Pennsylvania BCL (Business Corporation Law) § 1930 [15 Pa. C.S.A. §1930]. In the past, corporations from time to time tried to avoid giving dissenter's rights by avoiding a merger, while still consummating the transaction by issuing new shares to the shareholders of the corporation with which they would otherwise merge. When the issuing of new shares became so substantial that they were sufficient to elect a majority of the board, corporation statutes would sometimes look through the transaction and refuse to allow a "mouse-swallows-the-lion" without providing for dissenter's rights. For example, see §311 F of the Pennsylvania 1933 BCL [15 P.S. §1311 F]. Suggestions have also been made by judges that extra – statutory dissenter's rights might be made available depending upon the relative size of the issuing corporation to the other parties in the fundamental transaction. For example, see footnote 7 in Terry v. Penn Central Corp., 668 F.2d 188, 194 (3d Cir. 1981). What these statutes and court decisions attempted to do, was to preserve the spirit of granting dissenter's rights to shareholders of a corporation involved in a transaction which in its result mirrors a merger – especially when the objecting shareholder's corporation is not dominant following the transaction.

The framers of the Pennsylvania 1988 BCL did away with this concept in BCL §1571(b)(3) [15 Pa. C.S.A. §1571(b)(3)]. The statute very clearly states that the shareholders of a corporation that acquires assets by the issuance of shares, even if those shares being issued are sufficient to elect a majority of the directors of the corporation, do not enjoy dissenter's rights. The official comment to this subsection states that it is specifically intended to repeal the provisions of §311 F of the 1933 BCL and overrule the suggestion in footnote 7 in Terry v. Penn Central Corp. Thus in Pennsylvania, the corporation can accomplish through the back door without giving dissenter's rights the same ultimate transaction result that would provide dissenter's rights if it were accomplished through the merger process.

If dissenter's rights were available for this type of transaction, such dissenter's rights would be limited to shareholders of Sweet Tooth, Inc. which is selling all of its assets for shares of ECCO and then going into voluntary dissolution. However, Don is a shareholder of ECCO and accordingly has no dissenter's rights in this situation, even if such rights were available in Pennsylvania for such a sale in connection with voluntary dissolution.

The facts state that ECCO's board authorized the transaction "after proper investigation." There is nothing in the facts to indicate that the directors failed to make a good faith determination that the acquisition was in ECCO's best interests. Therefore, one must conclude that Don cannot successfully claim that ECCO's board breached their fiduciary duty of care or duty of loyalty.

2. Kay's failure to file financing statements does not affect the enforceability of the security agreement against the debtor ECCO.

UCC sections 9-201 and 9-203 [13 Pa. C.S.A. §§9201, 9203] govern the rights between Kay and ECCO regarding Kay's security interest. Under §9-203 the conditions for enforceability of a security interest against the debtor are: (1) the debtor has signed a security agreement describing the collateral, (2) value has been given, and (3) the debtor has rights in the collateral. When these conditions are met, attachment occurs, and between Kay and ECCO these conditions were fulfilled. A security agreement was executed by Edna on behalf ECCO. Kay extended a line of credit to ECCO, thus providing the value (see UCC§1-201(44)), and ECCO received the goods giving it rights in them.

Under UCC §9-302 (13 PA. C.S.A. §9302) a filing is necessary to perfect a security interest in inventory. Kay did not file financing statements, and therefore Kay's security interest is unperfected. However, while UCC sections 9-301 and 9-312[13 Pa. C.S.A. §9301 and §9312] subordinate Kay's security interest to other creditors, they do not subordinate Kay's interest to the debtor, ECCO. On the contrary, since ECCO signed the security agreement giving Kay a security interest in the products she supplied, and attachment has occurred, UCC §9-201 [13 Pa. C.S.A. §9201] provides that the security agreement "...is effective according to its terms between the parties...". Therefore, having defaulted on the line of credit obtained from Kay, ECCO has no defense to Kay's request to repossess the products she supplied to ECCO. The procedures for repossession are contained in Part 5 of Article 9 but need not be discussed.

3. The Court will hold Sam to be unperfected because he filed only under "Kay's Pennsylvania Chocolate Kitchen," ECCO's trade name, and not under ECCO's real name and will deny Sam's motion to repossess the Debtor's inventory because now the Trustee has priority.

As stated earlier, the Uniform Commercial Code in §9-302 requires a filing to perfect a security interest in inventory. Sam prepared the security agreement and financing statements identifying the debtor as "Kay's Pennsylvania Chocolate Kitchen" and filed the financing statements in the proper offices. Unfortunately for Sam, Sam did not use the debtor's correct name but only the debtor's trade name. This is insufficient as UCC §9-402(7) [13 Pa. C.S.A. §9402(g)] provides that the financing statement is sufficient in showing the name of debtor if it gives the corporate name of the debtor whether or not it adds other trade names. This seems clearly to require that the debtor's true name be used in the filing. The official comment to this subsection makes this very clear by stating that "trade names are deemed to be too uncertain and too likely not to be known to the secured party or persons searching the record, to form the basis for a filing system." Therefore, Sam has failed to perfect his security interest by not filing in the debtor's true name. [Section 9-402(8)[13 Pa. C.S.A. §9402(h)] does provide that if the financing statement substantially complies with the section's requirements it is effective if not seriously misleading. Also see In Re: Mc Bee, 714 F.2d 1316(5th Cir. 1983).]

If Sam is determined to be unperfected, the priority rules of UCC §9-301[13 Pa. C.S.A. §9301] will be utilized by Tom to gain priority over Sam's security interest, the effect of which is to treat Sam as an unsecured creditor. Sec. 9-301(3) defines a "lien creditor" to include a trustee in bankruptcy, and §9-301(1)(b) states that an unperfected security interest is subordinate to the rights of a lien creditor. Therefore, Tom will prevail.

4. Henry will be discharged from his guaranty because Sam negligently failed to recover the indebtedness by first selling ECCO's inventory.

In the guarantee prepared by Sam and signed by Henry, Henry only agreed to reimburse Sam for losses remaining after Sam had first made a reasonable effort to recover the indebtedness from the sale of the debtor's inventory. When executing the guaranty containing this condition, Henry could reasonably assume that Sam would perfect a security interest in ECCO's inventory and that Henry could rely on this inventory to reduce, if not eliminate, Henry's liability under the guaranty agreement. As it turned out, the situation is far different from Henry's reasonable expectations, because the court has declared Sam to be an unsecured creditor and this means that the trustee, not Sam, will liquidate ECCO's inventory. ECCO being hopelessly insolvent, one can assume that there will be very little left for distribution on Sam's unsecured claim.

Henry should argue that Henry's liability under the guaranty is conditioned upon Sam taking reasonable steps to sell the inventory to reduce the debt and until Sam does so, Henry's obligation is not – and will not – come due. In addition, since the current situation came about only through Sam's failure to use ECCO's proper name on documents prepared by Sam and filed by Sam, Henry also can successfully claim that he is released from his guaranty because of Sam's negligence in failing to live up to his obligations under the guaranty agreement. As stated by the Pennsylvania Supreme Court in Dollar Bank v. Swartz, 540 Pa. 369, 657 A.2d 1242, 1244 (1995) "...the failure to perfect the security interest...was per se unreasonable". Having failed to use reasonable efforts to collect the indebtedness from the corporate debtor's inventory assets as promised in the guaranty agreement, Sam can not now ask Henry to bear the burden of Sam's negligence.

Sam might claim that had he been able to liquidate all of ECCO's inventory as required under the guaranty agreement, there still would have been a deficiency for which Henry is liable. This is a meritorious claim, but the burden is upon Sam to show what that deficiency would be, and the facts are silent in this regard. The only thing we do know is that Sam has demanded payment from Henry and that Henry is not responsible for the full indebtedness – and is not responsible for any deficiency unless Sam can produce evidence showing what that deficiency would have been.

Question No. 3: Facts and Interrogatories

The first year class at Widget Law School in Pennsylvania was a diverse group. Killdare, a licensed medical doctor, firmly believed in fee for service medicine and had become disenchanted with Health Maintenance Organizations. Pat, a devout hypochondriac who visited doctors on a regular basis, had an unsuccessful career as a spokesperson for a chain of health food stores before starting law school. Prior to beginning law school, Terry had been a homemaker and primary caretaker of Terry's three (3) minor children. Killdare, Pat and Terry were in the same classroom on the first day of law school. An enthusiastic law professor asked Pat to describe the case assigned for class. Overcome by anxiety, Pat had a seizure and collapsed onto the classroom desk.

Terry, seated next to Pat, called out, "It's an emergency! Pat needs help!"

Killdare bounded down the aisle of the classroom, pushing students aside and screaming, "Let me through, I'm a doctor!" Using professional skills, Killdare treated Pat for thirty minutes and Pat made a complete medical recovery from the seizure incident. Pat, grateful for Killdare's help, baked some rice cake brownies for Killdare. When Killdare promptly sent a bill to Pat for medical services rendered, Pat, already faced with substantial debt for doctor appointments and law school costs, was horrified.

1. What legal theory should Killdare assert to support the bill to Pat for medical services and with what likelihood of success?

Overwhelmed by financial obligations and still angry about Killdare's bill, Pat decided to sue Killdare for negligence. Pat thought that a lawsuit against Killdare might help solve Pat's financial problems and provide a way to retaliate against Killdare. Pat consulted with four (4) separate attorneys. Each attorney Pat consulted reviewed the seizure incident, had the facts reviewed by experts and concluded that Pat did not have a viable claim. Each attorney Pat consulted refused to take the case.

Pat disregarded the legal advice and timely filed a negligence action against Killdare in the proper Pennsylvania Court of Common Pleas.

2. In addition to a general denial and a demurrer, what defense should Killdare raise in this negligence action and with what likelihood of success?

Assume the Pat vs. Killdare lawsuit is terminated in Killdare's favor. However, despite the positive outcome, Killdare is extremely annoyed at the substantial financial costs he incurred as a result of the litigation.

3. What cause of action could Killdare pursue against Pat to recover these costs and what is the likelihood of success?

In the interim, Widget Law School was challenging and required a great deal of work from its students. Terry's spouse Chris frequently became testy and argumentative about the demands of Terry's law school classes. One evening, Chris consumed several alcoholic beverages and started an argument. The argument escalated and Chris threw a law school textbook at Terry's head, punched a hole in the fiberboard wall within inches of where Terry stood and angrily warned Terry that it would be Terry "who would be damaged the next time." Terry was very frightened. Terry also knew that Chris kept a gun in the house and was worried about the personal safety of the children as well. This was not the first time Chris had seriously threatened and frightened Terry.

Terry was hesitant to take any action because Chris was the sole financial support of the family while Terry attended law school fulltime. However, the situation at home continued to escalate and Terry realized that something must be done quickly. Terry refused to file a criminal action against Chris or to file for divorce.

4. Based on the concerns raised in the above facts, what is the most appropriate legal action Terry should pursue against Chris?

Question No. 3: Examiner's Analysis

1. **Killardare could assert a quasi contract cause of action for unjust enrichment as the legal basis for seeking payment for medical services rendered to Pat by Killardare.**

A cause of action in quasi-contract for quantum meruit, a form of restitution, is made out where one person has been unjustly enriched at the expense of another. Feingold v. Pucello, 439 Pa. Super. 509, 654 A.2d 1095 (1995), rearg. den'd. (March 22, 1995). In order to prove unjust enrichment, one must generally prove the following elements: (1) benefits conferred on defendant by plaintiff; (2) appreciation of such benefits by defendant; and (3) acceptance and retention of such benefits under circumstances that it would be inequitable for defendant to retain the benefit without payment of value. Schenck v. K.E. David, Ltd., 446 Pa. Super. 94, 666 A.2d 327 (1994); Torchia v. Torchia, 346 Pa. Super. 229, 499 A.2d 581 (1985).

Unjust enrichment is essentially an equitable doctrine. Styler v. Hugo, 422 Pa. Super. 262, 619 A.2d 347 (1993), aff'd. 535 Pa. 610, 637 A.2d 276 (1994). Quasi-contracts have often been called implied contracts or contracts implied in law; but, unlike true contracts, quasi-contracts are not based on the apparent intention of the parties to undertake the performances in question, nor are they promises. Restatement (Second) Contracts Section 4. They are obligations created by law for reasons of justice. Id.

The existence of unjust enrichment depends upon whether a defendant has been unjustly enriched and is based on the specific situation and not based on the intention of the plaintiff and defendant. Schenck, supra. Yet, benefitting from the act of another is not by itself enough to establish unjust enrichment. Torchia, supra. A plaintiff must demonstrate that a defendant either wrongfully secured or passively received a benefit that it would be unconscionable for the defendant to retain. Id. Where unjust enrichment is found, the law implies a contract, which requires the defendant to pay to the plaintiff the value of the benefits conferred. Schenck, supra.

Killardare rushed over to provide medical care to Pat and treated Pat for thirty minutes. Thus, Pat received the benefit of thirty minutes of Killardare's professional medical services. Because Pat was unconscious during at least part of the time, Pat was not aware of the services at the time they were provided nor did Pat expressly accept Killardare's services. Pat was unable to appreciate the benefits at the time they were provided due to the emergency nature of the situation. However, regardless of Pat's inability to appreciate the benefits, Pat may have been unjustly enriched by Killardare's services. Quasi-contracts may be found in the absence of any expression of assent by the party to be charged. Martin v. Little, Brown and Company, 304 Pa. Super. 424, 450 A.2d 984 (1981) quoting Schott v. Westinghouse Electric Corporation, 436 Pa. 279, 259 A.2d 443 (1969).

The last query is whether it would be unconscionable or inequitable for Pat to retain the benefit of medical care without compensating Killardare. In order to prove that a defendant has been unjustly

enriched by the plaintiff's services, there must be convincing evidence that the plaintiff's services were not gratuitous. Mitchell v. Moore, ___ Pa. Super. ___, 729 A.2d.1200 (1999). An intention to pay for work done will be assumed except in the case of parent and child or where a claimant has become "part of the family." Brown v. McCurdy, 278 Pa. 19, 122 A. 169 (1923).

There is evidence that Killdare was not a volunteer and had an expectation of payment when the services were performed. The facts state that Killdare was a professional doctor who firmly believed in fee for service medicine. There is nothing in the facts that would indicate that Killdare was acting as a volunteer. Killdare was not Pat's parent or child, nor was there any indication that Killdare was "part of the family." Therefore, the intention to pay for work done will be assumed.

If it is determined that it would be inequitable for Pat to have benefitted from the medical care without paying Killdare for these services, Pat would have been unjustly enriched and Killdare would be entitled to the reasonable value of the services provided to Pat by Killdare. If, however, one finds that it would not be unconscionable for Pat to retain the benefit of Killdare's services without paying Killdare, one would conclude that there would be no unjust enrichment and Killdare would not be entitled to the reasonable value of services provided.

2. Killdare could raise the Good Samaritan defense if Pat sued Killdare for negligence and the defense would likely be successful and shield Killdare from liability for ordinary negligence.

Pennsylvania statute provides civil immunity for a licensed physician against liability for ordinary negligence in an emergency situation as follows:

42 Pa.C.S.A. Section 8331 Medical Good Samaritan civil immunity.

Any physician licensed by any state, who happens by chance upon the scene of an emergency or who arrives on the scene of an emergency by reason of serving on an emergency call panel or similar committee of a county medical society or who is called to the scene of an emergency by the police or other duly constituted officers of a governmental unit or who is present when an emergency occurs and who, in good faith, renders emergency care at the scene of the emergency, shall not be liable for any civil damages as a result of any acts or omissions by such physician or practitioner or registered nurse in rendering the emergency care, except any acts or omissions intentionally designed to harm or any grossly negligent acts or omissions which result in harm to the person receiving emergency care. **42 Pa.C.S.A. Section 8331(a).**

According to the facts, Killdare was a licensed doctor who was present in the classroom when Pat fainted, and who then, in good faith, rendered emergency care to Pat at the scene of the emergency. Assuming that Killdare acted negligently with respect to the medical treatment rendered to Pat, this statute would protect Killdare from any and all liability for civil damages sustained by Pat as a result of Killdare's negligent treatment. If, however, Killdare intentionally harmed Pat or was grossly negligent in treating Pat, neither of which is supported by the facts, Killdare would not be entitled to the immunity provided by this Good Samaritan statute.

3. Killdare could pursue a cause of action for wrongful use of civil proceedings against Pat and would likely be successful.

Pennsylvania's Dragonetti Act created a cause of action for wrongful use of civil proceedings. Northwestern Nat. Cas. Co. v. Century III Chevrolet, Inc., 863 F. Supp. 247 (W.D.Pa. 1994). The statute provides:

Section 8351 Wrongful use of civil proceedings. A person who takes part in the procurement, initiation or continuation of a civil proceeding against another is subject to liability to the other for wrongful use of civil proceedings [if]:
(1) He acts in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based; and
(2) The proceedings have terminated in favor of the person against whom they are brought. **42 Pa.C.S.A. Section 8351.**

The statute also articulates plaintiff's burden of proof in an action based on wrongful use of civil proceedings:

Section 8354. Burden of proof. In an action brought pursuant to this subchapter, the plaintiff has the burden of proving, when the issue is properly raised, that:
(1) The defendant has procured, initiated or continued the civil proceedings against him.
(2) The proceedings were terminated in his favor.
(3) The defendant did not have probable cause for his action.
(4) The primary purpose for which the proceedings were brought was not that of securing the proper discovery, joinder of parties or adjudication of the claim on which the proceedings were based.
(5) The plaintiff has suffered damages. **42 Pa.C.S.A. Section 8354.**

Lack of probable cause is an essential element of a cause of action for wrongful use of civil proceedings. Probable cause exists when:

A person reasonably believes in the existence of the facts upon which the claim is based and either:
(1) Reasonably believes that under those facts the claim may be valid under the existing or developing law;
(2) Believes to this effect in reliance upon the advice of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information; or
(3) Believes as an attorney of record, in good faith, that his procurement, initiation, or continuation of a civil cause of action is not intended to merely harass or maliciously injure the opposite party. **42 Pa.C.S.A. Section 8352.**

The Pennsylvania statute also permits a plaintiff to recover damages, including but not limited to losses in connection with counsel fees and emotional distress, when the essential elements set forth in 42 Pa.C.S.A. 8351 have been established. **42 Pa. C.S.A. Section 8353.**

Thus, to succeed in a cause of action for wrongful use of civil proceedings under the Dragonetti Act, Killdare must allege and prove three elements: (1) that the underlying proceedings were terminated in Killdare's favor; (2) that Pat caused those proceedings to be instituted without probable cause; and (3) that the proceedings were instituted primarily for an improper purpose. Bannar v. Miller, 701 A.2d 232, (Pa. Super. 1997), reargument denied.

The lawsuit was terminated in Killdare's favor, which satisfies the first element of this tort. Killdare would likely be able to successfully prove that Pat did not have probable cause to initiate the proceeding. The facts presented do not indicate that Pat reasonably believed that Killdare had acted negligently. Further, after Pat consulted with legal counsel and fully disclosed the facts of the incident, rather than advise Pat that a valid claim existed, each attorney advised Pat that the facts did not support a viable claim for negligence. However, Pat disregarded this legal advice and proceeded with the lawsuit. Because Pat proceeded with the lawsuit knowing that the case had no merit, Killdare could assert that Pat did not have probable cause.

Killdare would also have to demonstrate that Pat initiated the lawsuit primarily for a reason other than securing the proper discovery, joining a party or parties, or adjudicating the claim on which the proceedings were based. The facts disclose that Pat, knowing that the lawsuit had no merit, filed the lawsuit as a way to obtain financial relief and to retaliate against Killdare. Retaliation and the elimination of Pat's debt were Pat's primary reasons for filing the lawsuit. As a result, Killdare would likely be able to show that Pat filed the lawsuit primarily for improper reasons and would likely be able to prove the third element necessary to prevail in a lawsuit based on the tort of wrongful use of civil proceedings.

Pennsylvania law regarding wrongful use of civil proceedings is similar to the Restatement (Second) Torts pertaining to wrongful use of civil proceedings. Rosenfeld v. Pennsylvania Auto. Ins. Plan, 431 Pa.Super. 383, 636 A.2d 1138 (1994); Walasavage v. Nationwide Ins. Co., 806 F.2d 465 (3d Cir. 1986). While the Dragonetti Act closely tracks the Restatement (Second) of Torts, the Pennsylvania statute requires a defendant in a wrongful use of civil proceedings action to act in a grossly negligent manner or without probable cause while the Restatement (Second) requires merely that the defendant act without probable cause.

Restatement (Second) of Torts Section 675 defines probable cause as follows:

One who takes an active part in the initiation, continuation or procurement of civil proceedings against another has probable cause for doing so if he reasonably believes in the existence of the facts upon which the claim is based, and either

- (a) correctly or reasonably believes that under those facts the claim may be valid under the applicable law, or
- (b) believes to this effect in reliance upon the advice of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information. Restatement (Second) Torts Section 675.

Thus, the application of the facts to the Restatement and the conclusion reached should be substantially similar to the analysis under the Pennsylvania statute with respect to determining the existence of probable cause.

4. Terry should file a Petition for Protection from Abuse pursuant to The Protection from Abuse Act (PFA Act).

The purpose of the PFA Act, 23 Pa. C.S.A. §6101, et seq., is to protect victims of domestic violence from perpetrators of such abuse. Lee v. Carney, 435 Pa. Super. 405, 645 A.2d 1363 (1994). A court is empowered to grant broad relief to bring about cessation of abuse. Heard v. Heard, 418 Pa. Super. 250, 614 A.2d 255 (1992).

The PFA Act describes several different acts which constitute abuse. One type of abuse defined in the PFA Act occurs when a family member places another family member in reasonable fear of imminent serious bodily injury. **23 Pa.C.S.A. Section 6102**. When Chris threw a law school textbook at Terry's head, punched a hole in the fiberboard wall next to Terry's head and angrily warned Terry that it would be Terry "who would be damaged the next time" Terry was very frightened and was placed in reasonable fear of imminent serious bodily injury. And, because this was not the first time Chris had seriously threatened Terry and Terry knew that Chris kept a gun in the house, Terry was also worried about the personal safety of the children. Even though Terry may not be able to prove physical violence, threats of violence made by Chris to Terry were most likely sufficient to place Terry in reasonable fear of physical danger.

Terry has serious concerns about custody and support as well as the physical safety of Terry and the children. The purpose of the remedies available under the PFA Act is to allow people to live peaceably and without fear of injury within their own families or residences. Miller on Behalf of Walker v. Walker, 445 Pa. Super. 537, 665 A.2d 1252 (1995). Terry's goals in seeking relief under the PFA Act would seem to be consistent with the articulated goals of and policies underlying the statute.

In addition to restraining Terry's spouse Chris from further acts of abuse, a Protection Order could direct Chris to leave the household; prevent Chris from entering the residence or the law school; award Terry temporary custody of the minor children; require Chris to pay child and spousal support; direct Chris to turn over the gun to the sheriff; require Chris to pay court costs and attorney fees associated with the Petition for Protection from Abuse and to pay for all losses, such as medical costs, if any, and damage to property which was a result of the abuse; and award any other appropriate relief sought by Terry. **23 Pa.C.S.A. Section 6108(a)**.

Therefore, for all of the reasons discussed above, Terry should file a Petition for Protection from Abuse.

Question No. 4: Facts and Interrogatories

Alvin, an 18-year-old recent high school graduate, decided to plan a party at the family home while his parents were away. Alvin told his sister, Mattie, who looked several years older than her actual age of 14 and a half, of his plans. Mattie promised to keep the party a secret.

About 30 of Alvin's friends attended the party including Larry, a 19-year-old, who recently graduated from a neighboring high school. On the night of the party, at approximately 11:30 p.m., Larry went upstairs to search for a bathroom. As he was searching, he opened a door and saw Mattie sitting on a bed watching television. Larry had never personally met Mattie but recognized her as a friend of his 17-year-old sister, Alexandra. Larry entered the room, closed the door behind him and began to talk to Mattie. After talking for awhile, they began to kiss. A short time later, Alvin opened the door and saw Larry and Mattie engaging in sexual intercourse. After a heated exchange, Alvin told Larry to get out of their home immediately.

The next morning, Alvin telephoned Larry at his home and told him that he was furious about the incident with Mattie and he was going immediately to the police department to report him. Larry, who was overcome with fear, sped towards the police station in a 1996 green Honda Accord. While in transit through the city, and as a result of his driving approximately 30 mph over the posted speed limit of 25 mph and swerving through traffic, he lost control of his vehicle and struck Barbara who was standing at a bus stop. Larry, who didn't even realize that he had struck Barbara, continued to drive toward the police station where he arrived several minutes before Alvin. As he was waiting for Alvin to arrive, Larry decided that he would have to eliminate Alvin as a witness to the prior evening's incident and he would simply deny anything happened if Mattie went to the police. When Alvin arrived, he parked across the street from the police station. As Alvin began to cross the street, Larry sped towards him. Alvin saw Larry driving the Honda just before the impact. The force of the impact threw Alvin 60 feet down the road into contact with another vehicle. Larry sped away from the scene.

Rose, a local merchant, heard the sound of the Honda striking Alvin and ran outside. Rose saw Alvin lying on the street in a pool of blood. Alvin, who saw the blood spurting from his chest and the pool of blood surrounding him, said to Rose in a barely audible voice: "Larry is the one who tried to kill me with the Honda. He is also the one who stole that Honda three weeks ago." Alvin then slipped into a state of unconsciousness and died shortly thereafter.

Three (3) days after she was struck, Barbara died of complications from the massive internal injuries she sustained when she was struck by the Honda being operated by Larry.

Shortly after her brother's death, Mattie informed the police that she had sexual intercourse with Larry on the night preceding her brother's death.

- 1.(a). Assume that it is the prosecutor's policy to charge any misdemeanor or felony crimes which apply to a given incident. Other than the crime of corruption of a minor, with what crime(s) will Larry most likely be charged with regard to the incident with Mattie?
- 1.(b). What defense(s) should Larry's counsel raise to these charges and with what likelihood of success?
2. Assume that Larry is found guilty of speeding and reckless driving before the District Justice. With the exception of any other summary offenses and any offenses relating to

leaving the scene or failure to report the accident, with what crime(s) will Larry most likely be charged and found guilty with regard to Barbara's death?

3. The prosecuting attorney charges Larry with murder with regard to Alvin's death. At Larry's trial, the prosecutor calls Rose as a witness and attempts to introduce the statement made to her by Alvin. As defense counsel, what objection(s) would you raise to the statement and with what likelihood of success?

Question No. 4: Examiner's Analysis

1.(a). Larry will most likely be charged with the crimes of statutory sexual assault, aggravated indecent assault and indecent assault.

A person commits statutory sexual assault, a felony of the second degree, when that person engages in sexual intercourse with a complainant under the age of 16 years and that person is four or more years older than the complainant and the complainant and the person are not married to each other. 18 Pa. C.S.A. Section 3122.1. As applied here, Larry is a 19-year-old who has engaged in sexual intercourse with a 14 and a half-year-old. The facts indicate that prior to the party, Larry and Mattie had not met each other. Accordingly, it can be inferred that the two individuals were not married to each other. Since Mattie is under sixteen and Larry is four or more years older than she is, and the two are not married, he will most likely be charged with statutory sexual assault.

A person who has indecent contact with the complainant or causes the complainant to have indecent contact with the person is guilty of indecent assault if the complainant is less than 16 years of age and the person is four or more years older than the complainant and the complainant and the person are not married to each other. 18 Pa. C.S.A. Section 3126(a)(8). Indecent contact is defined as any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in either person. 18 Pa. C.S.A. Section 3101. Here, the facts indicate that Larry touched Mattie's intimate parts through the act of intercourse and it can be inferred that this was for the purpose of arousing or gratifying his sexual desire. Since Mattie was less than 16 years of age and Larry was four or more years older than Mattie when the touching occurred, and the parties were not married, Larry would most likely be charged with the crime of indecent assault.

A person who engages in penetration, however slight, of the genitals of a complainant with a part of the person's body for any purpose other than good faith medical, hygienic or law enforcement procedures, commits aggravated indecent assault, a felony of the second degree, if the complainant is less than 16 years of age, and the person is four or more years older than the complainant, and the complainant and person are not married to each other. 18 Pa. C.S.A. Section 3125. In this case, the intercourse between Larry and Mattie would qualify as penetration of the genitals. There is no indication that the intercourse was initiated for the purpose of good faith medical, hygienic or law enforcement procedures. Further, since Mattie is less than 16 years of age, and Larry is four or more years older than Mattie, and the parties are not married to each other, Larry will most likely be charged with aggravated indecent assault.

Since the introductory language of §3125 "excepts" §3122.1 (Statutory Sexual Assault) from the Statute, an argument could be made that Larry could not be charged with both of these crimes on these facts. While it is clear that a person could not be sentenced to both of these crimes on these facts, the question asks "with what crime(s) will Larry most likely be charged," assuming it is the prosecutor's policy to charge any misdemeanor or felony crimes which apply to a given incident. Thus, an argument

can be made that Larry would most likely be charged with both of these crimes.¹ For example, see Commonwealth v. Przybyla, 722 A.2d 183 (Pa.Super. 1998) - defendant charged with statutory sexual assault and aggravated indecent assault arising from act of consensual intercourse. As an aside, the ability to charge a person with aggravated indecent assault on these facts is also supported by the fact that a conviction for such an offense triggers the reporting requirements of Megans Law, 42 Pa.C.S.A. §9793 while a conviction for statutory sexual assault does not. It is unreasonable to conclude that the legislature intended to preclude charging a person with aggravated indecent assault where the penetration of the genitals occurs through sexual intercourse thereby avoiding the reporting requirements of Megans Law when the penetration of the genitals of a minor occurs through intercourse rather than some other means.

1.(b). Larry’s counsel should raise the defense of mistake as to age and the result would depend on whether a jury determines, by a preponderance of the evidence, that Larry believed that Mattie was legally old enough to engage in sexual intercourse with him.

The portion of the Crimes Code governing sexual offenses has a section which specifically deals with mistake as to the age of a complainant. In particular, 18 Pa. C.S.A. Section 3102 provides that when criminality depends on the child’s being below a critical age older than 14 years, it is a defense for the defendant to prove by a preponderance of the evidence that he or she reasonably believed the child to be above the critical age.

In this case, the facts indicate that Mattie looked several years older than her actual age of 14 and a half. In addition, Larry recognized Mattie as a friend of his 17-year-old sister, Alexandra. The issue is whether defense counsel can convince the jury, by a preponderance of the evidence, that Larry reasonably believed Mattie to be legally able to engage in sexual intercourse based upon her appearance and her friendship with Larry’s sister. Although it is certainly possible that defense counsel could successfully raise this defense for Larry, a reasonable argument to the contrary can be made that these factors alone would call for assumptions on Larry’s part which are not reasonable to make when the line to be drawn between legal and illegal sexual relations is so critical.

2. Larry will most likely be charged and found guilty of involuntary manslaughter, homicide by vehicle and reckless endangerment.

A person is guilty of involuntary manslaughter when, as a direct result of the doing of an unlawful act in a reckless or grossly negligent manner or the doing of a lawful act in a reckless or grossly negligent manner, he causes the death of another. 18 Pa. C.S.A. Section 2504. By driving the Honda 30 miles per hour over the posted speed limit on a city street and swerving through traffic, which resulted in his losing control of the vehicle, Larry will be found to have been operating his vehicle in a reckless or grossly negligent manner. Because this led to Barbara’s death, he will most likely be charged and found guilty of involuntary manslaughter, cf. Commonwealth v. Hicks, 203 Pa.Super. 307, 201 A.2d 294 (1964). Recklessness, which encompasses gross negligence, is required for a conviction rather than mere negligence. See Commonwealth vs. Comer, 552 Pa. 527, 716 A.2d 593 (1998) which discusses the distinction between gross negligence and simple negligence.

¹The focus of question 1(a) is on Statutory Sexual Assault and only one point has been allocated to candidates who identify either aggravated indecent assault or indecent assault as potentially chargeable crimes.

Any person who unintentionally causes the death of another person while engaged in the violation of any law of this Commonwealth or municipal ordinance applying to the operation or use of a vehicle or to the regulation of traffic is guilty of homicide by vehicle, a misdemeanor of the first degree, when the violation is the cause of death. 75 Pa. C.S.A. Section 3732. To establish homicide by vehicle, the Commonwealth must prove beyond a reasonable doubt that the defendant violated a provision of the Motor Vehicle Code and this violation was a cause of the victim's death. Commonwealth v. Cheatham, 419 Pa.Super. 603, 607-08, 615 A.2d 802, 804-05 (1992). Causation will only be found where the defendant's violation of the Motor Vehicle Code was a direct and substantial factor in the death of the victim, and the fatal result was not so extraordinary or remote that it would be unfair to hold the defendant criminally responsible. Commonwealth v. Rementer, 410 Pa.Super. 9, 22-23, 598 A.2d 1300, 1306 (1991). To sustain a conviction for the offense of homicide by vehicle, the Commonwealth must establish that the driver of the vehicle acted recklessly or in a criminally negligent manner. Commonwealth v. Heck, 517 Pa. 192, 535 A.2d 1575 (1987).

The question makes it clear that Larry was found guilty of operating his vehicle 30 mph over the posted speed limit. By more than doubling the speed limit, Larry's actions should qualify as being reckless and/or criminally negligent. In addition, there is no indication that Larry intended to kill Barbara as he did not even know that he had hit her with his vehicle. Since Barbara's death occurred as a result of Larry more than doubling the posted speed limit which would qualify as being reckless and/or criminally negligent, he will likely be charged and found guilty of homicide by vehicle.

Larry can be also be found guilty of recklessly endangering another person as his reckless driving placed others in danger of death or serious bodily injury as evidenced by the fact that death did, in fact, result from Larry's reckless driving. See 18 Pa. C.S.A. §2705 and Commonwealth v. Tipton, 396 Pa.Super. 402, 578 A.2d 964 (1990).

3. Defense counsel will object to the entire statement being hearsay and the second part of the statement being irrelevant. However, the first part of the two-part statement will be admissible as a dying declaration, excited utterance or present sense impression exception to the hearsay rule. The second part will not be admissible, both because it isn't relevant and because it doesn't fall within an exception to the hearsay rule.

The first part of Alvin's statement to Rose provides that "Larry is the one who tried to kill me with the Honda." This statement would qualify as hearsay, as it is a statement (an oral assertion intended by Alvin as such) which is other than one made by the declarant while testifying at the trial, offered in evidence to prove the truth of the matter asserted (See Pa. R.E. 801). Hearsay is not admissible except as provided by the Rules of Evidence (See Pa. R.E. 802). However, the hearsay rule provides for exceptions where the declarant is unavailable. In particular, Pa. R.E. 804(a)(4) defines a witness as being unavailable where he is unable to be present or testify at the hearing because of death. Since Alvin is unavailable at trial, due to his death, his statement can come in under the belief of impending death exception which allows statements made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death (See Pa. R. E. 804(b)(2)).

A statement may be admissible as a dying declaration notwithstanding its hearsay attributes, if the declarant identifies his attacker, the declarant believes he is going to die, that death is imminent, and death actually results. The declarant's belief in his imminent demise, for purposes of admitting a dying declaration, may be inferred from surrounding circumstances, including the nature of declarant's wounds. See Commonwealth v. Griffin, 453 Pa.Super. 657, 684 A.2d 589 (1996).

In this case, Alvin told Rose that Larry is the one who tried to kill him as he saw blood spurting from his chest and saw the pool of blood surrounding him. Due to the fact that he had just been struck by a vehicle and thrown 60 feet through the air, and due to the nature of his wounds, it is likely that this statement will qualify as a Statement Under Belief of Impending Death (Dying Declaration) exception to the hearsay rule.

The first part of Alvin's statement could also be admitted as either a present sense impression or excited utterance exception to the hearsay rule, where the availability of the declarant is immaterial. These exceptions were discussed fully in Commonwealth v. Chamberlain, 557 Pa. 34, 731 A.2d 593 (1999). In short, Alvin's statement would qualify as a present sense impression as it explained an event Alvin was perceiving immediately after he perceived it (See Pa. R.E. 803(1)). Alvin's statement would qualify as an excited utterance as it related to a startling event and was made while Alvin was under the stress or excitement caused by the event (See Pa. R.E. 803(2)).

The second part of the statement provides "he is also the one who stole the Honda three weeks ago". Initially, it can be argued that this portion of the statement is not even relevant to the prosecutor's attempt to prove that Larry ran over Alvin with the automobile. In particular, the fact that Larry stole the Honda does not make it more or less probable that he ran over Alvin. See Pa. R.E. 401 and Commonwealth v. Scott, 480 Pa. 50, 54, 389 A.2d 79, 82 (1978). For the purposes of the murder trial, it really doesn't matter whether Larry owned, borrowed or stole the car that he used to run over Alvin. Further, any possible relevance would be outweighed by its prejudicial impact and it would not be admissible on that basis (See Pa. R.E. 403).

Even if it was determined that this second portion of the statement was relevant, the statement would qualify as a hearsay statement which does not fall within any exceptions and would therefore be inadmissible on that ground.

Question No. 5: Facts and Interrogatories

The legislature of State P recently passed four (4) bills dealing with various aspects of the growing computer industry. These bills are summarized as follows:

1. In order to encourage the development of computer assembly businesses in State P, Bill #1 requires that all computers purchased by State P for its own use be assembled within State P, unless the specific type of computer required is unavailable from a State P assembler.

2. The State P Consumer Protection Law allows a plaintiff to recover treble damages for a breach of warranty claim involving computer products. In order to protect State P businesses that assemble computers, Bill #2 amends the State P Consumer Protection Law to exclude treble damages in cases where the computer was assembled in State P. Only computers assembled outside State P would therefore be subject to treble damage claims.

3. Bill #3 prohibits including product prices in advertisements for computer products appearing in newspapers, on radio or television, or in other media. After examining numerous advertisements for computer products, the legislature concluded that many ads were, in its view, confusing to the consumer because advertised prices often did not include monitors, modems, printers or other peripheral products that many consumers would need to fully utilize a computer. Consumers should, according to supporters of this bill, simply get pricing information directly from retailers where questions concerning what was included within a specified price could be immediately answered.

4. Bill #4 requires that advertising, promotional literature and product packaging used by State P retailers of computers specify the location at which the computer offered for sale was assembled. The legislative purpose for this requirement is to enable State P consumers to identify those computers which are assembled in State P as they make purchasing decisions.

Approval of the Governor of State P is required for the bills to become law, and they have been properly transmitted to the Governor for her review. The Governor has determined that she will grant such approval of a bill only if, in the opinion of her legal staff, the bill does not violate any provision of the United States Constitution; otherwise, she intends to veto the bill. As counsel to the Governor, provide an opinion for each bill identifying what likely federal constitutional claim or claims could be asserted, and whether the Governor should veto the bill because it is likely to be declared unconstitutional.

Question No. 5: Examiner's Analysis

1. The requirement that computers purchased by State P for its own use be assembled within State P could be challenged under the Commerce Clause but will be a valid exercise of state power under the Commerce Clause.

The Commerce Clause of the United States Constitution, Article I, § 8, cl.3, grants to Congress the power to regulate interstate commerce. In addition, however, the Supreme Court has long held that the Commerce Clause also limits the power of states to interfere with or impose burdens upon interstate commerce.

“This ‘negative’ aspect of the Commerce Clause prohibits economic protectionism - that is, regulatory measures designed to benefit in-state economic

interests by burdening out-of-state competitors. Thus, state statutes that clearly discriminate against interstate commerce are routinely struck down unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism.”

New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 273-74, 108 S.Ct. 1803, 1807 (1988).

Bill # 1 facially discriminates against companies that assemble computers outside of State P. In this instance, however, State P is acting as a market participant in a manner similar to any other purchaser of goods rather than a market regulator. Under these circumstances, the Supreme Court has held that the Commerce Clause does not prohibit a state from exercising its own economic power to its own benefit. White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204, 103 S.Ct. 1042 (1983); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 96 S.Ct. 2488 (1976).

In Smith Setzer v. South Carolina Procurement Review Panel, 20 F.3d 1311 (4th Cir. 1994) the Court upheld a similar requirement: “Because state participation in the market, even participation that is frankly discriminatory in excluding foreign interests from receiving its benefits, does not establish barriers within the general market framework that impede interstate commerce, such activity falls outside the scope of the negative Commerce Clause.” Id., at 1318. Accordingly, State P’s proposed requirement that computers purchased for its own use be assembled within State P would be a valid exercise of state power under the negative aspects of the Commerce Clause and the Governor should not veto this bill.

2. Subjecting only computers assembled outside State P to treble damage claims will violate the negative aspect of the Commerce Clause. A claim under the Equal Protection Clause of the Fourteenth Amendment will likely be unsuccessful.

Bill # 2 operates to provide a distinct benefit for products assembled within State P by eliminating the possibility of treble damages for breach of warranty claims. Assemblers located outside of State P would still be subject to treble damage claims under the State P Consumer Protection Law. Unlike Bill #1, in this instance it is clear that State P is acting as a market regulator rather than as a market participant, because Bill #2 applies to computers purchased by any person or organization. Thus, Bill #2 is clearly a regulatory measure intended to benefit in-state economic interests by burdening out-of-state competitors. See, New Energy Co. of Indiana v. Limbach, supra, 486 U.S. at 273, 108 S.Ct. at 1807.

In Brown-Forman Distillers v. New York State Liquor Authority, 476 U.S. 573, 106 S.Ct. 2080 (1986), the Supreme Court described the two levels of scrutiny for state laws alleged to violate the Commerce Clause:

“When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state economic interests, we have generally struck down the statute without further inquiry. See, e.g. City of Philadelphia v. New Jersey, 437 U.S. 617, 98 S.Ct. 2531 (1978). When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the state’s interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844, 847 (1970).”

Bill #2 clearly falls into the former category and is therefore subject to strict scrutiny. Even if such directly discriminatory statutes are not invalid *per se* they will be upheld if, but only if, they serve a legitimate local purpose and the purpose could not be served as well by available non-discriminatory means. Maine v. Taylor, 477 U.S. 131, 106 S.Ct. 2440 (1986).

The only purpose asserted for Bill #2 is to protect State P businesses that assemble computers from the risk of higher damage claims; conversely, of course, non-resident businesses would remain subject to a risk of greater damages in the event of a breach of warranty. It is doubtful that this is a legitimate local purpose because it is protectionist on its face; there is no purpose other than to disadvantage out-of-state businesses. Bill #2 is therefore unlikely to survive a challenge under the Commerce Clause and the Governor should veto this bill. A similar treble damage provision was struck down in Rosenfeld v. Lu, 766 F.Supp. 1131 (S.D. Fla. 1991), in a case dealing with contracts between manufacturers and sales representatives. See also, Johnson MacDonald & Assoc. v. Webster Plastics, 856 F.Supp. 1249 (S.D. Ohio 1994) and John Havlir & Assoc., Inc. v. Tacoa, Inc., 810 F.Supp. 752 (N.D. Tex. 1993).

Establishing a distinction between resident and non-resident manufacturers also creates a classification that implicates the Equal Protection Clause of the Fourteenth Amendment. A classification which imposes different rules or restrictions on the exercise of legal rights and remedies is generally subject to the more relaxed standard of review often described as the “rational basis” test. That is, on any conceivable basis does the classification rationally further a legitimate governmental interest asserted by the state? McGowan v. Maryland, 366 U.S. 420, 425, 81 S.Ct.1101,1105 (1961). It is likely that an Equal Protection Clause challenge would be unsuccessful under this level of review, because the disadvantage placed upon non-resident assemblers could conceivably advance the purpose of encouraging assembly of computers in State P. See, FCC v. Beach Communications, Inc., 508 U.S. 307, 113 S.Ct.2096 (1993), applying the rational basis test under the equal protection component of the Fifth Amendment.

3. A restriction on price advertising for lawful products is likely to violate First Amendment protections afforded to commercial speech.

Beginning with Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S.Ct. 1817 (1976), the Supreme Court has on numerous occasions recognized that the free speech clause of the First Amendment establishes a limit upon regulation of even purely commercial speech. Thus, the restrictions on advertising prices for computer products contained in Bill #3 would be subject to challenge under the First Amendment.

Clearly, advertising the availability of a particular product at a specified price is commercial speech entitled to First Amendment protection. Virginia Board of Pharmacy, supra.
As the Court there noted:

“Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well-informed. To this end, the free flow of commercial information is indispensable. 425 U.S. at 765, 96 S.Ct. at 1827.

Bill #3 operates as a blanket prohibition against the truthful, non-misleading advertisement of prices for computer products. The legislature's rationale is premised upon the asserted need to protect consumers from confusing advertisements. As the Supreme Court has noted, however,: "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good. That teaching applies equally to state attempts to deprive consumers of accurate information about their chosen products. . .", 44 Liquor Mart, Inc. v. Rhode Island, 517 U.S. 484, at 503, 116 S.Ct. 1495 at 1508 (1996).

In Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S.Ct. 2343 (1980) the Court developed a four-part inquiry to examine restrictions placed upon blanket advertising prohibitions:

"At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interests asserted, and whether it is not more extensive than is necessary to serve that interest."

447 U.S. at 566, 100 S.Ct. at 2351. It is unlikely that Bill #3 would survive scrutiny under the Central Hudson test. Price advertising for computer products would concern lawful activity and not be inherently misleading. Even assuming that protection of consumers from "confusing" advertising would be a substantial governmental interest, a complete prohibition of price advertising hardly serves that interest. Indeed, the inability to advertise any price could easily generate more consumer confusion. The mere fact that the price of the computer is not always accompanied by prices of peripheral products hardly supports a ban on advertising the price of the computer itself. Finally, a complete ban is a far more extensive regulation than is necessary to advance the governmental interest. A requirement that prices for each component be separately stated would inform the public without precluding a large class of protected speech. Accordingly, Bill #3 likely violates the free speech clause of the First Amendment and the Governor should veto this bill.

4. Mandating inclusion of the location of product assembly in advertising and promotional literature will not violate the Free Speech Clause of the First Amendment. The requirement would not violate the Commerce Clause.

The protections afforded under the Free Speech Clause of the First Amendment include both the right to speak freely and the right to refrain from speaking at all. Wooley v. Maynard, 430 U.S. 705, 97 S.Ct. 1428 (1977). Protection against compulsory speech applies to commercial speech as well. Zauderer v. Office of Disciplinary Council, 471 U.S. 626, 651, 105 S.Ct. 2265, 2281 (1985). The Court in Zauderer, however, also recognized that the ". . . constitutionally protected interest in not providing any particular factual information in . . . advertising is minimal." Id. at 651. Further, the Court noted that:

"We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by killing protected commercial speech. But we hold that an advertiser's rights are adequately protected so long as disclosure

requirements are reasonably related to the state's interests in preventing deception of consumers." Id. at 651.

Bill #4 requires that advertising and other literature specify the location at which the computer offered for sale was assembled. The basis asserted for this compulsory speech is to enable State P consumers to identify computers assembled within State P. Compelled speech regarding the characteristics of a product, when based only upon curiosity rather than consumer protection, has been found invalid. In overturning a state law requiring disclosure of the use of a synthetic growth hormone in the production of milk, a court concluded ". . .that consumer curiosity alone is not a strong enough state interest to sustain the compulsion of even an accurate, factual statement." International Dairy Foods Assoc. v. Amestoy, 92 F.3d 67, 74 (2nd Cir. 1996). On the other hand, compelled speech for legitimate purposes such as consumer protection (as referenced in Zauderer) has been deemed valid. Here, consumer information may well be deemed a legitimate purpose. The Governor need not, therefore, veto Bill #4 on this basis.

Because the proposed legislation would impact upon out of state assemblers, it may also be examined for validity under the Commerce Clause. The bill does not, however, facially discriminate against non-resident assemblers or retailers since all promotional literature and product packaging must contain the place of assembly, regardless of where the products originate. Where a state regulates evenhandedly to advance a legitimate local interest, and the effects on interstate commerce are only incidental, the regulation will be upheld unless the burden on commerce is clearly excessive in relation to the local benefit. Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844, 847 (1970). See, Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 97 S.Ct. 2434 (1977). Here, the local interest - identification of the place of assembly - should not create an excessive burden on commerce. Local retailers can arrange for placement of the required information on packaging and promotional literature presumably at reasonable expense. Although the question may ultimately be close, Bill #4 need not be vetoed on a Commerce Clause basis.

Question No. 6: Facts and Interrogatories

Bob owned a very large home and lot in C County, Pennsylvania, known as Blackacre, which he wanted to sell so that he could move to a smaller house. He put a FOR SALE sign in the yard.

Ann intended to buy a small apartment building where she would live and rent the other units to tenants. Ann saw the sign and asked to see the house. Ann told Bob of her intentions and asked if he thought she could convert it into an apartment building. Bob assured her that the house was ideal for that purpose and that he knew of no obstacles to such a plan. Ann asked Bob about municipal zoning restrictions and although Bob was not familiar with the relevant zoning ordinance, he advised her that multiple family dwellings were permitted in the area.

Ann and Bob entered into a valid, handwritten Sales Agreement in which Ann agreed to pay \$100,000 for Blackacre. After the closing, Ann applied for a building permit to begin the renovation. Her request was denied because Blackacre was in an area designated for single family dwellings under the local zoning ordinance.

After Ann signed the Sales Agreement on Blackacre, she prepared a deed making a gift of her current residence, Whiteacre, to her niece, Nan, and Nan's husband, Hal, as tenants by the entireties. Because Nan and Hal were only 22 years of age and newly married, Ann wanted to make sure that they did not impulsively sell Whiteacre or divorce and leave Nan without a home. Ann therefore had the following clause added to her deed: "Any conveyance of Whiteacre before Nan attains age 35 shall be null and void."

1. After learning of the zoning ordinance, Ann wants nothing more to do with Blackacre. She brings an action to recover the price of the house which she paid and the closing costs. Upon what legal theory should this action be based and what is the likelihood of success?
2. In Count II of her Complaint, Ann seeks to recover lost profits due to her inability to rent Blackacre to tenants and punitive damages. Will Ann succeed?
3. When Nan is 33, she and Hal want to sell Whiteacre and move to a new home. Can they convey valid title to a purchaser?

Assume that Nan and Hal continue to reside on Whiteacre and divorce two (2) years later. In their Separation Agreement, Nan and Hal agreed to split the proceeds of the sale of Whiteacre equally and agreed to defer the sale of Whiteacre until Hal no longer resides on the property.

4. One year later, while Hal is still residing on Whiteacre, Nan brings an action against Hal to partition Whiteacre. Will Nan's action be successful?

Question No. 6: Examiner's Analysis

1. **Ann should be successful in a claim for rescission of the Sales Contract and Deed and restitution on the ground of misrepresentation.**

Misrepresentation is defined as "an assertion that is not in accord with the facts." Restatement 2d, Contracts § 159. In order to rescind a contract, the plaintiff must show that a representation was

made as to a statement of fact; that it was untrue and that it was either fraudulent or material. “Fraud renders a transaction voidable even where the misrepresentation is not material; on the other hand, a misrepresentation made innocently is not actionable unless it is material, and in such case there must be a right to reliance.” DeJoseph v. Zambelli, 392 Pa. 24, 139 A.2d 644, 647 (1958).

When the party making the misrepresentation does not know that it is false, the plaintiff may still obtain rescission if the misrepresentation by the defendant was material. Boyle v. Odell 413 Pa. Super. 562, 605 A.2d 1260 (1992). “A misrepresentation is material when it is of such a character, that if it had not been made the transaction would not have been entered into.” DeJoseph v. Zambelli, *supra*. 139 A.2d at 647. A misrepresentation cannot be a substantial factor in the victim’s manifestation of assent unless the victim relied on the misrepresentation. Restatement, Contracts 2d § 167, comment a.

Whether a party is justified in her reliance upon certain misrepresentations is a question of fact to be determined by the trier of fact. John E. Murray, Jr., Murray on Contracts, 3rd Ed., § 95. Reliance upon a misrepresentation, whether fraudulent or innocent, may be justifiable even when the relying party fails to make a reasonable investigation which would have exposed the misrepresentation, unless the fault amounts to a failure to act in good faith or in accordance with reasonable standards of fair dealing. *Id.*

Bob knew of Ann’s reason for purchasing Blackacre. His statements that the house was ideal for conversion into apartments, that there were no obstacles to the conversion and that multiple family dwellings were permitted in the area were untrue and were made for the purpose of inducing Ann to purchase the house. Ann must show that his statement induced her to enter the agreement and that she suffered an injury because she did not, in fact, intend to purchase a large home for her own use.

In LaCourse v. Kiesel, 366 Pa. 385, 77 A.2d 877 (1951), the Pennsylvania Supreme Court granted rescission of an Agreement for the sale of property when the plaintiffs discovered that zoning restrictions barred the use of their property for apartments, contrary to advertising by defendants. Although the defendants claimed that they were unaware of the zoning restriction, the Court held that when material misrepresentations are made, whether knowingly or not, they provide grounds for rescission. Similarly, in Boyle v. O’Dell, *supra*, the Court found that the defendant had not knowingly made a misrepresentation but held that the plaintiff was entitled to rescission of the transaction because the misrepresentation was material.

Here, the misrepresentation was material because Ann’s intention in entering into the transaction was to convert Blackacre into a multiple family dwelling. Whether Ann’s reliance on the misrepresentation was justifiable is a question of fact to be determined by the trier of fact. A Court would probably find that Ann’s reliance upon the misrepresentation was justifiable even though she failed to make a reasonable investigation because her failure to investigate most likely does not amount to a failure to act in good faith or in accordance with reasonable standards of fair dealing.

A person defrauded in a contract has a choice of remedies. She may rescind the contract and recover what she has paid or she may affirm the contract and recover damages. Here, Ann wanted nothing more to do with Blackacre and wished to recover what she had paid. The appropriate remedy, therefore, would be rescission of the transaction. When the purchaser in a real estate transaction has suffered from misrepresentation of a material fact by the seller, a right of rescission is established. In addition to granting rescission, the Court may grant the plaintiff restitution of losses incurred. *Id.*

Restitution, rather than damages, is a remedy consistent with rescission. Id. 605 A.2d at 1265. Ann may therefore rescind the contract and recover the closing costs as well as the money she paid in the transaction.

On the other hand, it can be argued that ignorance of a zoning ordinance may not be sufficient to allow rescission of a real estate contract because zoning is a matter of public record and Ann could have easily discovered the relevant ordinance. Thus, relying on Bob's word, rather than making an independent inquiry, could be seen as a lack of reasonable or justifiable reliance by Ann. If the trier of fact found that Ann's reliance was not justifiable, she would not be successful in rescinding the contract.

2. Ann may not recover lost profits or punitive damages in an action to rescind the transaction.

It is a general rule that a person defrauded in a contract has a choice of remedies. The victim may rescind the contract and recover what she has paid or she may affirm the contract and recover damages. Wedgewood Diner, Inc. v. Good, 368 Pa. Super. 480, 534 A.2d 537 (1987).

The rationale for this general rule is stated in Wedgewood Diner, Inc. v. Good:

The reason for applying the rule is that rescission, an equitable remedy, involves a disaffirmance of the contract and a restoration of the status quo; whereas, the recovery of damages, which is a legal remedy, involves an affirmation of the contract. A party who has been defrauded can either rescind the contract or he can affirm the contract and recover damages. To allow him to do both would be to allow a double remedy for the same wrong. Wedgewood Diner, Inc. v. Good, Id. 534 A.2d at 538.

Thus, Ann may not recover lost profits as contract damages. Nor may Ann recover punitive damages because a punitive damage claim is dependent upon the establishment of compensatory damages. "(W)hen one is permitted to rescind a transaction, one is foreclosed from pursuing a compensatory damage claim, (and) where one is permitted to rescind a transaction, one cannot also obtain punitive damages." Roberts v. Estate of Barbagallo, 366 Pa. Super. 559, 531 A.2d 1125, 1133 (1987). Further, punitive damages are not available for innocent or negligent misrepresentation.

Ann may not recover lost profits or punitive damages in an action to rescind the transaction.

3. Nan and Hal can convey title because the restraint on alienation contained in the deed is void and Nan and Hal took the property free of the restraint and with full power to convey the property.

The clause, "any conveyance of Whiteacre before Nan attains age 35 shall be null and void," is a disabling restraint on alienation which is generally held invalid except in the case of a spendthrift trust. Boyar, Hovencamp and Kurtz, The Law of Property, 4th Ed. (1991) § 6.2. This rule is based upon the public policy preference to eliminate impediments to the alienability of land. Etnier v. Pascoe, 275 Pa. 308, 119 A. 406 (1928).

The Restatement, Property 2d §4.1 states:

§ 4.1 Validity of Disabling Restraint

(1) A disabling restraint imposed in a donative transfer on an interest in property is invalid if the restraint, if effective, would make it impossible for any period of time from the date of the donative transfer to transfer such interest.

The clause in Ann’s deed clearly prohibits the conveyance of property for a stated period of time. It is, therefore, a disabling restraint on alienation. Because the clause is void, Nan and Hal took the property free of the restraint and with full power to convey the property to a purchaser.

4. Nan will not be successful in her action to partition Whiteacre because the postponement of the right to partition for a reasonable period of time is valid

Once parties who have held property as tenants by the entireties are divorced, the nature of their property interest is changed to a tenancy in common. Shoup v. Shoup, 469 Pa. 165, 364 A.2d 1319 (1976). As tenants in common, either party may seek to have the property sold and the proceeds divided between the parties by bringing an action in equity for partition of the property. Hyatt v. Hyatt, 273 Pa. Super. 435, 417 A.2d 726 (1979).

23 Pa.C.S.A. §3507 provides as follows:

§ 3507(a) General Rule. - Whenever married persons holding property as tenants by entireties are divorced, they shall, except as otherwise provided by an order made under this chapter, thereafter hold the property as tenants in common of equal one-half shares in value, and either of them may bring an action against the other to have the property sold and the proceeds divided between them.

§ 3507(b) Division of proceeds. - Except as provided in subsection (c), the proceeds of a sale under this section, after the payment of the expenses of sale, shall be equally divided between the parties.

The court however, may refuse partition when there has been an agreement to defer the right to partition for a reasonable and sufficiently discernable time. Kopp v. Kopp, 339 Pa. Super. 230, 488 A.2d 636 (1985). In Kopp, the Pennsylvania Superior Court upheld a separation agreement which provided that the wife had sole occupancy of the marital residence and “should the wife no longer use the premises as her residence the same shall be sold at a price agreeable to both Husband and Wife and the net proceeds therefrom shall be divided equally between Husband and Wife.” Id. 488 A.2d at 637.

An agreement to modify or postpone the time of partition may not place a restraint on alienation beyond a reasonable period of time. The court in Kopp held that where the right to compel partition was automatically triggered if the wife no longer wished to remain in the home or upon her death, the postponement of the right was for a reasonable period of time and therefore was valid. The court in Kopp adopted the guidelines of the Restatement of Property (1944) § 412 as to what constitutes a “reasonable” period of time.

Section 412 of the Restatement of Property (1944) provides:

§ 412 Restraints on the Power to Compel Partition.

A restraint on the power of a co-tenant to compel partition, created to last for a reasonable time only, is valid.

Comment c of Section 412 states that the meaning of “reasonable time” is set forth in Section 173, Comment c which provides:

- c. *What constitutes a reasonable period of time.* The period of time for which the creator of a future interest can exclude the power to compel partition or the liability thereto must be “reasonable.” When the stipulated period of time is not measured by lives in being at the time of the creation of such future interest, or by a period of years not exceeding twenty-one, or by a combination of such lives and years, such period of time is not reasonable. When the stipulated period is measured by such lives, or by such period of years, it is reasonable. Situations between these two extremes present an issue of reasonableness.

The court in Kopp considered the policy of the Commonwealth to encourage free alienation of property but stated that the concerns underlying the policy are not present in a separation agreement which postpones the right of partition for a reasonable and discernable period of time. Kopp v. Kopp, supra. 488 A.2d at 639.

When Nan and Hal divorced, they became owners of Whiteacre as tenants in common. As tenants in common, each party had a right to demand partition. Under the terms of the Agreement, however, the right to partition was deferred by agreement of the parties. The postponement of that right until Hal leaves Whiteacre or upon his death would probably be seen as a reasonable period of time. Nan will therefore not be successful in her action to partition Whiteacre because the postponement of the right to partition contained in their Agreement is valid.

Question No. 7: Facts and Interrogatories

Polly Parker (“Mrs. P”), age 75, lived in a high rise apartment complex (“High Rise”) in C-City, Pennsylvania. The apartment complex was owned and operated by the High Rise Company, Inc. (“High Rise Co.”), a Pennsylvania corporation with headquarters in C-City. Mrs. P was a widow who had lived in High Rise for three (3) years. She moved to High Rise after the death of her husband, because she was afraid to live alone in a house, and because High Rise advertised itself as a secure location for elder citizens.

Mrs. P still drove her own car and garaged it in the High Rise garage, located under the building. She paid an additional fee for parking in the garage.

On January 10, 1997, Mrs. P drove into the garage at 9:00 p.m., after a dinner out with a friend. When she got out of her car, she was grabbed from behind by a masked man, who picked her up and put her in his dilapidated car and drove out of the gates of High Rise, past the guard station, where the guard was sleeping. The guard was an employee of Security Guards, Inc. (“Security”), a well respected Pennsylvania corporation, which was hired by High Rise Co. to provide guards for the premises. There was a sign in the High Rise garage that identified the guards as being supplied by Security Guards, Inc.

The masked man drove Mrs. P to a secluded area and pulled her purse from her arm and violently threw her out of the car. Mrs. P staggered back to the road and a passing motorist drove her to the local police station where she made a report. She was subsequently taken to the local hospital, where she was admitted for treatment of injuries sustained in the incident.

The police investigated the crime against Mrs. P and made an arrest. During the criminal trial, another resident of High Rise (“Eyewitness”) identified Mrs. P’s attacker (“Attacker”) and testified that she saw Attacker drive through an unlocked and unguarded side entrance, and that the side entrance was regularly left unlocked. Attacker was sentenced to a five (5) year prison term. Eyewitness moved to another country in early 1998 and her whereabouts are unknown.

In December, 1998, Mrs. P visited her attorney, Able, seeking advice on possible legal action against High Rise Co. to recover for her injuries and trauma. Able prepared a Complaint, captioned Polly Parker v. High Rise Co., Inc., seeking compensatory damages, which Mrs. P signed and which Able filed in the appropriate county court in Pennsylvania, one day before the expiration of the applicable tort Statute of Limitations on January 9, 1999.

1. What common law civil tort cause of action should have been raised by Able in the Complaint brought on behalf of Mrs. P against High Rise, Co. and with what likelihood of success?
2. What defensive action should High Rise Co.’s counsel take with respect to Security Guards, Inc., to protect High Rise Co.’s legal rights in the tort action brought by Mrs. P against High Rise Co., and what effect should this action have on High Rise’s liability?

On February 10, 1999, Mrs. P died in her sleep.

3. Can Able proceed with the action on Mrs. P’s behalf, and if so, what legal steps should be taken to preserve her claims?

Assume, for purposes of Interrogatory 4, that the civil action proceeded against High Rise, and that, at trial, Able sought to introduce the transcript of Eyewitness' testimony from Attacker's criminal trial to establish the facts of the incident involving Mrs. P.

4. What objection should be raised by defense counsel to the introduction of the testimony, and how should the court rule on the objection?

Question No. 7: Examiner's Analysis

- 1. The Complaint should allege a cause of action for negligence against High Rise Co., for failing to provide adequate security for its tenants, including Mrs. P. The outcome will depend upon the evidence presented.**

Able should bring an action for negligence against High Rise Co. alleging that High Rise Co., as owner and landlord of High Rise, owed its tenants a duty to provide adequate security for its premises, and that it failed to do so, resulting in the attack on Mrs. P, causing her to sustain severe injuries.

The elements of an action for negligence are:

A duty or obligation recognized by law, setting a standard of conduct for the protection of others against unreasonable risks; 2. Breach of the duty; 3. Causal connection between the breach and an injury; 4. Actual loss or damage to a foreseeable person.

Prosser & Keeton on Torts, 5th Ed., 1984, p.149, Petrucci v. Bohringer & Ratzinger, 46 F.3d 1298 (3d Cir 1995). The Complaint should allege that High Rise Co. was negligent in promising security and then failing to provide adequate security for the parking garage at High Rise, and that Mrs. P's injuries were proximately caused by High Rise's failure.

There is no general duty owed by the landlord, as owner of private property, to anticipate and protect tenants against criminal conduct by third parties. Rather, the duty is that which is reasonable in light of the understanding between landlord and tenant. The fact that High Rise Co. advertised the security in its building, and that Mrs. P had rented an apartment there, at least in part because of the security, should be plead as facts supporting the claim of a duty by High Rise Co. It can be expected that High Rise Co. will deny that it was negligent and will allege that the criminal act that injured Mrs. P. was not caused by its negligence. See e.g., Feld v. Merriam, et. al., 485 A.2d 742 (1984), in which the Supreme Court of Pennsylvania held that injuries to tenants caused by criminal acts of third parties were not generally actionable against the landlord. However, if the landlord had agreed to provide a program of protection and failed to perform in a reasonable manner, the Court held that an action might be maintained.

Whether High Rise breached its duty to perform in a reasonable manner is a close question. The [apparent] failure of High Rise to lock and guard all entrances supports a claim against it. However, High Rise did hire a reputable company to provide security guards for the property, and it was reasonable for High Rise to expect Security to perform its duties in a responsible fashion. Whether High Rise was aware of security breaches on the property, and whether it was aware of Security's guards sleeping on duty, are factual issues.

See also Section 323 of the Restatement (Second) of Torts, which states, *inter alia*, that a party may be found liable for breach of a duty which was not imposed by law, but which was undertaken by the party and which was recognized as necessary for the protection of another person.

If it is found that High Rise had a duty to Mrs. P. by virtue of its advertising itself as a secure location, and if it is found that the duty was breached by High Rise's failure to ensure that all entrances were locked, a causal connection between the breach and the attack on plaintiff must be established. Mrs. Parker was hospitalized as a result of the attack, and sustained injuries, which should satisfy the damage element.

High Rise can be expected to deny responsibility for the negligence of the guard in sleeping on the job, on the basis that the guard was employed by another company, and was neither the employee nor agent of High Rise. The public, including Mrs. P., was on notice of the identity of the security guard company, as the company's name appeared on a sign in the garage.

Based on the available information, the issue of High Rise's liability for negligence is not clear, and the outcome of the case may depend on the evidence produced in support of the claim of duty on the part of High Rise Co, such as the representations made to tenants and prospective tenants about the level of security. Additionally, the court may consider the issue of High Rise Co.'s alleged failure to keep doors locked, and, possibly, guarded, as well as whether it had notice of the unlocked entrance or of the guards' sleeping on duty.

2. High Rise Co. should seek to join Security Guards, Inc. as an Additional Defendant. Since the Statute of Limitations for negligence has run, High Rise Co. will be limited to seeking contribution or indemnification from Security Guards, Inc., should liability be found against High Rise Co.

High Rise Co. should seek to join Security Guards, Inc., as a defendant in the action brought by Mrs. P. Rule 2252 of the Pennsylvania Rules of Civil Procedure provides:

- (a) . . .any defendant or additional defendant may join as an additional defendant any person, whether or not a party to the action who may be
 - 1. solely liable on plaintiff's cause of action, or
 - 2. liable over to the joining party on the plaintiff's cause of action; or
 - 3. jointly or severally liable with the joining party on the plaintiff's cause of action..

Pursuant to Rule 2253 of the Pennsylvania Rules of Civil Procedure, High Rise has sixty (60) days from the date of service of Mrs. P's Complaint on it to join Security Guards, Inc. as an Additional Defendant. Alternatively, High Rise will be required to obtain court approval for the joinder. However, even if High Rise Co. files a Complaint to Join Security Guards, Inc. as an Additional Defendant within sixty (60) days, since the Statute of Limitations for negligence is two (2) years from the incident giving rise to the cause of action, and since it is too late to join Security Guards prior to the running of the Statute of Limitations, it cannot be liable directly to the plaintiff. Accordingly, High Rise is limited to claiming that the proposed Additional Defendant is liable over or liable to it. Such a claim is, in essence, one for contribution or indemnification by the proposed Additional Defendant. Technically, the time for a claim for contribution or indemnification does not begin to run until the Original Defendant is found liable to the Plaintiff; however, High Rise can join Security Guards, Inc. in the action brought against it

by plaintiff, and present all claims together, thereby conserving judicial resources and allowing all related claims to be adjudicated at one time. See e.g., Hileman v. Morelli, 413 Pa.Super. 316, 605 A.2d 377, 382 (1992).

3. The action may proceed despite Mrs. P's death. Able should move to substitute Mrs. P's Estate and its Executor or Administrator as the Plaintiff, as Pennsylvania law requires that actions be brought in the name of the real party in interest.

Actions for personal injury caused by negligence survive the death of the plaintiff. See 42 Pa.C.S.A. Section 8302, which provides: “[A]ll causes of action or proceedings, real or personal, . . . shall survive the death of the plaintiff.”

However, since there must be a real party in interest before the action against High Rise Co. and Security Guards may proceed to trial, Able should petition the court to substitute the Administrator or Executor of Mrs. P's Estate as plaintiff, so that any award of damages may be paid to Mrs. P's Estate. See Rule 2002 of the Pennsylvania Rules of Civil Procedure which provides, in part: “. . .all actions shall be prosecuted by and in the name of the real party in interest. . .” Thus, Mrs. P's Estate would become the successor in interest to Mrs. P. Rule 2352 of the Pennsylvania Rules of Civil Procedure provides for the procedure for substituting a successor as a party, and Rule 2351 defines “successor” as: “. . .anyone who by operation of law, election or appointment has succeeded to the interest or office of a party to an action.”

4. The defendant should object that the testimony is inadmissible hearsay. The objection is likely to be sustained.

High Rise's counsel should object to the introduction of testimony from Attacker's criminal trial on the ground that it is inadmissible hearsay. The objection should be sustained.

Rule 801 of the Pennsylvania Rules of Evidence defines “hearsay” as “. . .a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Under Rule 802, hearsay is not admissible unless provided by the Rules of Evidence or other rules or by statute. Rule 804 sets forth an exception to the inadmissibility of hearsay based on the declarant's unavailability. “Unavailability” is defined to include absence from the hearing where the proponent of the statement has not been able to procure the declarant's attendance. Exceptions based on unavailability include the use of former testimony, which is defined as “. . .testimony given as a witness at another hearing of the same or different proceeding, . . .if the party against whom the testimony is now offered, or, in a civil action or proceeding, . . . a predecessor in interest, had an adequate opportunity and similar motive to develop the testimony by direct, cross or redirect examination.” (emphasis added). Thus, because High Rise Co.'s lawyers did not have the opportunity to cross examine Eyewitness about the testimony given at Attacker's criminal trial, the objection is likely to be sustained and the transcript not admitted.

Prior to the Pennsylvania Rules of Evidence, the Commonwealth Court, in the case of Miles v. Sweeney, 154 Cmwlth.Ct. 184, 623 A.2d 407 (1993), held that evidence from a criminal trial was not admissible in a subsequent civil action where neither the parties nor the subject matter was the same. Although there is no reported Pennsylvania case law since the codification of the Rules of Evidence, the outcome would likely be the same as in the Miles case, that is that the objection would be sustained.

Question No. 8: Facts and Interrogatories

Alice, a lifelong resident of Pennsylvania, died two (2) months ago leaving a will that named her nephew, Nick, as sole beneficiary of her sizable estate. Alice, a widow, was also survived by her estranged son. Included in Alice's estate is Blackacre, a beach front property located in State Y. Alice's son has hired attorney Able, the scrivener of Alice's will, to review the will hoping to find a way to challenge its validity. Upon review, Able had recalled that Nick was a subscribing witness to Alice's will. Alice's will is valid in its entirety under Pennsylvania law. Able has learned, however, that under State Y law the devise of Blackacre is void, due to Nick's status as subscribing witness, and Blackacre would pass to Alice's son as her sole intestate heir. Able had never checked the law of State Y when he assisted Alice in the preparation of her will.

Shortly after Alice's death, Nick decided to establish a consumer discount company using some of his recent inheritance for start up capital. Nick intends to lend money to individuals for the purchase of various consumer goods. In all cases, Nick will require his customers to sign a note. Nick will also require some customers to sign a security agreement granting Nick a security interest in the consumer goods purchased.

Nick has approached Bank and has requested a loan of \$200,000. Nick intends to re-lend the \$200,000 to his customers. Nick has offered the Bank a security interest in his notes and security agreements as collateral for the loan. On this basis, the Bank has approved the loan.

One month ago, Nick visited Wanda's Computer World ("Wanda's") looking for a computer system to use in his new business. Wanda's offers computer consulting services and also assembles and sells its own brand of computers. Nick explained his needs to Wanda and she agreed to assemble an appropriate computer for Nick. On that day, Nick signed a purchase agreement and paid Wanda in full. Nick agreed to pick up his computer two (2) weeks later. The purchase agreement properly and validly disclaimed all implied warranties under the Uniform Commercial Code. When Nick went to pick up his computer he said to Wanda, "Now are you sure this computer will allow me to run the ABC Accounting Software I have purchased from you?" Wanda replied, "Absolutely and completely!" One week after picking up the computer Nick realized that it was totally incapable of running the ABC Accounting Software.

1. If Alice's son files a challenge to Alice's will in Pennsylvania, questioning the validity of the devise of Blackacre to Nick, which state's law should the court apply and with what result?
2. Discuss the propriety under the Pennsylvania Rules of Professional Conduct of Able's representation of Alice's son in connection with a challenge of Alice's will.
3. What steps should Bank take to perfect a security interest in Nick's notes and security agreements?
4. What claim should be asserted by Nick against Wanda under the Uniform Commercial Code as a result of the inadequacy of the computer and with what likelihood of success?

Question No. 8: Examiner's Analysis

1. The Pennsylvania court should apply the law of State Y in determining the validity of the devise which would result in the property passing to Alice's son as her sole intestate heir.

The facts present a conflict of laws issue regarding the disposition of real property located in State Y under a will being contested in Pennsylvania, the domicile state of the testatrix. Generally, the court will balance the respective interests of the states involved to determine which state's law should be applied. When faced with a similar issue, the Pennsylvania Supreme Court clearly set forth the conflict of law rule as follows:

The law applicable to the question involved is that of New Jersey, the *lex loci rei sitae*. “. . . [I]t is a principle of private, international law, fortified by a great mass of authority, that all questions relating to the transfer of title to land wherever arising will be governed by the laws of the place where the land is situated. *Cites omitted*. This principle is applicable to questions relating to the effect of language in wills of testators not domiciled in the dominant situs. See, *Koehler Partition Case*, 360 Pa. 460, 463, 61 A.2d 870, where we quoted from Restatement, Conflict of Laws, §249, comment (c), to the effect that “A will of an interest in land is governed by the law of the state where the land is in spite of a direction in the will to convert the land into personalty.”

In re: Dublin Estate, 375 Pa. 599, 603, 101 A.2d 731 (1954). In 1982, the Supreme Court again reiterated “The situs state of realty is generally entitled to the severest deference. . . . That the laws of the situs state should govern the devise of real property is a sound principle, articulated in both Restatements of Conflict of Laws, and in the consistent statements of this Court.” *In re: Estate of Janney*, 498 Pa. 398, 401, 446 A.2d 1265 (1982).

Given the articulation of the law in this area by the Pennsylvania Supreme Court, it is clear that the law to be looked to in evaluating the validity of the devise is that of State Y. Accordingly, the Pennsylvania court should apply the law of State Y which will have the effect of invalidating the devise to Nick and having Blackacre pass to the intestate heir of Alice, her son.

2. Able's conduct in representing Alice's son was improper under the Pennsylvania Rules of Professional Conduct. Able should have refused to represent Alice's son as an advisor or advocate in a challenge to the will because of his prior representation of Alice and because of the potential conflict of interest with which Able is faced.

Able had represented Alice when she prepared the very will that Able is now assisting Alice's son to challenge. Pennsylvania Rule of Professional Conduct 1.9 provides, *inter alia*: “A lawyer who has formerly represented a client in a matter shall not thereafter: (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after a full disclosure of the circumstances and consultation. . . .” Able is representing Alice's son to challenge the will that he drafted on behalf of Alice, his former client. This clearly smacks in the face of the rule.

“[I]t is obvious that a lawyer could not represent an individual in a real estate transaction, and then, representing the individual's trustee in bankruptcy, attack the conveyance as a preference.” *The Law of Lawyering*, §1.9:202, p. 306.5 (1998). This analogous situation further illustrates the import of Rule 1.9.

On the issue of consent, clearly Able may no longer obtain the consent of Alice. The facts are absent any indication that Able attempted to obtain the consent of the personal representative of Alice's estate. Clearly, Able should not be representing Alice's son on this matter.

Finally, Able may be faced with a conflict due to the fact that the will, when drafted, was in violation of State Y law. Pa.R.P.C. 1.7(b) states "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after full disclosure and consultation. . . ." (Emphasis added). Able may have committed malpractice by not checking the law of State Y when he drafted the will. This may impair his ability to zealously represent Alice's son because of his potential interest in protecting himself. It is unlikely that Able could reasonably believe that this conflict would not adversely affect his ability to focus only on the interests of Alice's son. Additionally, Able could not possibly conclude that his client would consent to the representation after gaining a full understanding of the conflict. Accordingly, Able should have declined the representation.

3. Bank can only perfect its security interest in the notes Nick has his customers execute by taking possession of the notes as they are "instruments" under the Uniform Commercial Code. Bank can perfect its security interest in the notes that Nick has his customers execute which are accompanied by a security agreement by taking possession of the note and security agreement or by filing financing statements as the notes accompanied by security agreements are "chattel paper" under the Uniform Commercial Code.

Bank's determination of how to perfect a security interest in Nick's notes and security agreements must start with a classification of the notes and notes accompanied by a security agreement under the Uniform Commercial Code (the "Code"). The facts clearly indicate that on some occasions, Nick only requires his customer to sign a note while on other occasions he requires both a note and a security agreement from his customer.

The Code defines an "instrument" as "[a] negotiable instrument (defined in section 3104), or any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary endorsement or assignment. The term does not include investment property." 13 Pa. C.S.A. §9105(a). The notes received by Nick from his customers that are not accompanied by a security agreement clearly fall within this definition. In contrast, the Code defines "chattel paper" as "[a] writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods When a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of instruments, the group of writings taken together constitutes chattel paper." 13 Pa. C.S.A. §9105(a). The notes that Nick receives from his customers that are accompanied by a security agreement fall within this definition.

Once the collateral is properly classified, one must turn to the perfection rules to determine how the Bank should proceed in perfecting its security interest in the instruments and chattel paper. Section 9304(a) of the Code provides, "A security interest in chattel paper or negotiable documents may be perfected by filing. A security interest in money or instruments (other than instruments which constitute part of chattel paper) can be perfected only by the secured party's taking possession. . . ." 13 Pa. C.S.A. §9304(a). It should be noted that the language of the code regarding chattel paper is permissive and not mandatory. Thus, one may perfect a security interest in chattel paper by either filing or by taking possession. 13 Pa. C.S.A. §§9304(a) and 9305.

Bank should have Nick execute and deliver a security agreement identifying the instruments and chattel paper as the collateral for the loan from Bank to Nick and granting Bank a security interest in the same. Bank should take possession of each note signed by a customer of Nick that is not accompanied by a security agreement in order to perfect its security interest in the note. Bank should file financing statements identifying Nick's chattel paper as the collateral covered by the financing statements in order to perfect a security interest in the same. Bank also has the option of taking possession of the notes and security agreements constituting chattel paper in order to perfect its security interest in that collateral.

It should be noted that perfection of a security interest in chattel paper by filing leaves the Bank with some exposure under the Code. Section 9308 of the Code provides:

A purchaser of chattel paper or an instrument who gives new value and takes possession of it in the ordinary course of his business has priority over a security interest in the chattel paper or instrument:

- (1) which is perfected under Section 9304 (relating to perfection of security interest in instruments, documents and goods covered by documents; perfection by permissive filing; temporary perfection without filing or transfer of possession) or under Section 9306 (relating to "proceeds"; rights of secured party on disposition of collateral) if he acts without knowledge that the specific paper or instrument is subject to a security interest; or
- (2) which is claimed merely as proceeds of inventory subject to a security interest (section 9306) even though he knows that the specific paper or instrument is subject to the security interest.

Given this provision the safer course for the Bank to follow is the take possession of both the instruments and chattel paper.

4. Nick should assert a claim based on breach of express warranty against Wanda arising from Wanda's statement made when Nick picked up the computer.

Section 2313 of the Code provides, "Express warranties by the seller are created as follows: (1) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise." 13 Pa. C.S.A. 2313. Wanda clearly stated that the computer she had sold to Nick would run the software that he had purchased from her.

Wanda might argue that these words were uttered well after the sale had been completed and thus could not have been a part of the basis of the bargain. This situation is addressed in comment 7 to Section 2313 where it is stated, "The precise time when words of description or affirmation are made or samples are shown is not material. The sole question is whether the language or samples or models are fairly to be regarded as part of the contract. If language is used after the closing of the deal (as when the buyer when taking delivery asks and receives an additional assurance), the warranty becomes a modification, and need not be supported by consideration if it is otherwise reasonable and in order (Section 2209)." Section 2209 basically indicates that an agreement modifying a contract under Article 2 of the Code needs no consideration to be binding.

It appears from the facts that Nick was very concerned that the computer be able to run the software that he had purchased. So much so that he raised the issue when he picked up the computer. Wanda's response was in no way equivocal. Accordingly, Nick should prevail on a claim of breach of express warranty.

Grading Guidelines

Question No. 1

1. **Ademption of specific bequest**

- A specific bequest of securities adeems when they are disposed of by the decedent before death and there are no traceable proceeds.
- The foregoing will not occur if there is a contrary intention in the will such as a gift of equivalent value.

4 points

Comments: Applicants are expected to recognize the ademption of a specific bequest of securities where the securities have been disposed of by the decedent prior to death with no proceeds to trace and with no contrary intention established in the will.

2. **Non-ademption of a specific bequest of securities which, by merger, have been substituted with new securities**

- A specific bequest of securities does not adeem when the specifically described securities are not in existence in the decedent's estate at his death, when they have been replaced with new securities as a result of a merger.

4 points

Comments: Applicants are expected to recognize whether or not the ademption of specifically bequested securities occurs when at death the securities have been replaced with securities of a new company resulting from a merger.

3. **Taxability of gain from involuntary sale of securities**

- When securities pledged to a secured party as collateral for a personal guarantee are sold by the secured party upon default of the personal guarantee, the sale of the securities by the secured party is a taxable event to the guarantor.
- If the basis of the securities sold in the hands of the guarantor is less than the proceeds, there is a capital gain.
- If the securities were held for one year or more, the capital gain is long-term; otherwise, it is short term.
- The gain occurs irrespective of the related income tax treatment to the guarantor for payment of the debt which was guaranteed.

4 points

Comments: Applicants should recognize that the guarantor has realized a capital gain even when the holder of the security interest in the securities sells them as distinguished from the guarantor. Applicants should discuss the amount of the gain and whether it is long-term or short-term. The treatment of a sale

of securities to make a guaranteed payment is distinct from the treatment of a payment of guaranteed debt.

4. **Tax relief allowable to guarantor of corporate debt when a claim for indemnification is worthless**

- An individual who has guaranteed corporate debt is entitled to federal income tax relief for payment of the guaranteed debt when the guarantor's claim against the corporation is worthless.
- The particular tax treatment in this event is entitlement to a short-term capital loss.

4 points

Comments: Applicants should recognize the general federal income tax rule providing tax relief to non-corporate guarantors of corporate debt when called upon to make payment under their guarantee and when the indemnification claim therefore is worthless. The tax treatment generally is entitlement to a short-term capital loss in the year in which all claims against the corporation for which payment was made are worthless. The treatment for the payment of the guaranteed debt is distinct from the treatment of the sale of any securities enabling the guarantor to make payment.

5. **Limitations on an attorney when dealing with an unrepresented party**

- An attorney when dealing with an unrepresented adverse party should not give legal advice to such party other than to obtain counsel.

4 points

Comments: Applicants are expected to recognize that when an attorney is dealing with a party who is not represented by counsel and who has an interest adverse to his client, he or she should not give any advice to that party other than the advice to seek counsel. If an attorney nevertheless advises the unrepresented party beyond seeking counsel, he or she is in violation of the Rules of Professional Conduct even if the advice is accurate.

Question No. 2

1. **Dissenters Rights and/or Directors' Fiduciary Duty of Care**

- Although essentially equivalent to a merger, there are no dissenters rights to shareholders of the smaller corporation purchasing assets from the larger corporation and paying by issuing to it three times the shares already outstanding.
- The directors fulfill their fiduciary duty of care by conducting a "proper investigation" prior to authorizing the transaction.

5 points

Comments: Applicants should see that this situation resembles a merger and recognize that the form of the transaction dictates the availability of dissenter's rights. Partial credit is also available for discussing

that the facts given show the directors fulfilled their fiduciary duty of care, which could be raised in a derivative action.

2. **Secured Party's Rights to Repossession of Collateral**

- If the security interest has attached and the debtor defaults, the secured party has rights to repossess the collateral.
- Failure to perfect does not affect the secured party's rights as to the defaulting debtor.

5 points

Comments: Applicants should recognize the requirements for attachment of a security interest. The applicant should understand the general theory behind UCC Article 9, i.e. that the security agreement itself generally controls the rights between the secured party and the debtor, and the perfection rules are designed to govern the priorities among creditors claiming rights to the same collateral.

3. **Perfecting Security Interest – Debtor's Name**

- The purpose of the financing statement is to give public notice of the security interest, so the debtor must be identified.
- The use of debtor's trade name instead of its real name is (often) inadequate identification and thus no perfection.
- Without perfection a secured party loses priority to a bankruptcy trustee.

5 points

Comments: Applicants should recognize the general theory behind UCC Article 9's rules on perfection, and that if the debtor is not properly identified, there is no perfection. Applicants should also discuss the fact that the bankruptcy trustee has priority over an unperfected secured party (who then is treated as an unsecured creditor).

4. **Guaranty Agreement With Conditions**

- Conditions in an agreement to pay the debts of another must be fulfilled in order to collect from the guarantor.
- The creditor's failure to fulfill the conditions has led to a loss of collateral and the consequent loss of reduction of the debt balance.
- The guarantor should not suffer the consequences resulting from the creditor's failure to perfect the security interest in the inventory.

5 points

Comments: Applicants should recognize that Henry agreed to pay only after Sam had first made a reasonable effort to recover the debt by selling the inventory secured under the security agreement which

recovery is now impossible. Applicants should then discuss whether Sam has “made a reasonable effort” and decide what liability Henry has.

Question No. 3

1. Unjust Enrichment

- The elements of unjust enrichment are:
 - benefits conferred on defendant by plaintiff;
 - appreciation of such benefits by defendant; and
 - acceptance and retention of such benefits under circumstances that it would be inequitable for defendant to retain the benefit without payment of value.

5 points

Comments: Applicants are expected to identify the equitable doctrine of quasi contract-unjust enrichment, discuss the elements of the legal theory and apply the facts to the law in reaching a well supported conclusion.

2. Good Samaritan Defense

- Any physician licensed by any state, who is present when an emergency occurs and who, in good faith, renders emergency care at the scene of the emergency
 - shall not be liable for any civil damages as a result of any acts or omissions by such physician in rendering emergency care; except any acts or omissions intentionally designed to harm or any grossly negligent acts or omissions which result in harm to the person receiving emergency care.

5 points

Comments: Applicants should identify the medical good samaritan defense, discuss the elements and apply the facts in concluding that the defense would protect Killdare from civil liability for ordinary negligence.

3. Wrongful Use of Civil Proceedings

- Pennsylvania statute (Dragonetti Act) provides cause of action for Wrongful Use of Civil Proceedings.
 - A person who takes part in the procurement, initiation or continuation of a civil proceeding against another is subject to liability to the other for wrongful use of civil proceedings if:
 - He acts in a grossly negligent manner or without probable cause and primarily for a purpose other than for securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings

are based; and the proceedings have been terminated in favor of the person against whom they are brought.

5 points

Comments: Applicants should discuss the elements of the tort of wrongful use of civil proceedings and apply the facts to the law in reaching a well supported conclusion.

4. **Protection from Abuse Act**

- Abuse occurs inter alia when a family member places another family member in reasonable fear of imminent serious bodily injury.
- Purpose of PFA Act is to protect victims of domestic violence.
- Relief provided under the statute is very broad and in this specific situation the order could: direct abuser to leave the household; prevent abuser from entering the residence or the law school; award petitioning spouse temporary custody of the minor children; require abuser to pay child and spousal support; direct abuser to turn over the gun to the sheriff; require abuser to pay court costs and attorney fees associated with the Petition for Protection from Abuse; require abuser to pay for all losses, such as medical costs, if any, and damage to property which was a result of the abuse; award any other appropriate relief.

5 points

Comments: Applicants should identify PFA cause of action, discuss the abuse covered by the Act, and discuss the relief provided by statute which would be appropriate in the situation described in the facts.

Question No. 4

1(a). **Statutory Sexual Assault, Aggravated Indecent Assault/Indecent Assault**

- Crime of Statutory Sexual Assault (Statutory Rape), occurs when a person has sexual intercourse with a victim under the age of 16 years, the perpetrator is four or more years older than the victim and the two are unmarried.
- Mattie is under 16 and Larry is four or more years older than her and the two are unmarried.
- Aggravated Indecent Assault occurs when a person engages in penetration, however slight, of the genitals of a victim with a part of the person's body for any purpose other than good faith, hygienic or law enforcement procedures; if the victim is less than 16 years of age and the person is four or more years older than the victim, and the two are not married.
- Indecent Assault occurs where a person has indecent contact (touching of the sexual or intimate parts of the person for the purpose of arousing or gratifying sexual desire in either person) with a victim if the victim is less than 16 years of age and the person is

four or more years older than the victim, and the victim and the person are not married to each other.

5 points

Comments: Applicants are expected to identify the elements of the crime of statutory sexual assault in Pennsylvania and apply the facts to the law in reaching a well reasoned conclusion. Applicants can receive one point for identifying and discussing either aggravated indecent assault or indecent assault.

1(b). **Mistake as to Age**

- Mistake as to Mattie's age is a potentially valid defense.
- When criminality depends on the child's being below a critical age older than 14 years, it is a defense for the defendant to prove by a preponderance of the evidence that he or she reasonably believed the child to be above the critical age.
- Application - The issue is whether it can be shown by a preponderance of the evidence that Larry reasonably believed Mattie to be of legal age based upon her appearance and her friendship with Larry's sister.

3 points

Comments: Applicants are expected to identify mistake as to age as a potentially valid defense and apply it to the facts given in reaching a well reasoned conclusion which can be argued either way.

2(a). **Involuntary Manslaughter, Homicide by Motor Vehicle, Reckless Endangerment**

- A person is guilty of Involuntary Manslaughter when, as a direct result of doing a lawful or an unlawful act in a reckless or grossly negligent manner, he causes the death of another.
- Larry operated his Honda 30 mph over the posted speed limit on a city street and swerved through traffic which resulted in losing control of his vehicle and thus he will be found to have been operating his vehicle in a reckless or grossly negligent manner.
- To establish Homicide by Vehicle, the Commonwealth must prove that the defendant violated a provision of the Motor Vehicle Code and the violation was the cause of the victim's death. The facts in this case support a violation of this provision.
- A person is guilty of Reckless Endangerment if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily harm.

6 points

Comments: Applicants are expected to identify the crime of Involuntary Manslaughter, and the elements thereof and apply the law to the facts in reaching a well reasoned conclusion. Applicants are also expected to identify the crime of Homicide by Motor Vehicle and its elements and apply the elements to this fact pattern in reaching a conclusion. Finally, applicants are expected to identify that the crime of Reckless Endangerment can be charged on these facts.

3. **Hearsay/Dying Declaration Exception**

- Hearsay is a statement which is other than one made by the declarant while testifying at trial offered in evidence to prove the truth of the matter asserted.
- Hearsay Rule provides exceptions where the declarant is unavailable, including death. Present sense impression and excited utterance are also exceptions to hearsay rule where the availability of the declarant is immaterial.
- Belief of impending death exception allows a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death. Present sense impression exception to the hearsay rule allows a statement describing or explaining an event or condition made while the declarant was perceiving it, or immediately thereafter. An excited utterance exception allows a statement relating to a startling event made while the declarant was under the stress of excitement caused by the event.
- The first part of the two-part statement would be admissible under the belief of impending death exception due to the nature of his injuries, or under present sense impression or excited utterance exceptions to Hearsay Rule.
- The second part of the statement will not be admissible because it is not relevant to what the prosecutor is attempting to prove at trial and it does not fall within an exception to the hearsay rule.

6 points

Comments: Applicants are expected to define hearsay, discuss the potentially relevant exceptions including whether the declarant is unavailable or the availability of the declarant is immaterial. In addition, the Applicants are expected to recognize that the statement has two components and must discuss each component separately and arrive at a conclusion with regard to its admissibility.

Question No. 5

1. **Commerce Clause**

- The negative aspect of the Commerce Clause applies to state regulations which interfere with or burden interstate commerce.
- When a state acts as a market participant, it may establish regulations which would otherwise discriminate against out-of-state products.

5 points

Comments: Applicants should recognize the applicability of the Commerce Clause to state legislation which potentially interferes with or burdens interstate commerce; recognize that the proposed legislation discriminates against products assembled outside of State P; understand the market participant exception which allows a state to discriminate when it is acting on its own behalf, rather than as a regulator; and apply these principles to a well reasoned conclusion.

2. **Commerce Clause/Equal Protection**

- Proposed legislation which establishes a more favorable damage limitation for local products will be subject to analysis under the Commerce Clause.
- A facially discriminatory regulation will be invalid, unless through strict scrutiny it is determined that it serves a legitimate local purpose which could not be served as well by non-discriminatory means.

Equal Protection

- Proposed legislation which establishes a classification with respect to damages may be subject to analysis under the Equal Protection Clause.
- The validity of this proposed statute would be determined under a “rational basis” analysis.

5 points

Comments: Applicants should recognize the applicability of the Commerce Clause to proposed legislation subjecting out-of-state products to a different level of damages; recognize that the statute is facially discriminatory, and apply these principles to the facts in reaching a well reasoned conclusion. If the Equal Protection Clause is discussed, an applicant should recognize that a classification is created; understand the rational basis test, and apply these principles to a well reasoned conclusion.

3. **First Amendment**

- Price advertising is commercial speech entitled to First Amendment protection.
- Restrictions upon protected commercial speech are valid only if the regulation directly advances a substantial governmental interest, and is no more extensive than necessary to serve that interest.

5 points

Comments: Applicants should recognize the applicability of the First Amendment Free Speech Clause; understand that commercial speech is protected by the Free Speech Clause; demonstrate knowledge of the test applied to determine the validity of the regulation, and apply these principles to the facts in reaching a well reasoned conclusion.

4. **First Amendment/Commerce Clause**

- The Free Speech Clause of the First Amendment protects against regulation which mandates speech.
- Mandated speech must be reasonably related to a legitimate state interest.

Commerce Clause

- State regulations which do not facially discriminate, but otherwise impose burdens upon interstate commerce are subject to the Commerce Clause.
- The burden on commerce established by the regulation must be evaluated against the local benefit advanced by the regulation.

5 points

Comments: Applicants should recognize the applicability of the First Amendment Free Speech Clause to regulations which mandate speech; discuss whether the interests asserted by the state are furthered by the regulation, and apply these principles to the facts in reaching a well reasoned conclusion. If a claim under the Commerce Clause is discussed, the applicant should recognize that non-discriminatory statutes may establish burdens upon interstate commerce; compare the burdens created upon commerce with the benefits obtained by the regulation, and apply these principles to reach a well reasoned conclusion.

Question No. 6

1. Misrepresentation/Fraud

- Recognition of misrepresentation/fraud.
- Party may be liable for misrepresentation where assertion is untrue and is either fraudulent or material to the transaction.
- A misrepresentation that is made innocently is actionable if it is material and the injured party has a right to rely on it.
- Whether injured party's reliance on misrepresentation is justified is question of fact.
- A party who is defrauded in a contract may rescind the contract and obtain restitution.

6 points

Comments: Applicants should recognize and define misrepresentation in the context of the given facts. An applicant should discuss the elements of misrepresentation, and the remedy of rescission and provide an analysis of whether Ann's reliance was justifiable in reaching a well-reasoned conclusion

2. Election of Remedies

- Person defrauded in contract has a choice of remedies:
 - she may rescind contract and recover what she has paid (rescission and restitution); or
 - she may affirm the contract and recover damages.
- Party may not rescind contract and recover contract damages.

- Recovery of punitive damages is dependent on establishment of right to compensatory damages.
- Once Ann elects to rescind the contract and obtain restitution, she may not recover lost profits or punitive damages.

4 points

Comments: Applicants should discuss election of remedies and the fact that a party may not rescind a contract and recover contract damages. Partial credit is given for a well reasoned discussion of additional reasons why Ann may not recover lost profits or punitive damages.

3. **Restraint on Alienation**

- Recognition of restraint on alienation.
- Disabling restraint in donative transfer of real estate is invalid if it makes it impossible to transfer the property interest for any period of time.
- Clause in Ann's deed prohibiting conveyance of Whiteacre until Nan is 35 years old is a disabling restraint.
- Disabling restraint in Ann's deed is void and Nan and Hal may convey valid title.

5 points

Comments: Applicants should recognize the clause in Ann's deed as a restraint on alienation, and should conclude that the restraint is void and that Nan and Hal may convey valid title.

4. **Tenants in Common/Restraint on the Right to Compel Partition**

- When husband and wife who hold property as tenants by the entireties divorce, they hold the property as tenants in common.
- Tenants in common may bring action to compel partition of the property.
- Agreement to defer the right to partition may be valid if the restraint is for a reasonable and sufficiently discernable period of time.
- Nan will not succeed in an action to partition Whiteacre.

5 points

Comments: Applicants should recognize that divorce severs the tenancy by the entireties and that Nan may seek partition as a tenant in common. An applicant should also recognize that the agreement to defer partition may be valid and that Nan will probably not succeed in an action to partition Whiteacre.

Question No. 7

1. Negligence

- Elements of negligence include duty, breach, causation and damages.
- Landlord has no general duty to protect tenants against criminal acts by third parties.
- The duty and breach elements may be established where landlord agrees to provide a program of protection but fails to perform in a reasonable manner.

6 points

Comments: Applicants are expected to identify and discuss the elements of negligence, to recognize the general rule that a landlord is not responsible for the criminal acts of third parties but that this landlord may have assumed a duty to protect tenants, and to apply these principles to the facts in reaching a well reasoned conclusion.

2. Joinder of Additional Defendant

- Motion to join additional defendant.
- Rules of Civil Procedure requirements for joinder of non parties.
- Statute of limitations precludes Security Guards from being liable directly to plaintiff.
- Contribution/indemnification.

6 points

Comments: Applicants are expected to recognize that Security Guards is not a party to the civil action brought by Mrs. P against High Rise, Inc., and to discuss the procedure for joinder of a non party. An applicant should recognize that this procedure will allow High Rise to seek indemnification or contribution, but since the time for joinder by plaintiff has expired, Security Guards cannot be liable directly to plaintiff.

3. Substitution

- Action for personal injury caused by negligence survives the death of plaintiff.
- Real party in interest must pursue action.
- Motion for substitution of party plaintiff.

4 points

Comments: Applicants are expected to know that a negligence action will survive the death of the plaintiff, and that there must be a real party in interest, so the Estate must be substituted as the plaintiff.

4. **Hearsay - former testimony**

- Hearsay is a statement, other than one made by the declarant while testifying at the hearing or trial, offered in evidence to prove the truth of the matter asserted.
- Former Testimony Exception to Hearsay Rule exists where declarant is unavailable.
- Party against whom the testimony is offered, or a predecessor in interest must have an adequate opportunity and similar motive to develop the testimony by direct or cross examination.

4 points

Comments: Applicants are expected to identify the proper objection, to define hearsay, and analyze the claimed exception for former testimony, and apply these principles to the facts in reaching a well reasoned conclusion.

Question No. 8

1. **Conflict of Laws**

- The facts present a conflict of laws issue.
- The court will balance the respective interests of the states involved.
- The issue involves the validity of the devise of the land in state Y.
- State Y law should be applied to determine the validity of the devise.

5 points

Comments: Applicants should recognize that this is a conflict of laws issue, discuss the fact that the issue involves a devise of real estate and discuss how conflict of laws rules govern the effectiveness of the devise.

2. **Former client - adverse interests**

- Professional responsibility issue.
- An attorney may not represent a client whose interests are directly adverse to a former client.
- An attorney may not represent a client where the attorney's interests are adverse to those of the client.

5 points

Comments: Applicants should recognize the conflict involved and discuss the propriety of representing an individual in a challenge to a document that the attorney previously drafted as well as the conflict present because of the potential liability of the drafting attorney.

3. **Perfection of security interests in instruments and chattel paper**

- Secured transactions issue.
- The notes standing alone are instruments and to perfect a security interest in them, the bank must obtain possession of the notes.
- The notes together with the security agreements are chattel paper and the bank may perfect by possession or filing.

5 points

Comments: Applicants should distinguish the collateral as instruments and chattel paper and discuss the applicable rules for perfection of security interests in instruments and chattel paper.

4. **Express warranty arising by affirmation of fact after deal is consummated**

- Warranty issue.
- Express warranty may arise from an affirmation of fact.
- Affirmation of fact may come after the contract is concluded as it will operate as a modification to the contract which is enforceable without additional consideration.

5 points

Comments: Applicants should recognize that an express warranty claim can be raised, discuss the requirements necessary for such a claim, and note that the warranty is applicable despite the fact that the affirmation came after the sale.