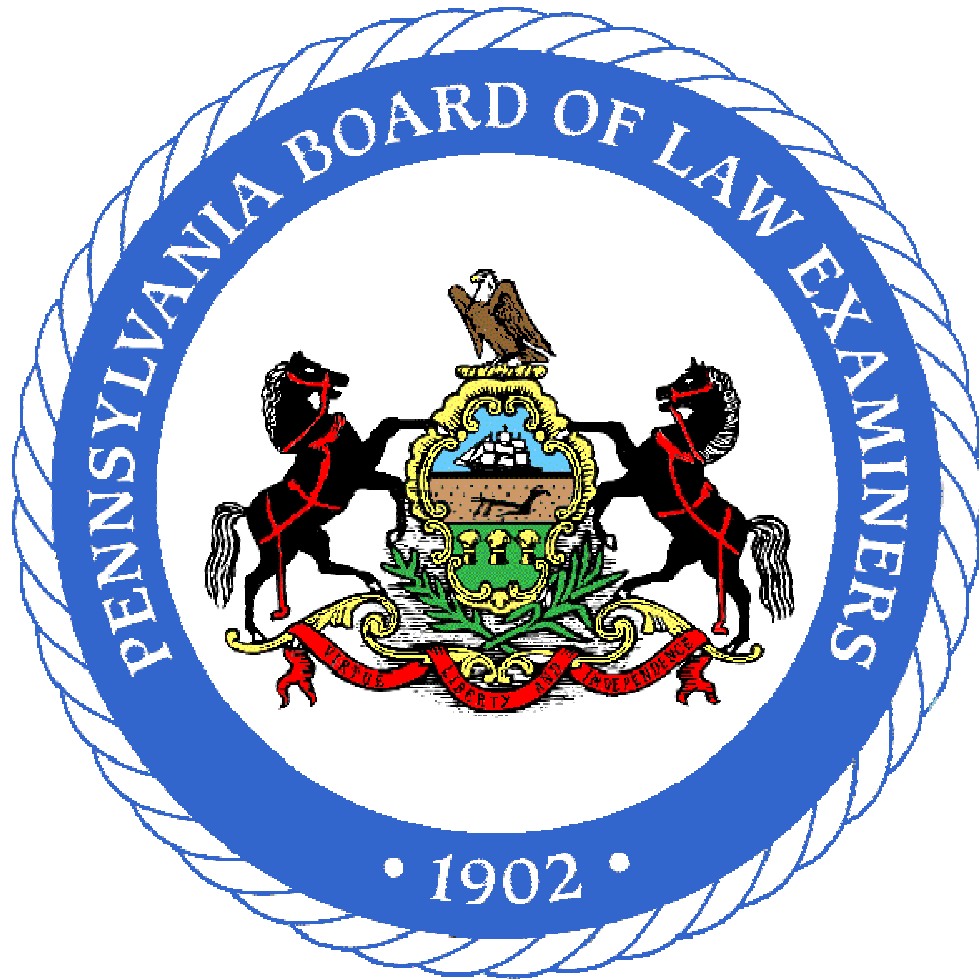


# FEBRUARY 2005 PENNSYLVANIA BAR EXAMINATION

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## Essay Questions and Examiners' Analyses and Performance Test



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## Question No. 1: Facts and Interrogatories

In 2004, Frank, a real estate developer and a resident of Pennsylvania, found \$1,000 hidden behind a false wall in his home while he was remodeling. He and his family had no idea how it got there. He decided to keep it and use it on a gambling spree at a local racetrack. After losing nine \$100 bets, he placed a \$100 bet on the tenth and last race and won \$5,000. He celebrated with some drinks and went home with the \$5,000 winnings in his pocket along with his losing tickets.

While driving home from the track, he was stopped in Pennsylvania for speeding and failed a sobriety test. The next day, he consulted Abel, his attorney, about whether to plead guilty on the speeding and/or DUI charges which had been filed against him.

In their consultation, Abel discussed with Frank all the pros and cons of pleading guilty. However, he neglected to explain to Frank a special favorable first-time offender program for DUI defendants. For several weeks after the consultation and before his scheduled preliminary hearing on both charges, Frank made several calls to Abel, which were not returned. Frank was extremely worried about deciding whether to fight the charges or plead guilty, and had called Abel requesting further information from Abel on how the charges might be resolved.

At the hearing where Abel and Frank next met, Abel disclosed for the first time that two weeks earlier, and just after the consultation, Abel had discussed the charges against Frank with the prosecuting attorney and learned that she was willing to drop the speeding charge in return for Frank's entering the special first time offender program. Frank was tremendously relieved, took the offer and entered into the special program.

Prior to surrendering his driver's license as required in the program, Frank decided to make a return trip to the racetrack on New Year's Eve afternoon of 2004. He did not win on any bets, lost \$200, and kept his losing tickets. He also became intoxicated again and was killed in a one-car accident while driving home to be with his wife for New Year's Eve.

Frank left a will leaving one of his developments (Blackacre) to his adult son, Sam, and another development (Whiteacre) to his adult daughter, Darla. Due to extreme financial problems, which occurred after his will was executed, Frank had sold Blackacre, which had not been encumbered, and encumbered Whiteacre with a loan for more than it was worth. The balance of the estate was left in his will to Wilma, his wife of four years.

At his death, Frank had recovered financially and left significant other assets but had not updated his will nor paid off the lien on Whiteacre, which still exceeded its value. Frank's will was valid in every respect; however it did not specifically or generally address the payment of any debts. Wilma had, when marrying Frank, waived all her rights to take anything from his estate other than what he left her under his will.

1. Assume that Frank is on the cash basis of income tax accounting and that under applicable property law the \$1,000 found in Frank's wall became legally his in the year that he died. Is the \$1,000 taxable to Frank for Federal income tax purposes and, if so, when?
2. To what extent, if any, are Frank's racetrack winnings and losses reportable by him for Federal income tax purposes in 2004? Assume that Frank's only betting in 2004 was limited to the instances in the facts.

3. Other than any rules on competence and diligence, what rule(s), if any, under the Pa. Rules of Professional Conduct did Abel violate in representing Frank on his speeding and DUI charges?
4. What, if anything, will Sam inherit from Frank's estate?
5. What, if anything, will Darla inherit from Frank's estate?

### **Question No. 1: Examiner's Analysis**

#### **1. The \$1,000, which Frank found is gross income to him in 2004.**

Under Section 61 of the Internal Revenue Code of 1986, as amended (IRC), taxable income includes income from every source derived unless specifically exempted. Treasure trove is not specifically covered in the IRC, but it is specifically covered in the regulations thereunder at Section 1.61-14(a) and in Revenue Ruling 61, 1953-1 CB 17. This regulation states that: "Treasure trove, to the extent of its value in the United States currency, constitutes gross income for the taxable year in which it is reduced to undisputed possession." Treasure trove is not specifically exempted in the IRC. Since the facts state that Frank got possession of the \$1,000 in the year of his death, and that it was legally his under applicable property law, the \$1,000 was taxable to Frank in the year of his death. Also, because Frank was on the cash basis of income tax reporting (according to the facts), the \$1,000 was taxable to him in the year he found it and when he was determined to be its lawful owner according to the facts. See IRC Section 451.

#### **2. The \$5,000, which Frank won at the racetrack, is income taxable to him in 2004, but he can offset the cost of his winning bet and, if he itemizes deductions, he can deduct the costs of his losing bets to the extent of his net winnings.**

Income from betting, such as Frank's \$5,000 winning ticket, constitutes gross taxable income for Federal income tax purposes under Section 61 of the IRC. The amount of income to be reported from a winning such as Frank's \$5,000 is the full \$5,000 less the cost of the bet, which in Frank's case was \$100. *Hochman, David* (1986) TC Memo 1986-24; *Silver, Max* (1940) 42 BTA 461, acq. 1940-2 CB 7. Therefore, Frank must report \$4,900 in 2004 income (or his Executor must report it for him).

The facts also state that on Frank's first trip to the track he lost \$900 on the nine other races. This \$900 is deductible to Frank to the extent of his winnings. Since his winnings exceed these losses, these losses would be deductible. IRC Section 165(d) and IRC Reg. Section 1.165-10. The calculation for this deduction is made on the basis of the taxpayer's taxable year (generally the calendar year).

Also since Frank gambled a second time during the year of his death (2004) as the facts indicate, he could deduct the losses he incurred New Year's Eve afternoon. They were, according to the facts, \$200. They and the above \$900 still do not exceed his winnings for the year, and thus are deductible.

The fact that he kept his losing tickets would help him (or his Executor) document the deduction. The bottom line would be that for 2004, Frank had \$4,900 in reportable winnings and \$1,100 in deductible losses. Note: the IRC Section 165(d) deductions for gambling losses of a person who is not in the business of gambling (such as Frank) are taken on Form 1040, Schedule A (itemized deductions). They are subject to certain limitations which may not result in a full dollar of tax benefit for the

deduction against a dollar of income from winnings. However, these mechanics and limitations are beyond the scope of this question.

**3. Able has violated Rule 1.4 of the Pennsylvania Rules of Professional Conduct (Pa. R.P.C.) on Communication.**

Pa. R.P.C. Rule 1.4, Communication, provides:

- (a) A lawyer shall keep a client informed about the status of a matter and promptly comply with reasonable requests for information.
- (b) A lawyer shall explain a matter to the extent necessary to permit the client to make informed decisions regarding the representation.

Although this rule was revised effective January 1, 2005, the revised rule would not be applicable in the present case since the conduct by Attorney Abel occurred prior to the effective date of the revised rule. However, the analysis would be similar under both rules since the above referenced provisions were retained in the text of the revised rule.

The comments to this Rule (both the pre- and post-Jan. 1, '05 versions) provide that a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left the lawyer clear instructions as to what is or is not acceptable to the client. Abel in this regard violated Subsection (a) by not timely informing Frank of the favorable plea bargain for two weeks, especially in light of Frank's calls. Knowing about the plea bargain offer would have greatly reduced Frank's anxiety.

Abel also clearly violated Subsection (a) by not returning Frank's phone calls concerning the status of his case. The calls were clearly "reasonable requests for information" which Frank had concerning the charges. As a result, Frank had several weeks of anxiety, which were not necessary had Abel not violated the above rules.

Abel also failed to sufficiently explain to Frank all of the options that were available to Frank, when he neglected to explain the special first offender program during the initial consultation. The failure of Abel to fully explain all of the options in the initial consultation, affected Frank's ability to make an informed decision on how to proceed with respect to the charges and arguably could constitute a violation of Subsection (b).

Frank could have lodged a complaint against Abel under Pa. R.P.C. Rule 1.4, Communication with the Pennsylvania Disciplinary Board.

**4. Sam will not inherit anything from Frank's Estate.**

Although under Frank's will (which the facts state was valid in every respect) Sam was to inherit Blackacre, when Frank sold Blackacre before his death, the specific devise to Sam of Blackacre is said to have adeemed. Ademption occurs whenever a specific devise in a will of a property is frustrated by the fact that the Testator thereafter sells the property. *McFerren's Estate*, 365 Pa. 490, 76 A.2d 759 (1950); *Estate of Stalnaker*, 330 Pa.Super. 399, 479 A.2d 612(1984). It doesn't matter why the devised property is no longer part of the Testator's estate with the exception of certain provisions regarding incapacities, fires, casualties, and/or any balance due Testator on the purchase, condemnation or

foreclosure of the subject property under the Pennsylvania Probate Estates and Fiduciaries Code (PEF Code) found generally at 20 Pa. C.S.A. Section 2514 (16.1, 16.2 and 18). The facts do not disclose that any such exceptions are applicable. Furthermore, the facts don't indicate that there was an intent contrary to ademption expressed in Frank's will, which could have compensated Sam for the ademption under 20 Pa.C.S.A. §2514. Since the facts indicate that Frank simply sold Blackacre because he needed the money, these statutory exceptions to the general rule on ademption do not apply.

In summary, Sam will not inherit anything from Frank's estate because he was not left anything other than Blackacre which has totally adeemed, since none of the exceptions to the general ademption rule apply, and since Frank has left the residue of his estate to Wilma.

**5. Darla will receive Whiteacre from Frank's estate but it will not be exonerated from the lien on it securing Frank's debt.**

Section 2514 (12.1) of the PEF Code provides that, unless a contrary intent appears in Frank's will, Whiteacre will pass to Darla subject to any security interest (mortgage) existing at the date of Frank's death without any right of exoneration therefrom out of Frank's estate. There is no contrary intent in Frank's will suggested by the facts. Furthermore, the facts state that there was no general or specific direction in Frank's will to pay his debts or the lien on Whiteacre. Even if there had been such a general direction, Section 2514 (12.1) of the PEF Code specifically provides that the devise to Darla would, in the absence of a specific direction, remain subject to the encumbrance thereon which is in excess of Whiteacre's value.

Although the question does not ask what Darla might do, she would probably be well advised to disclaim Whiteacre under Section 6200 et. seq. of the PEF Code because the facts state it is encumbered for more than it is worth.

## Question No. 2: Facts and Interrogatories

While eating at a restaurant located in Mountainville, Pennsylvania, Jerry sustained a broken jaw and other serious bodily injuries when he was punched several times in the face by Tom. The restaurant manager, Ed, heard the commotion caused by the incident and immediately went to see what happened. Tom told Ed that he was verbally and physically attacked by Jerry and then hit Jerry in self-defense. Carl, who was a patron in the restaurant, appeared to be the only eyewitness to the incident. Ed approached Carl who appeared visibly “shaken” and “upset”, but coherent. Carl told Ed that Jerry yelled threats and made aggressive movements toward Tom immediately before Tom hit Jerry. Tom and Carl did not know each other. Ed also interviewed Jerry who said that he was hit in the face by Tom without provocation and that Carl was not telling the truth.

Jerry was hospitalized for four weeks and incurred medical bills and lost wages. Jerry’s wife Selma took six months off work without pay to help care for Jerry during his recovery. Selma not only performed household chores that Jerry was unable to do, she also cancelled recreational activities, including a family vacation.

Jerry retained Attorney Fred who filed a Complaint on his behalf to commence a civil lawsuit against Tom for battery, in the Common Pleas Court of Mountainville, Pennsylvania. The Complaint sets forth Jerry’s version of the facts that were consistent with his statement to Ed. Tom’s attorney then filed an Answer and New Matter to the Complaint, verified by Tom under oath by a properly notarized affidavit, setting forth Tom’s denial of responsibility for the alleged tortious conduct. The Answer and New Matter asserted that Tom acted in self-defense. Attorney Fred filed a Reply to New Matter asserting that Tom was the aggressor and that Jerry did not provoke the attack.

1. If Tom files a Motion for Judgment on the Pleadings, how should the Court rule?

Assume that the Court denies the Motion for Judgment on the Pleadings and a trial is scheduled. Discovery under the Pennsylvania Rules of Civil Procedure, including Tom and Jerry’s depositions, are completed in a timely manner. At Tom’s deposition, he again maintained under oath that he was acting in self-defense.

As part of trial preparation, Tom and Carl meet for the first time at a coffee shop to discuss the incident. Carl admits to Tom that he fabricated the story given to Ed due to his personal hatred for Jerry. Tom then confides in Carl that he lied and hit Jerry several times without provocation. Tom and Carl were unaware that Tonya and Sue, two waitresses, overheard the entire conversation.

Carl died unexpectedly the day before trial. Tom’s attorney files a written Offer of Proof with the Court, proposing to introduce Carl’s statement through testimony by Ed as evidence to prove that Jerry was the aggressor in the incident.

2. What objection(s) should Attorney Fred make to Tom’s offer of proof, what response should Tom’s attorney make and how should the Court rule?

Tom did not testify at the civil trial but relied upon other evidence for his defense. A verdict in the civil case was rendered in favor of Tom. After reading about the verdict in the newspaper, Tonya and Sue go to the Mountainville police and relate the conversation they overheard between Carl and Tom.

3. What cause of action could Selma have brought if she was a plaintiff in Jerry's civil lawsuit against Tom?
4. The police would like to charge Tom with the criminal offense of perjury. Should the District Attorney's Office approve the filing of the perjury charge against Tom?

### **Question No. 2: Examiner's Analysis**

#### **1. Tom's Motion for Judgment on the Pleadings should be denied by the Court.**

Jerry commenced a civil lawsuit against Tom that asserted a claim for battery. Tom filed an Answer and New Matter. Pennsylvania Rule of Civil Procedure 1030 provides that affirmative defenses are to be pled in a responsive pleading as New Matter. Jerry filed a Reply to New Matter asserting that Tom was the aggressor.

A Motion for Judgment on the Pleadings is governed by Pa.R.C.P. 1034, which provides as follows:

- (a) After the relevant pleadings are closed but within such time as not to unreasonably delay the trial, any party may move for judgment on the pleadings.
- (b) The Court shall enter such judgment or order as shall be proper on the pleadings.

The Pennsylvania Courts have consistently recognized that a Motion for Judgment on the Pleadings is similar to a demurrer as would be raised by Preliminary Objections. The Motion is to be granted only where there are no disputed facts and the party filing the Motion, as a matter of law, is entitled to judgment. *Kelaco v. Davis and McKean General Partnership*, 743 A.2d 525, 528 (Pa. Super. 1999); *Miller v. Nelson*, 2001 Pa. Super. 9, 768 A.2d 858. In deciding whether to grant the Motion, a Court is limited to the pleadings and relevant documents that are properly attached to the pleadings. *Citicorp North America v. Thornton*, 707 A.2d 536, 538 (Pa. Super 1998). A court is required to accept all of the well-pled facts of the non-moving party (Jerry). *Ridge v. State Employees' Retirement Board of Commonwealth of Pennsylvania*, 690 A.2d 1312 (Pa. Cmwlth. 1997).

The Motion for Judgment on the Pleadings is a proper procedural Motion to file at this point since all of the relevant pleadings have been filed; that is Complaint, Answer, New Matter and Reply to New Matter.

The Court would deny the Motion for Judgment on the Pleadings since this is not the proper time to reconcile a factual dispute as to what occurred. Tom alleged that he was acting in self-defense while Jerry alleged that this was an unprovoked attack. Judgment on the Pleadings is proper only when no material facts are in dispute. *Vogel v. Berkly*, 354 Pa. Super. 291, 511 A.2d 878 (1986). Since there are disputed facts, the Motion for Judgment on the Pleadings must be denied.

Additionally, Tom has failed to establish that based on the pleadings, he is entitled to judgment as a matter of law. The Complaint sets forth the elements of battery, which are an intentional offensive touching or contact. *Levenson v. Souser*, 384 Pa. Super. 132, 557 A.2d 1081 (1989). Here the Complaint states that Jerry was actually touched by Tom, when he was punched in the face, which was obviously offensive. Since the Complaint sets forth Jerry's allegation that he was the victim of an unprovoked attack and the Reply to New Matter denies that Jerry was the aggressor, the facts, which

must be taken as true, more than sufficiently set forth a cause of action for battery. The Court would therefore deny the Motion for Judgment on the Pleadings.

**2. The Court should rule in Tom’s favor as to the offer of proof and permit Ed to relate what Carl told him, since the testimony would fall within the Excited Utterance and Present Sense Impression Exceptions to Hearsay.**

Hearsay is an out of court statement that is offered to prove the truth of the matter asserted. Pa. R. E. 801. The out of court statement of Carl, now deceased, is offered by Tom to prove that Jerry yelled threats and made threatening movements toward Tom, thus tending to prove that Jerry was the aggressor. If otherwise admissible, this would be relevant evidence to support Tom’s defense that he was not the aggressor. Carl is deceased and thus his statement to Ed is classic hearsay since it is meant to prove the truth of the assertion regarding Jerry’s behavior. Thus Attorney Fred’s best objection would be hearsay.

Tom’s attorney would argue that Carl’s statement to Ed is admissible at trial under the Excited Utterance Exception to Hearsay. Pa. R.E. 803(2) states:

“(2) Excited Utterances – a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.”

While no strict time limit has been set in which a statement must be made in relation to the incident, the Courts have held that nervous excitement generated by the incident must continue to dominate while the reflective process remains in abeyance. See comment *Pa.R.E. 803(2) and Commonwealth v. Gore*, 262 Pa. Super. 540, 547 548, 396 A.2d 1302, 1305 (1978). Here Ed immediately interviewed the parties after hearing the commotion associated with the incident. Ed noted that Carl was “shaken” and “upset” at the time of the interview. It is highly likely that the objective evidence together with the closeness in time between the interview and the incident would lead the Court to rule that the Excited Utterance Exception to Hearsay is applicable and the statement is admissible.

Tom’s attorney could also argue that under Pa.R.E. 803(1), this statement falls within the Present Sense Exception to Hearsay. This Rule provides the following exception to the Hearsay Rule:

“(1) Present Sense Impression – A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition , or immediately thereafter.”

The comment to Pa.R.E. 803(1) explains the rule as follows:

“for this exception to apply, the declarant need not be excited or otherwise emotionally affected by the event or condition perceived. The truthfulness of the statement arises from its timing. The requirement of contemporaneousness, or near contemporaneousness, reduces the chances of premeditated prevarication or loss of memory.”

The Court would probably admit the statement under the Present Sense Impression Exception based upon the time between the incident and the statement to Ed. However, the Court could conclude that since Ed talked to Tom first, the time delay between the incident and Carl’s statement was

significant enough so that the Present Sense Impression Exception would not apply. Thus, although the Present Sense Impression Exception to Hearsay is appropriate to raise in this situation, an argument based upon the facts can be made that this exception does not apply.

**3. A cause of action for a loss of consortium could be brought by Selma in Jerry’s Complaint.**

Selma would be able to include a cause of action based upon a loss of consortium, which is a right growing out of the marriage relationship. The interference with the right of consortium by a tortfeasor (Tom) to one spouse (Jerry) affords the other spouse (Selma) with a legal cause of action to recover damages for that interference. *Novelli v. Johns-Manville Corp.*, 395 Pa. Super. 144, 148, 576 A.2d 1085, 1087 (1990).

A loss of consortium claim is grounded on the loss of a spouse’s services after injury. Here, during his recovery period, Jerry was unable to perform normal and usual household tasks. Selma lost the services and society of Jerry for at least the four week hospitalization and also had to perform the household tasks herself. The loss of services and society are compensable. *Jackson v. Travellers Ins. Co.*, 414 Pa. Super. 336, 606 A.2d 1384 (1992). Consortium is a right growing out of the marriage relationship where husband and wife have a right to the society, companionship and affection of each other. *Novelli, supra*. Here Selma suffered a loss of the society, companionship and affection of her husband and also was compelled to cancel recreational activities including a vacation due to the injury to Jerry. Since a loss of consortium is derivative of the injured spouse’s claim and it arises from the bodily injury to the other spouse (Jerry), Selma is entitled to damages for loss of consortium. *Barchfield v. Nunley*, 395 Pa. Super. 517, 577 A.2d 910 (1990).

Selma could therefore include a cause of action for a loss of consortium in the Complaint filed against Tom.

**4. The District Attorney should approve the filing of perjury charges against Tom.**

Tom should be charged with perjury. Perjury is defined as follows:

18 Pa.C.S. 4902 Perjury:

- (a) Offense defined – A person is guilty of perjury, a felony of the third degree, if in any official proceeding he makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true.
- (b) Materiality – Falsification is material, regardless of the admissibility of the statement under Rules of Evidence, if it could have affected the course or the outcome of the proceedings. It is no defense that the declarant mistakenly believed the falsification to be immaterial. Whether a falsification is material in a given factual situation is a question of law.

\* \* \*

- (f) Corroboration – In any prosecution under this section, except under subsection (e) of this section, falsity of a statement may not be established by the uncorroborated testimony of a single witness.

The civil case went to trial without Tom testifying. Although Tom never gave testimony in court that would subject him to perjury, he did file an Answer and New Matter, which was properly verified under oath, through a notarized affidavit. The facts state that the Answer and New Matter was properly verified under oath by Tom, which serves as a basis for the perjury charge.

The facts also state that Tom, as part of the discovery process, testified at his deposition, under oath consistent with his statements to Ed. The law in Pennsylvania defines an official proceeding to include depositions. 18 Pa.C.S. 4501. Tom's fabricated testimony at the deposition and in the Answer will serve as the basis of the perjury charge since Tom offered false evidence by his testimony and in his Answer.

Also, there are two witnesses to the falsity of Tom's statement. Both Tonya and Sue overheard Tom admit that his statement about the incident was false. Tom made a false statement in his Answer and New Matter and also at his deposition. The essential elements of perjury including the testimony of two witnesses have been met and the district attorney should approve the filing of the perjury charge against Tom.

### **Question No. 3: Facts and Interrogatories**

In March 2003, Penelope, a 44 year old architect, met and fell in love with Alfred, a 38 year old teacher. Both Penelope and Alfred lived and worked in Pennsylvania their entire lives. Within a few months, Alfred proposed marriage to Penelope. She agreed provided that Alfred would sign a pre-nuptial agreement (Pre-nup).

Penelope directed her attorney to prepare the Pre-nup, which fully disclosed the statutory rights of the parties and their respective debts and assets, including accurate present values. The Pre-nup addressed the disposition of all current and future property owned by the parties. Paragraph 13 of the Pre-nup specifically excluded 35 acres of land, valued at \$350,000, which Penelope owned on Lake Katherine, from being considered as marital property and provided that this 35 acres, including any increase in value during the marriage until final separation, would be excluded from equitable distribution. Paragraph 14 of the Pre-nup provided that upon entry of a divorce, Penelope would pay \$5,000 per month for 60 months to Alfred as alimony and that the requirement to make these alimony payments would be governed solely by the provisions of the Pennsylvania Divorce Code. Penelope gave Alfred the Pre-nup several months before their November 2003 wedding. Alfred had ample time to review it and secure legal counsel, but he was so infatuated with Penelope that he chose to only page quickly through the Pre-nup without reading any of it except paragraphs 13 and 14. He commented, "It seems fair to me!" and signed it. Shortly after the wedding, the value of Penelope's 35 acres on Lake Katherine skyrocketed to 1.3 million dollars due to a celebrity unexpectedly purchasing the lot contiguous to it.

On June 5, 2004, the couple separated and Penelope filed for divorce. Alfred was distraught over the breakup and quickly became intimately involved with a co-worker, Monica. Alfred and Monica, who were unrelated, began to share an apartment and living expenses. They regularly went to public gatherings together where they often discussed with others their intimate relationship and their plans for a life together.

Shortly after she filed for divorce, Penelope decided to sell five of the thirty-five acres of land she owned on Lake Katherine. She knew that the five acres she selected lacked septic approval, which would prevent an owner from building on the land. She knew that without septic approval, the value of the land would be \$150,000, rather than \$300,000, which was the commonly known and accepted sale price for a five acre buildable lot on Lake Katherine. She advertised the lot as "5 acres on Lake Katherine with septic approval. \$300,000 going price."

Buyer approached Penelope at her office and expressed his willingness to pay her asking price provided that the land was septic approved. He knew that \$300,000 was the going price for a lot this size with septic approval. He made it clear that he intended to build on it. Penelope assured Buyer the land had the necessary septic approvals and immediately accepted \$300,000 in cash from Buyer, who was anxious to close the deal. During the transaction, the Buyer also gave Penelope a check for \$6,000 for a boat that was on the property. The next day, Penelope, with neither Buyer's knowledge nor consent, changed the writing on Buyer's check to reflect an amount of \$8,000. She endorsed the check and presented it to her bank for cashing where she was informed there was a three day waiting period to cash it. The next day the bank determined that there was only \$6,500 in Buyer's account and when they informed Buyer he reported Penelope's actions to the police.

1. Angry about Penelope's decision to leave, Alfred rereads the Pre-nup and decides that it is unfair. On June 7, 2004, he comes to your office and asks if he could have the Pre-nup voided on the grounds that he did not read most of it and that it is now unreasonable

because the value of Penelope's land is now substantially more than what it was worth when he signed the Pre-nup. How would you advise Alfred?

2. On January 14, 2005, while opening the mail at the apartment he still shared with Monica, Alfred received his final divorce decree, which was dated January 4, 2005. Assume for the purpose of this question only that the Pre-nup is enforceable and survives the divorce decree. What argument can Penelope raise regarding her obligation to pay alimony to Alfred after her divorce and with what likelihood of success?
3. Assume for the purpose of this question that Penelope admits that the value of the five acres with septic approval was \$300,000 and without it was \$150,000. Other than receiving stolen property and criminal attempt, with what crime(s) can Penelope be charged and likely be found guilty with regard to her sale of the land and boat to Buyer?

### Question No. 3: Examiner's Analysis

1. **Alfred should be advised that he had an obligation to read the entire agreement before he signed it and to provide for potential changes in circumstances over the course of the agreement and since he did neither, he will likely not be able to avoid it.**

Pre-nuptial agreements are contracts, and, as such, should be evaluated under the same criteria as are applicable to other types of contracts. *Simeone v. Simeone*, 525 Pa. 392, 581 A.2d 162 (1990). Absent fraud, misrepresentation or duress, spouses should be bound by the terms of their agreement. *Id. at 165*. Contracting parties are normally bound by their agreements, without regard to whether the terms thereof were read and fully understood and irrespective of whether the agreements embodied reasonable and good bargains. *Id. at 165*. The failure to read a contract does not warrant avoidance or nullification of its provisions. *Standard Venetian Blind Co. v. American Empire Insurance Co.*, 503 Pa. 300, 305, 469 A.2d 563, 566 (1983). Once a person enters into a written agreement, he builds around himself a stone wall, from which he cannot escape by merely asserting he had not understood what he was signing. *Bollinger v. Central Quarry Stripping and Construction Co.*, 425 Pa. 430, 432, 229 A.2d 741, 742 (1967). One is legally bound to know the terms of the contract entered. *Montgomery v. Levy*, 406 Pa. 547, 550, 177 A.2d 448, 450 (1962).

Everyone who enters a long-term agreement knows that circumstances can change during its term, so that what initially appeared desirable might prove to be an unfavorable bargain. Such are the risks that contracting parties routinely assume. Certainly, the possibilities of illness, birth of children, reliance upon a spouse, career change, financial gain or loss, and numerous other events that can occur in the course of marriage cannot be regarded as unforeseeable. If parties choose not to address such matters in their pre-nuptial agreements, they must be regarded as having contracted to bear the risk of events that alter the value of their bargains. *Simeone, supra*, 525 Pa. 402, 581 A.2d 166.

As applied here, the facts indicate that Alfred was presented with the Pre-nup well in advance of the wedding and he had ample time to review it. Despite this, he elected to simply page through the document quickly without reading it except for Paragraphs 13 and 14. For whatever reason, he decided not to read the terms of the agreement and this omission will not now provide him a basis to nullify or avoid the agreement as he had an obligation to read the contract before he signed it. Thus, Alfred should be advised that he does not have a legal ground to void the Pre-nup because of his failure to read the agreement.

With regard to Alfred's suggested challenge to the lack of reasonableness of the agreement, this challenge will also likely fail. Alfred read Paragraph 13 of the Pre-nup, which disclosed that Penelope owned the 35 acres on Lake Katherine and that it had a value of \$350,000. The facts indicate the valuation was accurate at the time the Pre-nup was prepared. This paragraph further provided that Penelope would retain the property, including any increase in value during marriage, in the event the parties divorced. At the time he signed the Pre-nup, Alfred indicated "It seems fair to me!" By not addressing the possibility of substantial future increases in the value of the property Alfred bore the risk that circumstances might change which would alter the reasonableness of the agreement as initially prepared. Accordingly, Alfred should be advised that he would likely be unsuccessful in his attempt to void the agreement on the grounds that it is no longer reasonable despite the substantial increase in the value of the property.

**2. Penelope can argue that Alfred should be barred from receiving alimony after her divorce based upon the fact that he has entered into cohabitation with Monica and Penelope will likely succeed with this argument.**

The Divorce Code, 23 Pa. C.S.A. Section 3706 provides that no petitioner is entitled to receive an award of alimony where the petitioner, subsequent to the divorce pursuant to which alimony is being sought, has entered into cohabitation with a person of the opposite sex who is not a member of the family of the petitioner within the degrees of consanguinity. Cohabitation may be shown by evidence of financial, social, and sexual interdependence, by a sharing of the same residence, and by other means. *Miller v. Miller*, 352 Pa. Super. 432, 434, 508 A.2d 550 (1986); *Moran v. Moran*, 2003 Pa. Super. 455, 839 A.2d 1091 (2003), re-argument denied, January 29, 2004.

In the present case, the Pre-nup provided that upon entry of the divorce Alfred would receive \$5,000 per month for 60 months subject to the provisions of Pennsylvania Divorce Code governing alimony. Penelope should argue that she should not have to make any alimony payments to Alfred after January 4, 2004, due to his cohabitation with Monica, a member of the opposite sex, who is unrelated to Alfred. Penelope should argue that cohabitation has been established in this case due to the fact that the two have been sharing an apartment and living expenses together for approximately six months and they have freely acknowledged their intimate relationship with others at public gatherings. They have also expressed to others their intent to have a life together. Based upon these facts, Penelope can argue that she should not be required to pay Alfred any alimony payments after the date of divorce and she will have a strong likelihood of success.

**3. Penelope can be charged with the crimes of theft by deception and forgery and will most likely be found guilty of both crimes.**

A person is guilty of theft by deception if he intentionally obtains property from another person by deception. 18 Pa. C.S. Section 3922; *Commonwealth v. Lawson*, 437 Pa. Super 521, 650 A.2d 876 (1994), appeal denied, 540 Pa. 596, 655 A.2d 985 (1995). 18 Pa. C.S.A. § 3901 defines property as anything of value. Deception occurs when a person intentionally creates or reinforces a false impression regarding the value of property, or fails to correct a previously created false impression that influences the victim regarding such value. 18 Pa. C.S. Section 3922(a)(1) and (3). The Commonwealth must demonstrate not only the presence of a false impression but that the victim relied upon that impression. *Lawson, supra* at 529, 650 A.2d at 880.

A person is guilty of forgery if with the intent to defraud or injure anyone or with knowledge that he is facilitating a fraud or injury to be perpetrated by anyone the actor alters any writing of another without his authority or utters any writing he knows to be forged. 18 Pa. C.S.A. Section 4101 (a)(1) and

(3). The Commonwealth must prove that there was a false writing, that the instrument was capable of deceiving, and that the defendant intended to defraud. *Commonwealth v. Dietterick*, 429 Pa. Super. 180,182, 631 A.2d 1347, 1348 (1993), appeal denied, 538 Pa. 608, 645 A.2d 1312 (1994).

Here, Penelope clearly created a false impression regarding the value of the five acres of land when she represented to the Buyer in the advertisement and in person that it was septic approved. In particular, she represented that the land had a value of \$300,000, which the facts indicate was the commonly known sale price for this size lot. In fact, she knew it was only worth \$150,000. She intentionally deceived the Buyer by indicating that it was a septic approved piece of land when she knew it was not. She knew that the Buyer intended to build on it and the property was not able to meet this requirement of Buyer. Further, it is clear that based upon the deceptive representations of Penelope the Buyer paid \$300,000 cash for the property which is twice what it was worth on the market as was known by both Penelope and Buyer. In sum, it appears that Penelope can be charged with and will likely be found guilty of the crime of theft by deception.

Penelope can also be charged with forgery. The Commonwealth must show that Penelope altered the Buyer's check without his authority. In particular, the Commonwealth must establish that Penelope changed the amount on the check from a six, which the Buyer had written and intended, to an eight. If they can prove that Penelope made this alteration the Commonwealth will meet this element of the forgery offense. The alteration of the check not only was capable of deceiving but did, in fact, deceive the bank teller when the check was presented. It was only when the bank discovered a lack of funds to cover the check and informed Buyer that the bank learned that the check had been altered. Penelope's uttering of the forged check to the bank also provides an independent basis for a forgery charge. Both the initial altering of Buyer's check and the subsequent uttering of it show an intent on the part of Penelope to defraud Buyer. It is clear from the facts that Buyer did not authorize Penelope to alter the check. In sum, Penelope will likely be charged with and found guilty of the crime of forgery.

#### **Question No. 4: Facts and Interrogatories**

Male Advocates for Custody (“MAC”) is a non-profit charitable organization which supports reform and enhancement of child custody laws to provide greater custodial rights for fathers. It provides counseling for fathers engaged in child custody disputes, conducts regular educational meetings with programming related to child custody issues, and publicly supports legislative initiatives in furtherance of fathers’ custody rights. Because of this focus on fathers’ rights, membership in MAC is limited to men, and women are not permitted to attend meetings or other group activities sponsored by MAC. Nor are women eligible for counseling or other services routinely provided by MAC to men.

MAC recently established a local chapter of the organization in C City, located in State P. C City allows non-profit charitable organizations located in the City to solicit contributions from C City employees through payroll deductions, and maintains a listing of such organizations that employees may designate to receive such contributions. Organizations wishing to be included on this list make a request to the Mayor, who will add the organization after confirming it is in fact a non-profit charitable group. Tim, president of the C City MAC chapter, learned of this fund-raising opportunity and has submitted a request to Mary, the current Mayor, to be included on the list of eligible organizations. In addition, Tim and other members of the local MAC chapter have begun a door-to-door solicitation campaign within C City to raise money in support of MAC’s activities.

Upon receiving MAC’s request to be included on the list of organizations eligible to receive contributions through employee payroll deduction, Mary confirmed that MAC was a non-profit charitable organization. However, upon learning of MAC’s policies limiting membership, meeting participation and services exclusively to men, Mary decided to refuse MAC’s request because of her adamant opposition to its goals and objectives.

C City officials thereafter notified Tim that by limiting attendance at educational meetings and the provision of counseling services to men, he was in violation of C City’s Non-Discrimination Ordinance, which prohibits discrimination on the basis of sex by any “person engaging in business or furnishing services to the public within C City.” Violations of the ordinance are punishable by substantial fines. C City has now advised Tim that enforcement proceedings will be commenced against him.

Tim has also been informed that he and other MAC members must apply for, obtain and carry a permit under C City’s Solicitation Ordinance in order to conduct door-to-door solicitation in the city. The Solicitation Ordinance applies to all persons or groups desiring to solicit door-to-door for any charitable, business or other purpose. In order to obtain a permit, an applicant must furnish C City with his name, address, the purpose of the solicitation and the identity of the recipient of the funds. The Solicitation Ordinance was enacted in order to prevent fraud and crime in C City neighborhoods, and provides for a fine to be imposed on individuals who solicit without obtaining the required permit.

1. MAC has consulted you concerning C City’s refusal to include MAC on the list of organizations eligible to receive contributions through employee payroll deductions. Advise MAC as to what federal constitutional claim or claims should be asserted to challenge this action and with what likelihood of success.
2. Tim has consulted you concerning: (a) C City’s attempt to enforce the Non-Discrimination Ordinance against him as a result of his adherence to MAC’s discriminatory practices; and

- (b) C City's requirement that Tim obtain a permit under the terms of the Solicitation Ordinance. Advise Tim as to what federal constitutional claim or claims should be asserted to challenge these actions and with what likelihood of success.
3. Assume that you have concluded that Tim has a reasonable basis to commence an action as a plaintiff in the United States District Court for State P seeking appropriate injunctive relief against C City as to the Non-Discrimination Ordinance and the Solicitation Ordinance. In order to avoid the notoriety of Tim or other individual solicitors being a named plaintiff in a lawsuit, Tim has requested that MAC be the only plaintiff, even though MAC has not been subject to any enforcement action by C City. Does MAC have appropriate standing to file such an action?

#### Question No. 4: Examiner's Analysis

1. **MAC should assert that C City's refusal to include it as an eligible organization to receive contributions through payroll deductions violates its rights under the Free Speech Clause of the First Amendment, and such a challenge will likely be successful.**

Solicitation of funds in support of a cause has long been recognized as a form of protected speech. *See, Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 629, 100 S.Ct. 826, 832 (1980). Further, the Supreme Court has recognized that this right may be asserted with respect to participation in governmental workplace solicitation campaigns, in which employees are permitted to designate the recipient charitable organizations to which funds are directed through a payroll deduction plan. *Cornelius v. NAACP Legal Defense and Education Fund*, 473 U.S. 788, 799, 105 S.Ct. 3439, 3447 (1985).

In *Cornelius*, the Supreme Court held that a federal charitable fund raising campaign was a non-public forum for the expression of speech. It was concluded that such a forum was subject to control over access based upon the subject matter and the identity of the speaker, so long as the distinctions drawn are reasonable in light of the purpose to be served by the forum and are viewpoint neutral. *Cornelius, supra*, 473 at 806, 105 S.Ct. at 3451. There, the Supreme Court held that the government could reasonably conclude that an organization raising funds for purposes of supporting litigation activities could be excluded from participation, compared with organizations, which focused on enhancing the health, safety and welfare of the public at large. The Court left open, however, for further consideration the question whether the decision to exclude the NAACP defense fund was in fact done on a viewpoint neutral basis. The principals enunciated in *Cornelius* have been applied more recently in cases involving participation of the Boy Scouts of America in similar governmental campaigns. *See, Boy Scouts of America v. Wyman*, 335 F.3d 80 (2<sup>nd</sup> Cir. 2003).

On its face, C City's process of including non-profit charitable organizations on the list of organizations for which payroll deductions are allowed is viewpoint neutral; that is, the only criteria is that the group be a non-profit charitable organization, regardless of the views espoused by that organization. Even a facially neutral policy, however, will not protect a decision to exclude an organization from the forum if it is "...impermissibly motivated by a desire to suppress a particular point of view." *Cornelius, supra*, 473 U.S. at 813, 105 S.Ct. at 3439. In fact, that is precisely what occurred when Mary decided not to include MAC as a participant in the employee campaign because of her adamant objection to its goals and objectives. Hence, her decision was not viewpoint neutral as required by *Cornelius*.

**2(a). C City’s attempt to enforce the Nondiscrimination Ordinance against Tim should be challenged as an infringement of his expressive associational rights protected under the First Amendment but such challenge may not be successful.**

Implicit in the right to engage in activities protected by the First Amendment is a right to associate with others in pursuit of a variety of political, social and other causes. *Roberts v. United States Jaycees*, 468 U.S. 609, 622, 104 S.Ct. 3244, 3252 (1984). Infringement on the right to associate for expressive purposes may be justified by a compelling state interest such as eliminating discrimination, where enforcement of the anti-discrimination provision did not materially interfere with the ideas the organization sought to express. This freedom of expressive association has been asserted on numerous occasions when governmental nondiscrimination laws have been applied to private groups and associations. In *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 107 S.Ct. 1940 (1987), for example, the Supreme Court upheld the application of a state law precluding discrimination in groups such as *Rotary* on the basis of sex, concluding that the functions and purposes of Rotary Clubs did not incorporate the kind of intimate or private relations warranting constitutional protection against enforcement of a nondiscrimination statute. Although the right of expressive association also extends to the pursuit of a wide variety of political, social, economic and other causes, even if the Clubs activities were so protected the Court found that *Rotary’s* discrimination against women was not in furtherance of or necessary for any of the expressive activity undertaken by the organization.

By contrast, in *Boy Scouts of America v. Dale*, 530 U.S. 640, 120 S.Ct. 2446 (2000), the Court concluded that a state law which precluded discrimination on the basis of sexual orientation improperly intruded on the expressive associational rights of the Boy Scouts, based upon a careful analysis of the principals, purposes and objectives of the organizations. The Court held that requiring the Boy Scouts to accept leaders who acted in a manner contrary to Boy Scout principles would unduly intrude upon these First Amendment rights.

The question presented on these facts, therefore, is initially whether the purposes, goals and activities of MAC constitute expressive associational activities warranting protection by the First Amendment. If so, it must be considered whether mandating the inclusion of women in its membership, functions and activities would materially intrude upon this right. It seems likely that the advocacy of “men’s rights” with respect to matters of custody would be viewed as activities warranting protection under the First Amendment. MAC is not a purely business or social organization; rather it is plainly an advocacy organization espousing a particular public position on matters of public interest. In light of the specific goals and objectives of MAC, if it can be shown that a compelled association with women in its activities and programs would unreasonably interfere with its expressive associational rights, to advocate its viewpoints, the constitutional challenge would be successful.

On the other hand, it is entirely possible that at least some women may share the views and beliefs of MAC since it cannot be assumed that a person’s gender will control their belief. Consistent with the analysis in *Rotary Club of Duarte, supra*, if it can be shown that that inclusion of women would not therefore impermissibly infringe upon the expressive associational rights of MAC members, the constitutional challenge will not be successful.

**2(b). C City’s requirement that a permit be obtained for door-to-door solicitation under the Solicitation Ordinance should be challenged under the Free Speech Clause of the First Amendment, and such a challenge would likely be successful.**

In *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 122 S.Ct. 2080 (2002), the Supreme Court held that a municipal ordinance requiring a permit in order to engage in door-to-door canvassing and solicitation violated the Free Speech Clause of the First Amendment. The permit requirement involved in *Watchtower Bible* required essentially the same information to be submitted as the C City solicitation ordinance, and also likewise required the permit to be carried on the person of the solicitor. The Court recognized that the prevention of fraud and crime were important interests that the municipality may seek to safeguard through some form of regulation. Nevertheless, the Court concluded that there was not an appropriate balance between the affected speech and the governmental interest purported to be served by the ordinance. Moreover, the breadth of the permit requirement, applying to all types and varieties of speech, both commercial and non-commercial, rendered it: . . . ”offensive – not only to the values protected by the First Amendment, but to the very notion of a free society – that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.” 536 U.S. at 166, 122 S.Ct. at 2089.

Here likewise, the C City Solicitation Ordinance would be subject to the same fatal constitutional defects, and a constitutional challenge by Tim or MAC would likely be successful.

**3. MAC will have standing to bring suit on behalf of its members to assert the constitutional challenges against the Nondiscrimination Ordinance and the Solicitation Ordinance.**

Tim is the individual who is threatened with an enforcement proceeding under the Nondiscrimination Ordinance, and who must obtain a permit under the Solicitation Ordinance. Tim would therefore satisfy the “case or controversy” requirement for standing under Article III of the Constitution. To establish standing under Article III, “[a] plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.” *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316,328, 119 S. Ct. 765, 772 (1999). As to Tim, the threatened prosecution is sufficient to provide standing. *See, Steffel v. Thompson*, 414 U.S.452, 459, 94 S. Ct. 1209, 1216 (1974).

By contrast MAC is not directly threatened with prosecution, under either Ordinance and is not a permit applicant under the Solicitation Ordinance, and thus would not ordinarily have standing. The Supreme Court has recognized, however, that an association has standing to sue on behalf of its members “when (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441 (1977). *See also, New York State Club Association v. City of New York*, 487 U.S. 1, 9, 108 S.Ct. 2225, 2231-32 (1988).

It appears that all three elements to permit associational standing are present on these facts. Tim, as a member of MAC, would otherwise have standing to sue in his own right; the interests of avoiding the Nondiscrimination Ordinance and the Solicitation Ordinance are germane to the purposes of MAC; and neither the claims asserted nor the relief requested requires the participation of individual members of MAC in the lawsuit. Under these circumstances, MAC could be the plaintiff in the action initiated against C City seeking appropriate injunctive relief.

### **Question No. 5: Facts and Interrogatories**

Dan purchased a newly constructed home in a development in C County, Pennsylvania from the builder, Homes, Inc. for \$100,000 pursuant to a valid written contract. After living in the home for about 5 months, Dan discovered that 6 skylights in his home were leaking. No oral or written representations or guarantees regarding the skylights had been made by any representatives of Homes, Inc. Dan immediately called Homes, Inc. and demanded repair or replacement of the skylights and Homes, Inc. sent a repairman who failed to properly fix the skylights. Dan liked the skylights very much and did not want to have them covered in any way. When the repairman failed to remedy the situation, Dan filed an action against Homes, Inc.

Dan also entered into a valid written contract with Pete whereby Pete agreed to paint the exterior of Dan's home for \$8,000. The agreement provided that \$2,000 would be paid prior to Pete's starting performance and \$6,000 upon completion. Dan paid \$2,000 and Pete painted the home. When Pete demanded payment upon completion, Dan refused to pay stating that Pete had not painted the interior of the porch. Pete replied that the interior of the porch was not part of the contract. When they still failed to agree after 2 months, Dan offered to give Pete a car that was worth about \$4,000 the next day instead of the money that he owed. Pete decided to accept the car rather than waiting for the cash and arguing with Dan. When Pete arrived to pick up the car at the agreed upon time, Dan said that the car was not available and would not be available for a couple of more months.

Dan was frustrated with the problems associated with his new home and he decided to purchase Blackacre in C County, Pennsylvania from Sue. Blackacre was a large lot with a fifty year old home on it. Dan paid fair market value and Sue properly executed a deed conveying Blackacre to Dan. Dan promptly recorded the deed.

A title examination for Blackacre revealed a recorded agreement by which Gas Company purchased a 12 foot right of way on Blackacre from Sue 30 years ago. Gas Company had installed and operated a pipeline on the right of way, which was about 50 yards from Dan's home.

Prior to closing, Dan observed a Gas Company truck and employees working on the pipeline about 50 yards from the home. He also saw Gas Company employees standing approximately 30 yards from his home.

After Dan occupied Blackacre for several months, he saw Gas Company employees digging on the path about 30 yards from his home. He did not know why the employees were so close to his home and demanded that they leave. When they refused, Dan contacted Gas Company and was advised that Gas Company had a second 15 foot right of way which it had purchased pursuant to a valid written agreement with Sue 10 years earlier. The agreement was not recorded. Gas Company advised Dan that it was the rightful owner of the 15 foot right of way and that Dan should have known of the right of way when he saw Gas Company trucks and employees on Blackacre. Dan honestly replied that he had seen the Gas Company truck and employees but had attributed their presence to the recorded right of way owned by the Gas Company.

1. Other than negligence, upon what legal theories should Dan base his action to recover damages against Homes, Inc. and with what likely result?
2. At trial, Dan's expert witness testified that the skylights could not be repaired but could be properly replaced at a cost of \$4,500. Another expert testified that in its current condition, the house could probably sell for about \$99,000 and, if the skylights were

replaced, the fair market value would be approximately \$102,000. Assume for this question only, that the court found Homes, Inc. to be liable to Dan with respect to the skylights. What is the proper measure of the damages that will be awarded to Dan?

3. Pete filed suit against Dan for breach of contract seeking damages in the amount of \$6,000. Dan defends on the ground that if he is liable to Pete, the damages cannot exceed the \$4,000 value of the vehicle that Pete had agreed to accept. Will Dan's defense be successful?
4. Dan files an action in ejectment to obtain possession of the 15 foot right of way on Blackacre claiming that the Gas Company does not own it. Will Dan prevail?

### **Question No. 5: Examiner's Analysis**

**1. Dan should file an action against Homes, Inc. for breach of the warranties of habitability and reasonable workmanship and Dan should prevail.**

Pennsylvania law recognizes implied warranties of habitability and reasonable workmanship in contracts where builder-vendors sell new homes to residential purchasers. *Elderkin v. Gaster*, 447 Pa. 118, 288 A.2d 771 (1972). The rationale for the theory of implied warranties was explained by the court in *Elderkin*:

Not only does a housing developer hold himself out as having the necessary expertise with which to produce an adequate dwelling, but he has by far the better opportunity to examine the suitability of the home site and to determine what measures should be taken to provide a home fit for habitation. As between the builder-vendor and the vendee, the position of the former, even though he exercises reasonable care, dictates that he bear the risk that a home which he has built will be functional and habitable in accordance with contemporary community standards. We thus hold that the builder-vendor impliedly warrants that the home he has built and is selling is constructed in a reasonably workmanlike manner and that it is fit for the purpose intended—habitation. *Id.* 288 A.2d at 776, 777.

These warranties are implied in law and are not created by representations of the builder-vendor. *Ecksel v. Orleans Const. Co.*, 360 Pa.Super. 119, 129, 519 A.2d 1021, 1026 (1987). They are implied by law in every contract for the sale of a new home. *Id.*

Courts have not articulated a set standard for habitability but require that a home be functional and habitable in accordance with contemporary and community standards. *Elderkin v. Gaster, supra*. "Reasonable workmanship" is not the equivalent of building perfection, but must be viewed as meaning reasonable under the circumstances. *Id.* 288 A.2d at 776, n. 13.

Here, Homes, Inc. is both the builder and the vendor of Dan's home. Although no express representations or warranties were provided by Homes, Inc., the contract between Homes, Inc. and Dan contained the implied warranties of habitability and reasonable workmanship.

It would be necessary for the court to determine whether the defective skylights were within the scope of these warranties. In *Fetzer v. Vishneski*, 399 Pa.Super. 218, 582 A.2d 23 (1990), the Pennsylvania Superior Court affirmed the trial court's finding that leaky skylights constituted a breach of the warranty of habitability. Courts have found a breach of the warranties of habitability and

reasonable workmanship in the case of a defective furnace in *Pontiere v. James Dinert, Inc.*, 426 Pa.Super 576, 627 A.2d 1204 (1993); a leaky basement in *Ecksel v. Orleans Const. Co.*, *supra*; and a leaky crawl space in *Tyus v. Resta*, 328 Pa.Super. 11, 476 A.2d 427 (1984).

In *Fetzer v. Vishneski*, *supra*, the Superior Court stated that the skylights' leakage itself was sufficient to breach the warranties of habitability even if the trial court had found that the builder had properly installed the skylights. Similarly, the court in the within matter would most likely find the defective skylights or the defective installation of the skylights to breach the warranties of habitability and reasonable workmanship. Dan would most likely prevail in his action against Homes, Inc.

**2. A court would probably determine that the proper measure of damages recoverable by Dan is the cost to replace the skylights.**

Generally, the measure of damages in a breach of contract action is based on the expectation interest of the injured party. Restatement (Second) of Contracts § 347. In the case of a building contractor's defective performance, the cost of repair or completion is the usual remedy because it provides the aggrieved party with his expectation recovery and the cost of repair or completion is normally less than the loss in value. John Edward Murray, *Murray on Contracts*, 3d ed. § 118.

If, however, the cost of repair is disproportionate to the loss in value to the injured party, then the loss in value is the proper measure of damages. *Douglass v. Licciardi*, 386 Pa.Super. 292, 562 A.2d 913 (1989). Courts balance the probable diminution in value to the injured party and the cost of repairs, bearing in mind that the cost of repairs may be determined with greater accuracy than the reduction in value to the injured party. *Freeman v. Maple Point, Inc.*, 393 Pa.Super. 427, 432, 574 A.2d 684, 687 (1990). A court may engage in this balancing test in order to avoid an excessive damage award to an injured party where it is not possible to prove the loss in value to the injured party with reasonable certainty.

Here, the problem arises because the cost to replace the skylights is \$4,500 and the only objective evidence of diminution in value is \$3,000. Dan, however, particularly liked the skylights and that may have been a crucial factor for him in purchasing his home. If Dan is awarded the cost to replace the skylights, his expectation interest is protected.

Pennsylvania courts have stated that in order to award damages based on the diminution in value in a builder's contract, the cost of completion must be clearly disproportionate to the value expected. In *Douglass v. Licciardi*, *supra*., Plaintiffs' expert testified that the cost of correcting the defects caused by Defendant's construction work would be \$20,574.11. Defendant's expert testified that the market value of the property would have increased by \$2,500 if it had been constructed in accordance with the contract. The jury awarded damages to the Plaintiffs in the amount of \$15,000 and the Defendant contractor appealed.

The Pennsylvania Superior Court affirmed and recognized that certain items contracted for by the Plaintiffs and not received did not affect the market value of the property because they were a matter of preference. The court explained that Plaintiffs:

contracted for these things, however, and they clearly had value to them. The weight to be accorded to the expert's opinion, therefore, was for the jury to determine. The jury was not compelled to accept the same or in reliance thereon conclude that the cost of repairing the defects in construction was disproportionate to the loss of value to Plaintiffs because of such defects." *Id.* 562 A.2d at 916.

Here, a court may properly find that the cost to replace the skylights is not clearly disproportionate to the diminution in value to Dan. The difference in cost is only \$1,500 and Dan should receive the benefit of what he bargained for. Accordingly, a court may award Dan damages in the amount of \$4,500.

**3. Dan's defense will not be successful because his obligation to pay \$6,000 was not discharged by the subsequent agreement to give the car to Pete.**

When Dan failed to pay Pete upon completion of Pete's performance, Dan was in breach of his contract with Pete. Dan's subsequent agreement with Pete to give him a car instead of paying him the original debt is an accord.

The Restatement (Second) of Contracts defines an accord as follows:

§ 281. Accord And Satisfaction

- (1) An accord is a contract under which an obligee promises to accept a stated performance in satisfaction of the obligor's existing duty. Performance of the accord discharges the original duty.

The same elements are necessary to establish an accord as to show the existence of a contract. There must be consideration and a meeting of the minds. *Brunswick Corp. v. Levin*, 422 Pa. 488, 491, 276 A.2d 532, 534 (1971). When there is a dispute or disagreement between the parties concerning the actual amount due, consideration for an accord arises when the creditor accepts an amount less than he or she claims to be due. *Nowicki Construction Co., Inc. v. Panar Corp., N. V.*, 342 Pa.Super. 8, 16, 492 A.2d 36, 40 (1985).

When parties enter into an accord, the original duty is not discharged until the accord is performed. The accord provides the obligor an opportunity to render the substitute performance in satisfaction of the original duty. Restatement (Second) of Contracts, § 281, cmt. b.

The accord requires actual payment or performance and is not satisfied by the mere promise of future performance. *Lazzarotti v. Juliano*, 322 Pa.Super. 129, 138, 469 A.2d 216, 221 (1983). Instead, the accord suspends the original duty. *Nernberg and Laffey v. Patterson*, 411 Pa.Super 417, 421, 601 A.2d 1237, 1239 (1991). If a breach of the accord by the obligor occurs, the obligee may elect to enforce either the underlying agreement or the accord. *Zager v. Gubernick*, 205 Pa.Super. 168, 173-74, 208 A.2d 45, 49 (1965).

Pete and Dan had a dispute as to the actual amount due. Pete agreed to accept the car in satisfaction of Dan's debt to him even though the car was worth less than the actual amount due under the original contract. There is no indication in the facts that the parties intended Dan's promise to give the car to Pete to discharge the original debt in the absence of performance. When Dan defaulted on his duty to provide the car to Pete, Pete then had the option to sue on either the original debt or the accord. Pete had the right to seek the greater recovery by suing on the original debt and he will most likely recover \$6,000. Dan's defense will not be successful.

**4. If Dan had no actual or constructive notice of the 15-foot right of way, he holds title as a bona fide purchaser for value and will probably prevail in his action in ejectment.**

The Pennsylvania recording statute provides for a “race-notice” system where the validity of a deed depends upon notice and the chronological priority of recording. 21 P.S. 351. The recording statute applies to “all deeds, conveyances, contracts, and other instruments of writing wherein it shall be the intention of the parties executing the same to grant, bargain, sell and convey any land. . .situate in this Commonwealth. . .” 21 P.S. 351. The act protects bona fide purchasers for value who purchase land without notice of any prior unrecorded deed or conveyance of that land and record first. *Long John Silver’s, Inc. v. Fiore*, 255 Pa.Super. 183, 386 A.2d 569 (1978). A bona fide purchaser is one who pays valuable consideration and has no notice of outstanding rights of others and acts in good faith. *Carnegie Natural Gas Co. v. Braddock*, 142 Pa.Cmwlt. 383, 597 A.2d 285 (1991).

Under Pennsylvania law, either actual or constructive notice of a prior deed may defeat a subsequent claimant’s interest. *Overly v. Hixson*, 169 Pa.Super 187, 82 A.2d 573 (1951). Constructive notice is not limited to documents of record because a subsequent purchaser could have learned of facts that may affect his title by inquiry of persons in possession or others who the purchaser reasonably believes knows such facts. *Sidle v. Kaufman*, 345 Pa. 549, 29 A.2d 77, 81 (1942).

Dan purchased the property from Sue for valid consideration and recorded his deed. He knew of one right of way, which belonged to Gas Company because the agreement between Sue and the Gas Company had been recorded. The granting of the second right of way had not been recorded and Dan promptly recorded his deed. Dan honestly stated that he did not know of the 15-foot right of way because he attributed the presence of the Gas Company trucks and employees to Gas Company’s ownership of the pipeline on the 12-foot right of way of which he had knowledge.

The issue of Dan’s knowledge of the presence of the 15 foot right of way is a question of fact and will depend upon the evidence at trial. Under the facts stated herein, Dan did not have actual or constructive notice of the right of way. The purchaser of land does have a duty to inspect the premises and, if the pipeline on the 15-foot right of way was obvious, then Dan may have had a duty to make an inquiry. The given facts do not support a finding that Dan would have discovered the right of way upon reasonable inspection. If Dan had no knowledge of the right of way, he holds title to the 15 foot right of way included in his deed to Blackacre as a bona fide purchaser for value and will prevail in the ejectment action.

## Question No. 6: Facts and Interrogatories

Chris is a contractor and the owner of a retail building supply business located in Pennsylvania. His contracting work involves the construction of new homes. Chris has considered developing a residential subdivision but feels he lacks the experience necessary to be successful. Chris recently met Paul and Mary, successful land developers. He related his desire to develop a residential subdivision. Paul and Mary invited Chris to join them in developing Blackacre; a tract that they knew was for sale. They agreed to purchase and develop Blackacre.

In early January of 2005, Chris, Paul and Mary approached Able, a Pennsylvania attorney with whom none had a prior relationship, and asked him to represent the three of them in the formation and operation of a business to carry out their plan, to which Able agreed. Able prepared and filed articles of incorporation for Land, Inc., a Pennsylvania corporation, prepared bylaws and issued 100 shares in Land, Inc. to each of Chris, Paul and Mary. Chris, Paul and Mary were elected directors. Mary was elected president and Paul was elected secretary/treasurer. Land, Inc. acquired Blackacre for \$90,000.

It quickly became apparent that Paul and Mary would not be able to work with Chris. Paul and Mary so advised Able. Paul and Mary decided they would schedule a special meeting of the board of directors wherein they would vote to convey Blackacre to themselves for \$90,000, never intending to pay Land, Inc. the \$90,000. Paul did not provide written notice of the special meeting to any of the directors despite a bylaw provision requiring him to do so. Chris learned of the meeting by chance in a conversation he had with Able. Chris attended the meeting, which occurred February 1<sup>st</sup>, and strongly objected to the conveyance of Blackacre. Paul and Mary nonetheless approved the conveyance, executed a sales agreement with a purchase price of \$90,000 and proceeded to closing. Although Paul and Mary now have a recorded deed for Blackacre they, as planned, have not paid the \$90,000 to Land, Inc. and have advised Chris that they do not intend to do so.

In anticipation of the development of Blackacre and growth in his retail business, Chris had telephoned Wood, Inc., a Pennsylvania wholesaler of wood products, and ordered five truckloads of plywood. The next day, Wood, Inc. faxed Chris a confirmation accepting the order that also indicated that "any sums outstanding for more than thirty (30) days after delivery shall bear interest at a rate of 1.5% per month." Chris had never discussed a finance charge with Wood, Inc. and did not reply to the confirmation. The plywood was delivered yesterday.

Chris has obtained his own legal counsel.

1. Could Chris successfully set aside the vote taken at the February 1<sup>st</sup> board meeting because written notice of the meeting was not given as required by the bylaws?
2. Assume that Chris does not desire to have Blackacre conveyed back to Land, Inc. and that Paul and Mary's failure to secure the \$90,000 that they owed is a breach of their fiduciary duty as directors of Land, Inc. On behalf of Land, Inc. what type of legal action could be filed by Chris to recover the \$90,000 from Paul and Mary and what steps should be taken by Chris relative to the board of directors of Land, Inc. prior to filing such an action?
3. Will Wood, Inc. be able to enforce the interest provision contained in its confirming memo?

4. Under the Pennsylvania Rules of Professional Conduct what steps should have been taken by Able prior to agreeing to represent Chris, Paul and Mary and should Able continue to represent them?

### Question No. 6: Examiner's Analysis

1. **Chris would not be successful in challenging the vote taken at the meeting due to lack of written notice because Chris waived the notice requirement by attending and participating in the meeting.**

Generally, corporate action is taken at a duly called meeting of the board of directors. When special meetings are called, bylaws often require written notice of the meeting be forwarded to each board member prior to the meeting. The facts indicate that Land, Inc.'s bylaws contained a provision requiring written notice of special meetings. Section 1705(b) of the Pennsylvania Business Corporation Law of 1988 (hereinafter the "BCL"), provides, "[a]ttendance of a person at any meeting shall constitute a waiver of notice of the meeting except where a person attends a meeting for the express purpose of objecting, at the beginning of the meeting, to the transaction of any business because the meeting was not lawfully called or convened." 15 Pa.C.S.A. §1705(b). Attendance at a meeting in person generally constitutes a waiver of any notice requirement. *See, Sell and Clark, Pennsylvania Business Corporations, §1705.4 (Rev. 2d Ed. 1998)*. If Chris wanted to object to the meeting on the basis of lack of written notice, Chris should have made his objection known immediately at the start of the meeting and should not have participated in the meeting. Chris, however, did not object to the meeting proceeding and, in fact, raised objections to the sale of Blackacre to Paul and Mary. Accordingly, Chris waived his right to object to the validity of the meeting.

2. **Chris should demand in writing that the Land, Inc. board of directors (the majority of which is comprised of Paul and Mary) sue Paul and Mary in the name of Land, Inc. to compel Paul and Mary to pay the \$90,000. If the Land, Inc. board, under the control of Paul and Mary, fails to pursue a suit against Paul and Mary, Chris should have his attorney file a shareholder's derivative action on behalf of Land, Inc. to recover the \$90,000 from Paul and Mary.**

A shareholder's derivative action is a suit filed by a shareholder on behalf of the corporation to assert a corporate right that the corporation's management has failed or refused to enforce. It is an equitable action brought by a shareholder of a corporation to enforce a right of the corporation itself and not a right of the shareholder. Derivative suits developed as a way for a shareholder to protect the interests of the corporation, as an incorporeal being, from the misfeasance and malfeasance of its directors.

A shareholder's derivative action is permitted if the party filing the suit meets certain criteria under Section 1782 of the BCL. 15 Pa. C.S.A. §1782. A shareholder's derivative action is not to be filed to enforce a shareholder's direct right to assert a claim held by the shareholder. *See, Sell and Clark, Pennsylvania Business Corporations, §1782.2 (Rev. 2d Ed. 1998)*. In this case, Paul and Mary have breached the terms of the agreement of sale they entered into with Land, Inc. The \$90,000 is not owed to Chris per the terms of the agreement (no direct claim); rather, it is owed to Land, Inc. Therefore, Chris, as a shareholder not having a direct claim against Paul and Mary, should take the necessary steps to assert the right of Land, Inc. to receive payment (which will indirectly benefit Chris because of his position as a shareholder).

Chris should send a written notice to Paul and Mary, demanding that they join him in having Land, Inc. sue themselves for the \$90,000 due to Land, Inc. per the sales agreement entered into at the

special meeting. This demand would satisfy the requirement of Pennsylvania Rule of Civil Procedure 1506(a)(2) that requires the proponent of a shareholder's derivative action to state in the complaint "the efforts made to secure enforcement by the corporation or similar entity or the reason for not making any such efforts." One might argue that such a demand in this case would not be required because making the demand upon Paul and Mary, the culpable parties, would cause irreparable harm to the corporation. *See, Cuker v. Mikalauskas, 547 Pa. 600, 692 A.2d 1042 (1997)*. Although Chris could argue that no demand is necessary, sending the written notice coupled with a failure of Paul and Mary to act eliminates this potential procedural issue and does not appear to be an undue burden on Chris. Accordingly, although Chris might proceed without making the demand it may be prudent to avoid the demand issue by simply sending the notice.

If the board of Land, Inc. fails to act or refuses the demand, as the facts indicate it will, Chris's counsel should prepare and file a shareholder's derivative action on behalf of Land, Inc. naming Paul, Mary and Land, Inc. as the party defendants. *See, Pa. R.C.P. 2177*. The complaint should reference the demand made by Chris and should indicate that Chris was a shareholder of Land, Inc. at the time the land was conveyed and at the time that Paul and Mary have breached the agreement by failing to make the required payment. These allegations are required by Rule 1506 as set forth above and by Section 1782(a) of the BCL which requires that the plaintiff aver that the he or she "was a shareholder of the corporation . . . at the time of the transaction of which he complains."

Given the clear breach of contract by Paul and Mary and their breach of fiduciary duty as directors of Land, Inc. it is likely that the action filed by Chris's counsel on behalf of Land, Inc. would be successful.

**3. Wood, Inc. should be able to charge a finance charge if payment is not made within thirty (30) days of delivery.**

This situation is governed by Section 2207 of the Pennsylvania Uniform Commercial Code (the "Code"). 13 Pa. C.S.A. §2207. Section 2207 provides, *inter alia*:

Additional terms in acceptance or confirmation

(a) GENERAL RULE.—A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(b) EFFECT ON CONTRACT.—The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

- (1) the offer expressly limits acceptance to the terms of the offer;
- (2) they materially alter it; or
- (3) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

Under Section 2207 a written confirmation operates as an acceptance even though it contains additional terms. Between non-merchants the terms are considered a proposal for addition to the contract. Between merchants such terms are proposals that become a part of the contract unless the offer limited the acceptance to the terms of the offer, they materially alter the contract or there is an objection to the terms. 13 Pa. C.S.A. §2207(a) and (b).

Wood, Inc. and Chris are both merchants. The Code defines a “merchant” as “[a] person who: deals in goods of the kind; or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction . . .” 13 Pa. C.S.A. §2104. Clearly, both Wood, Inc. and Chris are merchants. Under the facts, the material alteration language of Section 2207(b)(2) is the only possible exception that will apply to them.

The language adding interest is an additional term. Under Section 2207(b)(2) between merchants this term will become part of their contract unless it “materially alter[s] it.” Comment 5 to Section 2207 indicates that a term providing for reasonable interest or interest consistent with trade practices on overdue payments is not a material alteration. While arguments could be made for and against the inclusion of the interest term in this contract, if the interest provision is found to be consistent with trade practices on overdue payments, it will not be considered to be a material alteration and the term will become part of the agreement. See *Herzog Oil Field Service, Inc. v. Otto Torpedo Company*, 391 Pa. Super. 133, 570 A.2d 549 (1990).

It should be noted that the memo that was not responded to by the receiving merchant within ten days would satisfy the statute of frauds. 13 Pa. C.S.A. §2201.

4. **Able should have made inquiry about the relationship of the parties and should have determined that there was a significant risk of conflict among them as the representation proceeded but that he could represent them competently and diligently in the formation of the entity despite the conflict. Able should have disclosed the risks of the joint representation to all involved and should have obtained their consents to the joint representation in writing. Now that a direct conflict has arisen Able must determine if he can reasonably continue in the representation without being adversely affected.**

Pennsylvania Rule of Professional Conduct 1.7 provides:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
  - (1) the representation of one client will be directly adverse to another client; or
  - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
  - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
  - (2) the representation is not prohibited by law;
  - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent.<sup>1</sup>

Joint representation by Able is not per se improper; however, Able should have recognized that there is a significant risk that his representation will be materially limited in that his ability to recommend and advocate all possible positions to each participant might be restricted because of his duty of loyalty to the others. Able should have examined the circumstances of the parties, their respective goals and should have determined that a risk was posed by his representation of all three of the parties. Able should have concluded that a concurrent conflict did exist; but, since no conflict currently existed that would prevent him from reasonably providing competent representation that he could proceed with the representation and formation of the corporation.

Having concluded that a concurrent conflict did exist, Able should have carefully explained the implications of joint representation to all of the parties including the advantages and disadvantages. Having done so, Able should have requested and obtained the “informed consent” of each party. Although the rule does not require a written consent it would be advisable to obtain the consent in writing as this would help emphasize to the client the importance of the consent and would be helpful in avoiding disputes over the nature and substance of the consent in the future.

Once the representation commenced Able should have monitored the situation to ensure that any conflict that might arise would not “materially limit” his ability to continue the representation. In the instant matter, it appears that the interests of Paul and Mary have become directly adverse to that of Chris. Under these circumstances Able’s continued representation of the group would be adversely affected and Able should withdraw as counsel for the group and advise them to retain separate counsel. *See, Hazard and Hodes, The Law of Lawyering, §11.14 (3rd Ed. 2002).*

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<sup>1</sup>Former Rule 1.7 contained similar provisions and read, “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: the lawyer reasonably believes the representation will not be adversely affected; and the client consents after full disclosure and consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.”

## **Grading Guidelines**

### **Question No. 1**

#### **1. Federal Income Tax: Taxability of Treasure Trove**

- Section 61 of the Internal Revenue Code (IRC) makes all income from whatever source derived taxable unless specifically exempted.
- Treasure trove is not specifically mentioned in Section 61 but is specifically included in the regulations thereunder as taxable generally in the year it is found.

3 points

Comments: Applicants are expected to recognize that since federally taxable income includes all income from whatever sources derived (unless specifically exempted), treasure trove is such income and is taxable generally when it is found.

#### **2. Federal Income Tax: Taxability of Gambling Winnings and Deductibility of Losses**

- Gambling winnings are taxable in the year won on a cash basis.
- The cost of a winning bet can be offset against a winning.
- Losses on gambling are deductible to the extent of winnings.

3 points

Comments: Applicants are expected to recognize that gambling winnings are taxable for federal income tax purposes. The cost of a particular bet can be offset against a particular winning. Other provable losses can be deducted as an itemized deduction to the extent of winnings. In Frank's first trip to the racetrack, he won \$5,000, spent \$1,000 and ended up with \$4,000 after offsets and deductions. In his second gambling spree, he lost \$200. Candidates are not expected to address whether the deductions may be lost in part due to limitations on deductions and whether a taxpayer itemizes deductions. Candidates are expected to know that the \$5,000 winning ticket, less the \$100 cost thereof is taxable, and that the \$900 in losing tickets from Frank's first racetrack trip and the \$200 in losing tickets from his second trip can be deducted in 2004 since they do not exceed his \$4,900 in winnings.

#### **3. Pennsylvania Rules of Professional Conduct Rule 1.4: Communication**

- A lawyer should explain a matter to the client sufficiently to permit the client to make informed decisions.
- A lawyer should promptly return phone calls from clients.
- A lawyer should promptly inform the client of a proffered plea bargain in a criminal case.

6 points

Comments: Applicants are expected to recognize that Abel did not keep Frank informed when he did not promptly advise Frank of the plea bargain. Applicants are also expected to recognize that Abel did not sufficiently explain to Frank the factors necessary for Frank to plead guilty or not guilty on Frank's criminal charges when Abel did not for nearly two weeks after the initial consultation explain the special first offender program. Finally, applicants should observe that Abel did not promptly return Frank's calls about the status of his case. All of these violated Rule 1.4.

**4. Wills: Ademption**

- Ademption occurs whenever a specific devise in a will of property is frustrated by the fact that the testator sells the property
- There are certain exceptions to ademption involving the incapacity of the testator when the ademption occurs and other exceptions involving involuntary conversions and/or balances due testator on the sale, condemnation or foreclosure of the devised property.
- There is also a general contrary testamentary intent exception to ademption.

4 points

Comments: Applicants are expected to recognize that the specific devise of Blackacre has adeemed under the general rule of ademption and that none of the possible exceptions apply. Applicants are expected to recognize that Sam will take nothing from Frank's estate due to the ademption and to the lack of any contrary provision in Frank's will or the law which would protect Sam especially when the residue of Frank's estate is validly bequeathed to his surviving spouse.

**5. Wills: Non-exoneration of Liens on Specifically Devised Property**

- Specifically devised real estate will pass to the devisee subject to any lien thereon in the absence of specific direction to the contrary in the testator's will.
- A general direction to pay debts of the testator will not exonerate specifically devised real estate from a lien thereon.

4 points

Comments: Applicants are expected to recognize the general rule that specifically devised real estate subject to a lien remains subject to the lien in the hands of the devisee in the absence of a specific direction in the will to the contrary. Darla will inherit the devise to her, but it will be subject to the lien thereon (which is greater in amount than the value of the devised property) because there is no contrary intent (specific or general) expressed in Frank's will.

## Question No. 2

### 1. Motion for Judgment on the Pleadings

- Motion is properly filed once all of the relevant pleadings are filed (Complaint, Answer/New Matter and Reply to New Matter).
- Motion granted if there are no disputed facts and the moving party is entitled to judgment as a matter of law.
- There is a dispute of material facts and the Complaint sufficiently sets forth a cause of action for battery, which precludes Tom from being entitled to judgment as a matter of law.
- Motion should be denied.

4 points

Comments: Applicants must recognize that although a Motion for Judgment on the Pleadings is proper procedurally, it will be denied since there is a dispute as to how the incident occurred and the Complaint adequately sets forth a cause of action, which precludes Tom from being entitled to judgment as a matter of law at this stage.

### 2. Hearsay

- Carl's statement is hearsay since it would be introduced to prove the truth of his statement and is therefore inadmissible unless it falls within an exception.
- The statement falls within the Excited Utterance Exception to Hearsay due to Carl's condition at the time he gave the statement and the closeness in time between the statement and the incident.
- The statement also falls within the Present Sense Exception to Hearsay since Carl gave the statement to Ed who arrived immediately after the incident.
- The Court should rule in Tom's favor and grant the Offer of Proof based upon either the Excited Utterance or Present Sense Impression Exception to the Hearsay Rule.

6 points

Comments: Applicants must identify the statement made by Carl as hearsay, but should determine that the statement is admissible under the Excited Utterance or Present Sense Impression Exceptions to Hearsay.

### **3. Loss of Consortium**

- Loss of consortium could be included in the Complaint as a cause of action filed on behalf of Selma.
- Loss of consortium is a cause of action arising out of the marriage relationship.
- Selma has a claim for loss of services after the injury and loss of society (at least during the hospitalization).
- Loss of consortium is a derivative cause of action of Jerry's injury claim.

5 points

Comments: Applicants should identify loss of consortium as an additional cause of action to be included in the Complaint. Also, applicants should explain that consortium is a claim by the spouse of the injured party for loss of services and loss of society, which is derivative of Jerry's injury claim.

### **4. Perjury**

- The perjury charge against Tom should be approved for filing by the District Attorney.
- Tom filed an Answer and New Matter that was properly verified under oath through a notarized affidavit and testified at his deposition under oath, giving false testimony on both occasions.
- Tom's false testimony is material to the matter at hand; whether Tom or Jerry was the aggressor.
- Falsity can be established by the testimony of two corroborating witnesses, Tonya and Sue.

5 points

Comments: Applicants must identify that Tom's conduct meets the elements of perjury in that he gave false statements under oath in an official proceeding, which was both material and which can be corroborated by two witnesses.

### **Question No. 3**

#### **1. Pre-Nuptial Agreements**

- Pre-Nuptial agreements are evaluated as contracts.
- The party is bound to read an agreement which he or she intends to sign and failure to do so will not be a ground for avoiding the agreement.

- A party to an agreement must anticipate changed circumstances in the future and failure to do so will not be a ground for avoiding it.

6 points

Comments: Applicants are expected to identify that pre-nuptial agreements are contracts to which the party is required to read and provide for future change in circumstances.

## **2. Alimony payments**

- Alimony payments after divorce are barred by cohabitation.
- Cohabitation includes financial, social and sexual interdependence.

4 points

Comments: Applicants are expected to recognize that alimony is barred after divorce by cohabitation and based on the facts of this case that alimony will likely be barred after January 4, 2005.

## **3(a). Theft by deception**

- Penelope created a false impression as to the value of her property upon which the Buyer relied.
- Buyer paid more money than the property was worth due to the falsely created impression created by Penelope.

5 points

Comments: Applicants are expected to recognize that Penelope committed the crime of theft by deception and apply the elements of the offense to the facts presented.

## **3(b). Forgery**

- Alteration of the check without authority with an intent to defraud constituted forgery.
- Uttering of the altered check with intent to defraud also constituted forgery.

5 points

Comments: Applicants are expected to recognize that Penelope committed forgery by both altering the check, which had been given to her by Buyer and uttering the altered check to the bank, both actions being taken with the intent to defraud Buyer.

## Question No. 4

### 1. First Amendment – Free Speech

- Solicitation of funds is a form of protected speech under the First Amendment Free Speech Clause.
- A governmental fund-raising campaign is a non-public forum for the expression of speech.
- In a non-public forum, the identity of the speaker and subject matter of speech is subject to reasonable control, so long as the distinctions made are reasonable in light of the nature of the forum.
- In a non-public forum, distinctions drawn as to the identity of the speaker and subject matter must also be made on a viewpoint-neutral basis.
- The exclusion of MAC was not done on a viewpoint-neutral basis, and thus violates MAC's rights under the Free Speech Clause.

5 points

Comments: Applicants should recognize the applicability of the Free Speech clause of the First Amendment to the solicitation of funds, discuss the test applicable in assessing a First Amendment challenge and reach a well reasoned conclusion.

### 2(a). First Amendment – Expressive Association

- There is an implicit right of association for expressive purposes under the First Amendment.
- An infringement on this right may be justified by a compelling state interest.
- Enforcement of non-discrimination laws is a compelling state interest.
- Even as a compelling state interest, enforcement of non-discrimination laws must not materially interfere with the expressive associational rights of a group.

5 points

Comments: Applicants should recognize the applicability of the right of expressive association under the First Amendment, discuss the test applicable in assessing such a challenge and reach a well reasoned conclusion.

## **2(b). First Amendment – Free Speech**

- Door-to-door solicitation is a protected form of expression under the Free Speech Clause of the First Amendment.
- Infringement on this right requires an important governmental interest that is directly served by the regulation sought to be imposed, and must not be overly broad by precluding more speech than is necessary to serve the governmental interest.
- Prevention of fraud and crime are important governmental interests.
- The interest of C City in preventing fraud and crime is not directly served by the imposition of a permit requirement applicable to all forms of door-to-door solicitation.
- Subjecting all forms and types of solicitation to a permit requirement is overly broad in light of the governmental interest served.

5 points

Comments: Applicants should recognize the applicability of the Free Speech clause of the First Amendment to the permit requirement for the solicitation of funds, discuss the test applicable in assessing such a challenge and reach a well reasoned conclusion.

## **3. Standing**

- Article III of the Constitution requires that a plaintiff have standing to assert a claim in order to satisfy the case-or-controversy requirement.
- Standing requires an injury to the plaintiff fairly traceable to the defendant's conduct.
- Tim would have the requisite injury because he is individually threatened with prosecution under the Ordinances, but MAC, as an organization, is not threatened with prosecution under the Ordinances and would not have such an injury.
- An organization may have standing to sue on behalf of its members if the members would have standing, the interests it seeks to protect are germane to its purpose, and neither the claim or relief requested requires participation of individual members.

5 points

Comments: Applicants should recognize the injury component that is required to establish standing and recognize and discuss the existence of organizational standing by MAC to bring suit on behalf of its injured members.

## Question No. 5

### 1. Breach of warranties of habitability and reasonable workmanship

- Warranty of habitability or reasonable workmanship is implied in every contract where a builder-vendor sells a new home to a residential purchaser.
- The warranties are not created by representations of the builder-vendor but are implied in law.
- The contract between Homes, Inc. and Dan contained an implied warranty of habitability or reasonable workmanship, which was probably breached.

5 points

Comments: Applicants are expected to recognize that a contract between a builder/vendor and a residential purchaser contains an implied warranty of habitability and/or reasonable workmanship, and that under the facts, Dan is likely to prevail in such a claim.

### 2. Damages

- Goal of damages in breach of building contract by the contractor is to protect the expectation interest of the injured party.
- Where the building contractor breaches the contract by defective performance, cost of repair or completion is the usual remedy.
- If the cost of repair is disproportionate to loss in value to the injured party, the loss in value is the proper measure of damages.
- When it is not possible to prove the loss of value to the injured party with sufficient certainty, then the party may recover damages;
  - a) based on the cost to remedy the defects even if the recovery is somewhat more than the loss in value to the property; or
  - b) the diminution in the market price of the property caused by the breach.
- The cost to replace the skylights is not clearly disproportionate to the loss in value to Dan and the court may award Dan damages in the amount of \$4,500.

5 points

Comments: Applicants should discuss plaintiff's expectation interest, the methods of calculating damages and reach a well-reasoned conclusion.

### **3. Accord and Satisfaction**

- Accord is a contract whereby an obligee promises to accept a stated performance in satisfaction of the obligor's original duty.
- Where there is a dispute between the parties concerning the amount due, consideration for an accord is found when the creditor accepts an amount less than he or she claims to be due.
- Original duty is not discharged until the accord is performed or satisfied.

5 points

Comments: Applicants are expected to recognize and define an accord and that satisfaction of the accord is necessary to discharge the original debt. Applicants are expected to conclude that the original debt of \$6,000 was not discharged because the accord was not satisfied.

### **4. Pennsylvania Recording Statute/Notice**

- The Pennsylvania recording statute protects bona fide purchasers for value who record first.
- A bona fide purchaser is one who pays valuable consideration for land without notice of prior unrecorded deeds or conveyances and acts in good faith.
- The issue of Dan's knowledge of the unrecorded right of way is a question of fact.
- Dan probably did not have knowledge of the unrecorded right-of-way at the time of his purchase of Blackacre and was a bona fide purchaser for value in the conveyance of Blackacre from Sue.
- Dan will probably prevail in his ejectment action with respect to the right-of-way included in his deed to Blackacre.

5 points

Comments: Applicants should recognize the effect of the Pennsylvania race-notice recording statute on the right of a bona fide purchaser for value without notice of a prior unrecorded interest. Applicants should discuss notice to Dan as a question of fact and reach a well-reasoned conclusion.

## **Question No. 6**

### **1. Notice of Director's Meeting**

- Bylaws required notice for special meeting.
- Notice can be waived by attendance and participation at the meeting.

- Can attend for sole purpose of objecting.

4 points

Comments: Applicants should recognize that notice was required but that Chris' attendance and participation resulted in the notice requirement being waived.

## **2. Shareholder's Derivative Suit**

- Shareholder derivative suit can be filed on behalf of the corporation.
- Demand must be made upon the corporate board unless injury will result to the corporation.
- Must be a shareholder to pursue the derivative action.
- Breach of fiduciary duty or breach of contract support the filing of the action.

6 points

Comments: Applicants should explain a shareholder derivative suit and should discuss the fact that Chris should be a shareholder and should make demand on the board and if the board does not act should file suit on behalf of the corporation.

## **3. Confirming Memo Between Merchants**

- Parties are merchants.
- Memo contained additional terms.
- Additional terms are added if they do not materially alter the contract.

5 points

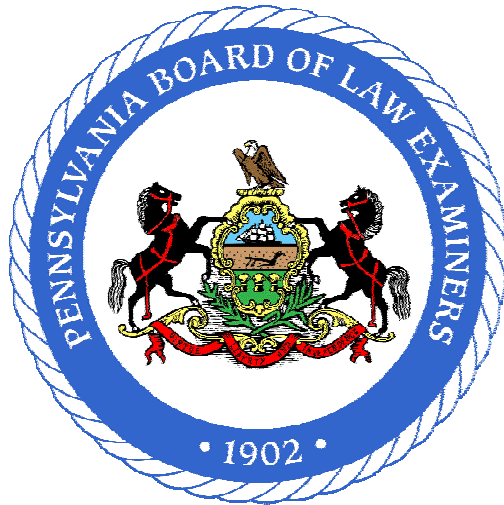
Comments: Applicants should recognize that the parties are merchants and that the confirmation contains new terms, which become part of the contract unless they materially alter the contract.

## **4. Conflict of Interest**

- Attorney should analyze the potential for conflict.
- Attorney should advise clients of potential conflicts and obtain their informed consent.
- Once a direct conflict arises, the attorney should withdraw.

5 points

Comments: Applicants should indicate that Able should analyze the relationship of the parties, determine the level of potential conflict, disclose the risks and obtain informed consent. Once a conflict has arisen, Able should withdraw if the conflict will materially limit his ability to represent the group.



Supreme Court of Pennsylvania  
Pennsylvania Board of Law Examiners

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**Pennsylvania Bar Examination**

February 22 and 23, 2005

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**PERFORMANCE TEST**

February 22, 2005 – 9:00 a.m. to 10:30 a.m.

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*Use GRAY covered book for your answer to the Performance Test.*

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**FILE**

# OAKS, NOODNIK & ASSOCIATES

Attorneys at Law

Memorandum

To: Applicant  
From: Oscar Oaks, Esquire  
Re: Arbitration Brief for **Klemp v. Mitey Motors**

Our client, Phil Klemp, bought a Mitey Motors, Inc. vehicle from Pesky Cars and is seeking a remedy under the Pennsylvania Automobile Lemon Law. As authorized by Pennsylvania law, the parties have agreed to have an Arbitrator decide the controversy rather than litigate the matter in court. Under the Agreement to Arbitrate, the Arbitrator has complete authority to rule on the issues raised and award any relief available under the Pennsylvania Automobile Lemon Law.

The Arbitration hearing is scheduled to take place in 2 weeks. The Agreement to Arbitrate, which is in this File, was negotiated by the parties and frames the specific questions submitted by the parties for Arbitration. Your task is to write a persuasive brief, which will be submitted to the Arbitrator on behalf of our client, prior to the hearing, that addresses the questions submitted to the Arbitrator. The Agreement to Arbitrate sets forth the format and requirements that you should adhere to in preparing the brief. Basically, the brief should set out the conclusion for each question followed by an analysis supporting the conclusion, in which the relevant facts are applied to the law in a clear and persuasive manner. You should assume that the facts set forth in the documents in the File are true and should rely on them in preparing the brief. However, you do not need to attach any documents to your brief at this time since I will attach the necessary documents when I submit the brief.

This Arbitrator is a former judge and demands sound legal reasoning leading to a conclusion that is based on legal principles. In your analysis be sure to apply the facts to the statutory definitions and other applicable law to fully explain why a statutory provision that you are relying upon to support your conclusion is applicable in this case. For example, don't merely state that a manufacturer or dealer has certain obligations without explaining why the statement is applicable under the facts of our case.

The File contains the Agreement to Arbitrate, my notes from the initial interview with Mr. Klemp, a copy of the sales receipt for the purchase of the vehicle, a copy of the Repair Orders from Pesky Cars, a copy of the warranty provided by Mitey Motors and our expert's affidavit. The Library contains the only legal principles and authorities that you should consider and rely upon to complete this task.

## **NOTES FROM INITIAL INTERVIEW WITH PHIL KLEMP 1/29/05**

Phil came in because he is convinced that the car he purchased is a “lemon” and wants the manufacturer to take it back. The manufacturer, Mitey Motors, Inc., alleges that its authorized dealer has fixed the car and even refuses to return Phil’s phone calls at this point. Phil brought in his sales and service receipts. All repairs were done by the Pesky Car service department. Pesky is an authorized dealer and service and repair provider for Mitey Motors. Phil has written to the manufacturer several times to complain about the situation, but has never received a response that is anything but a “sorry for your trouble, bring it back to the service department” answer. He did some research on the internet and learned that Mitey Motors does not have an informal dispute settlement procedure. However, when searching through his paperwork related to the purchase of the car, Phil found a pamphlet describing the Pennsylvania Automobile Lemon Law. Phil is frustrated and quite angry about the car and wants to take some type of legal action.

Apparently, this controversy started in the spring when Phil’s son, Aaron, was accepted to Collegiate College, a local university. In an attempt to persuade his son to attend Collegiate College, live at home and commute to school, Phil bought Aaron a bright orange sporty Mitey Motors, Inc. convertible from Pesky Cars, the local Mitey Motors dealer. Phil paid only \$15,000 for the 2 door 2004 Crawler convertible, which was in tremendous demand. When new, the car generally sold for approximately \$22,000. He got the great deal, Phil explained, because the Crawler was used for two months as a demonstrator vehicle by Pesky, but only had 3,400 miles on the odometer when Phil purchased it on April 7, 2004.

Problems with the Crawler developed soon after the purchase. Phil described chronic issues with the transmission, convertible top, wipers and the side molding. Phil brought in all of the Repair Orders and the sales receipt from the purchase of the car as well as the warranty provided by Mitey Motors.

The Crawler presently has 6,990 miles registered on the odometer, so it is well within the warranty. On January 28, 2005, Phil’s son Aaron was unable to put the car in reverse to back into a space. He drove the car home and parked it in the garage. Phil said that the Crawler would remain in his garage and that neither he nor his son were going to drive the car until this matter was finally settled with Mitey Motors, Inc. and Pesky Cars. Phil wants a refund on the purchase of the Crawler and wants all of the relief that he is entitled to. He made it very clear

that this experience was so stressful that, after the matter is resolved, he does not ever want to deal with a Mitey Motors, Inc. product or employee again.

**FOLLOW-UP NOTE:** On 1/30/05, I contacted Austin Mangey, the manager of Pesky Cars, the local Mitey Motors, Inc. Dealership, regarding legal action against the company based on the Pennsylvania Automobile Lemon Law, 73 P.S. 1951 et seq. On 2/5/05, Mr. Mangey called and said that Mitey Motors, Inc. had authorized him to enter into binding arbitration of the matter with a mutually agreed upon arbitrator. I contacted Phil to discuss the matter and he very much wants to resolve the matter by arbitration. We submitted 3 names to Mangey and he selected an arbitrator from that list. We negotiated an Agreement to Arbitrate and I have obtained an Expert's Affidavit regarding the condition of the Crawler.

# AGREEMENT TO ARBITRATE

## **Klemp v. Mitey Motors, Inc.**

We, Phil Klemp (“PLAINTIFF”) and Mitey Motors, Inc. by Austin Mangey, manager and representative of Mitey Motors (“DEFENDANT”), as authorized by Pennsylvania law, hereby agree to resolve our dispute regarding a vehicle manufactured by Mitey Motors, Inc. and sold by Pesky Cars of Pennsylvania to Phil Klemp through the use of BINDING ARBITRATION in accordance with the following terms and conditions:

**1. ELECTION OF ARBITRATOR:** Jennifer Books, Esquire

**2. APPLICABLE LAW:** 73 P.S. 1951 et seq.

**3. QUESTIONS SUBMITTED TO ARBITRATION:** (a) Has Plaintiff established a cause of action under the provisions of the Pennsylvania Automobile Lemon Law, 73 P.S. 1951 et seq. in connection with his purchase of a 2004 Mitey Motors Crawler Convertible? (b) If Plaintiff has established a cause of action, what relief is he entitled to in this case?

**4. ARBITRATION BRIEF:** Each party shall submit an Arbitration Brief (“BRIEF”) to the Arbitrator and a copy to the opposing party at least 10 days before the Arbitration Hearing. The brief should be focused, succinct and based on the particular facts and applicable legal principles. The brief shall be in the following format:

**a. TITLE:** Use block letters for the title and designate the Brief as either “PLAINTIFF’S ARBITRATION BRIEF FOR KLEMP v. MITEY MOTORS, INC.” or “DEFENDANT’S ARBITRATION BRIEF FOR KLEMP v. MITEY MOTORS, INC.”

**b. FORMAT:** Use a separate heading for each question identified in paragraph 3 of this Agreement to Arbitrate. For each heading, write and underline a single sentence that restates the question as a conclusion and succinctly provides the reasoning or basis for the conclusion that you are advocating. Under each heading, provide an analysis that fully explains and supports your party’s conclusion by applying the relevant facts to the law. Cite caselaw and statutes to support your analysis and identify documents relied upon to support cited facts. For example, if facts used in the brief are from an invoice, identify the document as an “Invoice dated 10/2/03” in your discussion. If relying on facts from an Affidavit, state the name of the Affiant and the date on the Affidavit.

**5. EVIDENCE:** The Pennsylvania Rules of Evidence are not applicable to this Arbitration. Parties may submit all relevant documents that he or she intends to use at the Arbitration as an attachment to the Arbitration Brief. If a party objects to the admission of a document, the Arbitrator will hear argument on the issue and make a ruling at the appropriate time during the Arbitration. The Parties will have an opportunity to testify at the Arbitration. The testimony of additional witnesses may be submitted by Affidavit as an attachment to the Arbitration Brief. Although a party may request that a witness testify at the hearing, the Arbitrator, in her sole discretion, will determine whether a witness, other than a party, will testify at the hearing.

**6. COMMUNICATION WITH THE ARBITRATOR OUTSIDE OF HEARING:** All communication with the Arbitrator by a party or representative of a party shall be by letter with a copy sent to the opposing party.

**7. CONFIDENTIALITY:** This Arbitration proceeding shall not be recorded by any means or in any form.

**8. PAYMENT OF ARBITRATOR:** The parties agree to pay the Arbitrator at the rate of \$250 per hour for all time spent in connection with her role as an Arbitrator in the above matter, including but not limited to document review, legal research, travel, drafting the Arbitration Award, and conducting the hearing. Unless otherwise allocated by the Arbitrator in the Arbitration Award, the Arbitrator fee will be split equally by the parties.

**9. ENTRY OF JUDGMENT:** The Arbitrator shall have the ability to determine the respective rights and liabilities of the parties and to award any relief, remedy or sanctions consistent with relevant Pennsylvania Law to the same extent that a Judge of this Commonwealth could. The Arbitrator's written decision shall be submitted to a Judge of the Court of Common Pleas of this county and shall be entered as an Order of the Court. The Arbitrator's decision regarding the questions identified in paragraph 3 is binding, final and may not be appealed except upon (1) denial of a hearing to a party; (2) fraud or misconduct which caused the award to be unjust, inequitable or unconscionable; or (3) evident miscalculation of figures or evident mistakes in any award.

The undersigned, intending to be legally bound hereby, agree that in lieu of resolving this matter in the Court of Common Pleas, this dispute will be submitted to the above named Arbitrator for binding Arbitration in accordance with the terms and conditions contained herein.

Phil Klemp

Phil Klemp

Austin Mangey

Austin Mangey

for Mitey Motors, Inc.

and Pesky Cars of Pennsylvania

# PESKY CARS OF PENNSYLVANIA

*Your Authorized MITEY MOTORS Dealer*

## INVOICE

Date of Sale: April 7, 2004

**Seller:**

Pesky Cars of Pennsylvania  
123 Main Street  
Fairmont, PA

**Buyer:**

Phil Klemp  
765 North Avenue  
Mensch, PA

**Model Vehicle**

Crawler Convertible BLT 03, 4 speed automatic

**Color**

Absolute Orange

**Year Vehicle Manufactured**

2004

**Vehicle Identification Number**

PA1234567803

**Odometer Reading on Date of Sale**

3,400 miles

<b>Cost of Vehicle</b>	\$15,000.00
<b>Tags</b>	100.00
<b>Processing Fee</b>	75.00
<b>Pa. Registration</b>	25.00
	<hr/>
	\$15,200.00
<b>State Tax @ 6%</b>	912.00
<b>Total paid</b>	<hr/>
	\$16,112.00

**Insurance Company** Best Insurance (Seller confirmed new vehicle covered as of 4/7/04)

**Registration Information**

<b>State:</b>	Pennsylvania
<b>Registered Owner</b>	Phil Klemp
<b>Plate #</b>	PAK1234

# PESKY CARS OF PENNSYLVANIA

*Your Authorized MITEY MOTORS Dealer*

## REPAIR ORDER No. 123

**Date** May 13, 2004  
**Vehicle** 2004 Absolute Orange Crawler Convertible  
**Owner** Phil Klemp  
**Miles in** 4,100  
**Miles out** 4,103

Presenting issue	Service Completed	Parts	Labor	Charge
Wind whistling under convertible top at windshield	Readjust & tighten top	No	.4	NC
Top rattles	Tighten bolt	No	.2	NC
Top leaks	Install new gasket	Gasket	.5	NC
Transmission slid into neutral from drive while driving on highway; pulled over & put back into drive	Tighten linkage on transmission	No	.7	NC

# PESKY CARS OF PENNSYLVANIA

*Your Authorized MITEY MOTORS Dealer*

## REPAIR ORDER No. 456

**Date** August 3, 2004  
**Vehicle** 2004 Absolute Orange Crawler Convertible  
**Owner** Phil Klemp  
**Miles in** 5,200  
**Miles out** 5,207

Presenting issue	Service Completed	Parts	Labor	Charge
Top rattles	Tighten bolt	No	.2	NC
Water leak at top of passenger side window	Install new gasket	Gasket	.5	NC
Transmission did not go into reverse immediately when put into reverse in parking lot – approximately 20 second delay	Replace linkage on transmission	Linkage	2 hours	NC

# PESKY CARS OF PENNSYLVANIA

*Your Authorized MITEY MOTORS Dealer*

## REPAIR ORDER No. 789

**Date** August 28, 2004  
**Vehicle** 2004 Absolute Orange Crawler Convertible  
**Owner** Phil Klemp  
**Miles in** 5,498  
**Miles out** 5,498

Presenting issue	Service Completed	Parts	Labor	Charge
Wipers stopped working	Wiper motor replaced	Wiper motor	.75	NC

# PESKY CARS OF PENNSYLVANIA

*Your Authorized MITEY MOTORS Dealer*

## REPAIR ORDER No. 1910

**Date** October 30, 2004  
**Vehicle** 2004 Absolute Orange Crawler Convertible  
**Owner** Phil Klemp  
**Miles in** 6,100  
**Miles out** 6,100

Presenting issue	Service Completed	Parts	Labor	Charge
Side trim fell off	Side trim reattached	Exterior side trim	.5	NC

# PESKY CARS OF PENNSYLVANIA

*Your Authorized MITEY MOTORS Dealer*

## REPAIR ORDER No. 2345

**Date** December 7, 2004  
**Vehicle** 2004 Absolute Orange Crawler Convertible  
**Owner** Phil Klemp  
**Miles in** 6,700  
**Miles out** 6,712

Presenting issue	Service Completed	Parts	Labor	Charge
Top rattles & whistles	Tighten bolt	No	.2	NC
Transmission not shifting from gear to gear, stays in low even when on highway engine revving high	Replace torque converter	Torque converter	3 hours	NC

## **GENERAL WARRANTY**

Mitey Motors, Inc. warrants to the original consumer/purchaser and all subsequent vehicle owners of all of its 2004 model-year vehicles operated in the United States, that such vehicles are free from manufacturing defects in material or workmanship for a period of 36 months or 36,000 miles, whichever occurs first. The warranty period begins on the vehicle's in-service date, which is the first date that the vehicle is sold to a retail purchaser, leased or used as a company car or demonstrator by a Mitey Motors dealer. Repairs and adjustments needed to correct defects in materials or workmanship covered by this warranty are made at no charge for parts and labor. This warranty does not cover damage or failures resulting directly or indirectly from misuse, fire, accidents or improper repairs.

# AFFIDAVIT

I, Harold Smith, hereby depose and state that:

1. I am an adult individual over the age of 18 years of age.
2. I am a 1985 graduate of the Ace Technical School of Automotive Engineering in Graceland, Pennsylvania.
3. I am certified by the International Association of Automotive Technicians as an auto mechanic, supervisor category, and currently own and work at Harold's Auto Repair, 345 2nd Street, Fairmont, Pennsylvania, where I am a car mechanic and supervise the work of 5 other employees.
4. I was hired by Oscar Oaks, Esquire, to examine a 2004 Mitey Motors Crawler Convertible owned by Phil Klemp, Vehicle Identification Number PA1234567803 for defects and problems.
5. I conducted a thorough inspection on February 9, 2005, after the above mentioned vehicle was towed to my garage where I was able to first examine the car on the ground, then put the car on a lift and then conduct a test drive.
6. I am very familiar with the 2004 Crawler Convertible 4 speed automatic because they are extremely popular and frequently need servicing.
7. On this particular car, on physical examination, I saw that the linkage in the transmission had been replaced. However, the defect/problem is within the automatic transmission with the torque converter. Replacing the linkage is not going to fix the problem. The 2004 Crawler Convertible 4 speed automatic transmission is notorious for problems with the torque converter. A damaged torque converter causes damage to the transmission, which can result in a loss of power at crucial times, which is obviously very dangerous. Simply repairing or replacing a damaged torque converter will not correct this problem because of the internal damage to the transmission which would have been caused by the damaged torque converter. The only way to correct this problem is to have a new transmission installed at the same time as the torque converter is replaced.
8. My findings as stated above were confirmed by a 10 mile road test. The odometer now stands at 7,000 miles.
9. There did not appear to be any other defects/problems with the car at this time.

Harold Smith

February 9, 2005

# **LIBRARY**

Pennsylvania Automobile Lemon Law  
73 P.S. § 1951 et seq.

Section 1951. Short title

This act shall be known and may be cited as the Automobile Lemon Law.

Section 1952. Definitions

The following words and phrases when used in this act shall have the meanings given to them in this section unless the context clearly indicates otherwise:

“Dealer” or “motor vehicle dealer.” A person in the business of buying, selling, leasing or exchanging vehicles.

\* \* \*

“Manufacturer.” Any person engaged in the business of constructing or assembling new and unused motor vehicles or engaged in the business of importing new and unused motor vehicles into the United States for the purpose of selling or distributing new and unused motor vehicles to motor vehicle dealers in this Commonwealth.

“Manufacturer’s express warranty” or “warranty.” The written warranty of the manufacturer of a new automobile of its condition and fitness for use, including any terms or conditions precedent to the enforcement of obligations under the warranty.

“New motor vehicle.” Any new and unused self-propelled, motorized conveyance driven upon public roads, streets or highways which is designed to transport not more than 15 persons, which was purchased or leased and is registered in the Commonwealth . . . and is used, leased or bought for use primarily for personal, family or household purposes, including a vehicle used by a manufacturer or dealer as a demonstrator or dealer car prior to its sale. The term does not include motorcycles, motor homes or off-road vehicles.

“Nonconformity.” A defect or condition which substantially impairs the use, value or safety of a new motor vehicle and does not conform to the manufacturer’s express warranty.

“Purchaser.” A person, or his successors or assigns, who has obtained possession or ownership of a new motor vehicle by lease, transfer or purchase or who has entered into an agreement or contract for the lease or purchase of a new motor vehicle which is used, leased or bought for use primarily for personal, family or household purposes.

Section 1953. Disclosure

The Attorney General shall prepare and publish in the Pennsylvania Bulletin a statement which explains a purchaser’s rights under this law. Manufacturers shall provide to each purchaser at the time of original purchase of a new motor vehicle a written statement containing a copy of the

Attorney General's statement and a listing of zone offices, with addresses and phone numbers, which can be contacted by the purchaser for the purpose of securing the remedies provided for in this act.

#### Section 1954. Repair Obligations

(a) Repairs required. – The manufacturer of a new motor vehicle sold or leased and registered in the Commonwealth shall repair or correct, at no cost to the purchaser, a nonconformity which substantially impairs the use, value or safety of said motor vehicle which may occur within a period of one year following the actual delivery of the vehicle to the purchaser, within the first 12,000 miles of use or during the term of the warranty, whichever may first occur.

(b) Delivery of vehicle. – It shall be the duty of the purchaser to deliver the nonconforming vehicle to the manufacturer's authorized service and repair facility within the Commonwealth, unless, due to reasons of size and weight or method of attachment or method of installation or nature of the nonconformity, such delivery cannot reasonably be accomplished. Should the purchaser be unable to effect return of the nonconforming vehicle, he shall notify the manufacturer or its authorized service and repair facility. Written notice of nonconformity to the manufacturer or its authorized service and repair facility shall constitute return of the vehicle when the purchaser is unable to return the vehicle due to the nonconformity. Upon receipt of such notice of nonconformity, the manufacturer shall, at its option, service or repair the vehicle at the location of nonconformity or pick up the vehicle for service and repair or arrange for transporting the vehicle to its authorized service and repair facility. All costs of transporting the vehicle when the purchaser is unable to effect return, due to nonconformity, shall be at the manufacturer's expense.

#### Section 1955. Manufacturer's duty for refund or replacement

If the manufacturer fails to repair or correct a nonconformity after a reasonable number of attempts, the manufacturer shall, at the option of the purchaser, replace the motor vehicle with a comparable motor vehicle of equal value or accept return of the vehicle from the purchaser and refund to the purchaser the full purchase price or lease price, including all collateral charges, less a reasonable allowance for the purchaser's use of the vehicle not exceeding 10 cents per mile driven or 10% of the purchase price or lease price of the vehicle, whichever is less. Refunds shall be made to the purchaser and lienholder, if any, as their interests may appear. A reasonable allowance for use shall be that amount directly attributable to use by the purchaser prior to his first report of the nonconformity to the manufacturer. In the event the consumer elects a refund, payment shall be made within 30 days of such election. A consumer shall not be entitled to a refund or replacement if the nonconformity does not substantially impair the use, value or safety of the vehicle or the nonconformity is the result of abuse, neglect or modification or alteration of the motor vehicle by the purchaser.

#### Section 1956. Presumption of a reasonable number of attempts

It shall be presumed that a reasonable number of attempts have been undertaken to repair or correct a nonconformity if:

- (1) the same nonconformity has been subject to repair three times by the manufacturer, its agents or authorized dealers and the nonconformity still exists; or
- (2) the vehicle is out-of-service by reason of any nonconformity for a cumulative total of 30 or more calendar days.

#### Section 1957. Itemized statement required

The manufacturer or dealer shall provide to the purchaser each time the purchaser's vehicle is returned from being serviced or repaired a fully itemized statement indicating all work performed on said vehicle including, but not limited to, parts and labor. It shall be the duty of a dealer to notify the manufacturer of the existence of a nonconformity within seven days of the delivery by a purchaser of a vehicle subject to a nonconformity when it is delivered to the same dealer for the second time for repair of the same nonconformity. The notification shall be by certified mail, return receipt requested.

#### Section 1958. Civil cause of action

Any purchaser of a new motor vehicle who suffers any loss due to nonconformity of such vehicle as a result of the manufacturer's failure to comply with this act may bring a civil action . . . and, in addition to other relief, shall be entitled to recover reasonable attorneys' fees and all court costs.

#### Section 1959. Informal dispute settlement procedure

If the manufacturer has established an informal dispute settlement procedure which complies with the provisions of 16 CFR Pt. 703, as from time to time amended, the provisions of section 8 shall not apply to any purchaser who has not first resorted to such procedure as it relates to a remedy for defects or conditions affecting the substantial use, value or safety of the vehicle. The informal dispute settlement procedure shall not be binding on the purchaser and, in lieu of such settlement, the purchaser may pursue a remedy under section 8.

#### Section 1960. Resale of returned motor vehicle

- (a) Vehicles may not be resold, transferred or leased at retail or wholesale. – If a motor vehicle has been repurchased under the provisions of this act or a similar statute of another state, it may not be resold, transferred or leased in this State unless:
  - (1) The manufacturer provides the same express warranty it provided to the original purchaser, except that the term of the warranty need only last for 12,000 miles or 12 months after the date of resale, transfer or lease whichever is earlier.

- (2) The manufacturer provides the purchaser, lessee or transferee with a written statement on a separate piece of paper, in ten point all capital type, in substantially the following form:

“IMPORTANT: THIS VEHICLE WAS REPURCHASED BY THE MANUFACTURER BECAUSE IT DID NOT CONFORM TO THE MANUFACTURER’S EXPRESS WARRANTY AND THE NONCONFORMITY WAS NOT CURED WITHIN A REASONABLE TIME AS PROVIDED BY PENNSYLVANIA LAW.”

\* \* \*

The provisions of this section apply to the resold, transferred or leased motor vehicle for the full term of the warranty required under this subsection.

\* \* \*

- (b) Returned vehicles not to be resold. – Notwithstanding the provisions of subsection (a), if a new motor vehicle has been returned under the provisions of this act or a similar statute of another state because of a nonconformity resulting in a complete failure of the braking or steering system of the motor vehicle likely to cause death or serious bodily injury if the vehicle was driven, the motor vehicle may not be resold in this Commonwealth.

\* \* \*

#### Section 1961. Application of Unfair Trade Act

A violation of this act shall also be a violation of the act of December 17, 1968 (P.L. 1224, No. 387), known as the Unfair Trade Practices and Consumer Protection Law.

#### Section 1962. Rights preserved

Nothing in this act shall limit the purchaser from pursuing any other rights or remedies under any other law, contract or warranty.

#### Section 1963. Nonwaiver of act

The provisions of this act shall not be waived.

United States District Court  
E.D. Pennsylvania (1988)

Paul W. Gambrill, et al

v.

Alfa Romeo, Inc.  
696 F.Supp. 1047

A non-jury trial was held in this diversity action in which the plaintiffs (“Gambrills”), who purchased a new 1987 Alfa Romeo, seek recovery pursuant to the Automobile Lemon Law, 73 P.S. Section 1951 et seq; . . . The defendant, (Alfa Romeo”), a foreign corporation with its principal place of business in New Jersey, claims that the automobile was not defective when sold and that the malfunction was caused by the Gambrill’s misuse of the car.

The Court makes the following findings of fact and conclusions of law:

On June 11, 1987, plaintiffs, who are residents of Pennsylvania, purchased a new 1987 Alfa Romeo Graduate Coupe from YBH Porsche-Audi . . . , a dealer located in Edgemont, Pennsylvania. The total sales price was \$18,669.60, itemized as follows:

Cash Price	\$15,200.00
Tags	19.00
Lien Fee	5.00

Sales Tax	642.00
Document Fee	11.00
Finance Charge	2792.60
Total	\$18,669.60

Plaintiffs have not paid \$1512.69 of the finance charges, which reduces the amount claimed to \$17,151.91. The car was purchased for personal use primarily by Mr. Gambrill. The car was manufactured and/imported by defendant Alfa Romeo. Included with the car sold to plaintiffs was defendant’s 1987 New Car Limited Warranty for 12 months or 36,000 miles covering parts and labor necessary to correct any manufacturing defects and excluding failures or damage caused by misuse.

On October 9, 1987, Mr. Gambrill drove the car home and parked it in the garage. The next morning he was unable to start the car and he telephoned YBH, the authorized dealer, who sent a tow truck and towed the automobile to its garage on October 10, 1987. At that time, the car was four months old and had been driven 6,251 miles.

Mr. Gambrill telephoned or visited YBH on many occasions in the following weeks. YBH personnel informed him that they were in the process of repairing the car. . . . On December 7, after two months of waiting for the repairs to be completed,

Mr. Gambrill had the car removed from YBH and towed to his house. When removed from YBH, the car's engine was disassembled, with some component parts in the trunk, some in the passenger compartment, and others left at YBH. The car remains inoperable.

\*\*\*

A YBH mechanic was unable to start the plaintiffs' car after it was towed in, and found that the valves were bent. It was the mechanic's opinion that the car had been "over-revved", causing the valve rods to bend. The plaintiffs' expert testified that there was no evidence of over-revving. The Court finds that the evidence presented by the defendant that the valve rods were bent as a result of the plaintiffs' over-revving was clearly insufficient for this Court to find that the manner in which the Gambrills drove their automobile was the cause of the defective condition. Mr. Gambrill testified that he never over-revved, and the Court found his testimony credible.

The court finds that the plaintiffs have carried their burden of showing that the Alfa Romeo had "a defect or condition which substantially [impaired] the use, value, or safety of a new motor vehicle and [did] not conform to the manufacturer's express warranty" and that the manufacturer

failed to repair or correct the defect within a reasonable time.

Section 8 of the Lemon Law, 73 P.S. Section 1958 creates a cause of action for "any purchaser of a new motor vehicle who suffers any loss due to nonconformity of such vehicle as a result of the manufacturer's failure to comply with this Act ...". There is no dispute that plaintiffs are "purchasers", defendant is a "manufacturer", and the Alfa Romeo is a "new motor vehicle" as these terms are defined in 73 P.S. § 1952.

\*\*\*

The consumer's right to relief under the Lemon Law arises "[I]f the manufacturer fails to repair or correct a nonconformity after a reasonable number of attempts." 73 P.S. § 1955. Since the car was kept by YBH, an authorized service facility of defendant, for over 30 days, the law presumes that a "reasonable number of attempts" have been made to repair the car. 73 P.S. § 1956. Accordingly, the only issue presented is whether there was a nonconformity which needed repair.

"Nonconformity" is defined as

A defect or condition which substantially impairs the use, value or safety of a new motor vehicle and does not conform to the manufacturer's express warranty.

As the Court has found, the car had a defect or condition which substantially impaired its use and did not conform to the manufacturer's express warranty.

There is no doubt that the Gambrills' new Alfa Romeo had a defect or condition which substantially impaired its use or value. The car has been immobilized since October 1987 despite the defendant's attempts during a period of two months to repair it. With the engine largely dismantled, the car sat idle in the Gambrill's garage since December 1987. Its condition has prevented its use altogether and substantially impaired its value.

\* \* \*

The Automobile Lemon Law specifically provides that if the manufacturer is unable to repair or correct the nonconformity within the time provided in the Act, the purchaser has the option of a comparable motor vehicle of equal value or upon return of the vehicle a refund of the full purchase price, including all collateral charges, less a reasonable allowance for the purchaser's use of the vehicle. (citation omitted) The plaintiffs have demanded a refund.

The Automobile Lemon Law makes it clear that pursuant to this Court's findings of fact, the Gambrills are entitled to the

refund provided by the Act upon return of the car to the defendant in the following amounts:

Refund of Purchase Price	\$17,151.91
Allowance for Purchaser's Use (6,251 miles at 10 cents per mile)	<u>- 625.10</u>
	\$16,531.81
Allowance to plaintiffs for Use of '78 Dodge from 12/8/87 to 10/8/88 which automobile Mr. Gambrill was required to purchase to go back and forth to his place of work (3,200 miles at 10 cents per mile)	<u>+ 320.00</u>
	\$16,851.81

Accordingly, judgment will be entered in favor of the plaintiffs and against the defendant in the amount of \$16,851.81 conditioned upon the plaintiffs paying the balance of the amount due and owing to the lienholder, . . . and delivering the Alfa Romeo automobile and its title, free and clear of all liens, to the defendant.

. . . The Court finds, that the plaintiff is entitled pursuant to 73 P.S. Section 1958 to recover reasonable attorney's fees.

\* \* \*

## Performance Test Question: Grading Guideline

### OVERVIEW

This Performance Test asks the Applicant to write a brief for the Arbitrator who will decide the outcome of the claim of Plaintiff, Phil Klemp, a client, under the Pennsylvania Automobile Lemon Law. Mr. Klemp has had ongoing problems with his Crawler convertible manufactured by Mitey Motors, Inc., which was sold to him by Pesky Cars of Pennsylvania and he wants the dealer and/or manufacturer to take the car back.

The Agreement to Arbitrate was negotiated by the parties and frames the specific questions submitted by the parties for Arbitration. The questions are: (a) Whether Plaintiff has established a cause of action under the provisions of the Pennsylvania Automobile Lemon Law, 73 P.S. 1951, et seq. in connection with his purchase of a 2004 Mitey Motors Crawler convertible? and (b) If Plaintiff has established a cause of action, to what relief is he entitled to in this case?

Following directions is an important part of the Performance Test and both the Agreement to Arbitrate and the Memorandum from Attorney Oscar Oaks to the Applicant contain specific instructions for the format required for the brief. The basic format instruction requires that the applicant set out the conclusion for each question followed by an analysis, in which the relevant facts are applied to the law in a clear, persuasive manner. The brief should contain sound legal reasoning.

### OVERVIEW OF POINT ALLOCATION

#### 1. **FORMAT OF BRIEF** **15%**

With respect to format, the brief should be titled “PLAINTIFF’S ARBITRATION BRIEF FOR KLEMP v. MITEY MOTORS, INC.” and should have a separate heading for the two questions identified in the Agreement to Arbitrate. For each heading, a single underlined sentence should restate the question as a conclusion and succinctly provide the reasoning or basis for the conclusion. Under each heading, the analysis should support the conclusion by applying the relevant facts to the law, citing statutory and caselaw and identifying documents relied upon, such as sales receipts or an Affidavit, which should be identified by the type of document and date.

The brief should contain sound legal reasoning leading to a conclusion based on legal principles. The quality of both the form and substance of the brief is an important consideration in the grading of this task.

#### 2. **CONTENT OF BRIEF**

(a) As a purchaser of a new motor vehicle who has suffered loss because of the nonconformity of his vehicle, which the Defendant Manufacturer has failed to repair or correct after a reasonable number of attempts, Plaintiff has established a cause of action under the Pennsylvania Automobile Lemon Law.

#### **Analysis:** **70%**

- The Lemon Law provides for a cause of action where the purchaser of a new motor vehicle suffers a loss due to the nonconformity of the vehicle, which results from the manufacturer’s failure to comply with the Act. (73 P.S. Section 1958; Gambrill)

- Under the Lemon Law, a manufacturer has a duty during a certain period of time to repair a nonconformity, which substantially impairs the use, value or safety of a new motor vehicle; and a manufacturer's failure to repair such nonconformity of a vehicle after a reasonable number of attempts entitles a purchaser to obtain a refund. (73 P.S. Section 1955)
- The plaintiff, Phil Klemp was the purchaser of a new motor vehicle.
- The Lemon Law defines a purchaser as a person who has obtained ownership of a new motor vehicle by purchase if the vehicle is used primarily for personal, family or household purposes. (73 P.S. Section 1952)
- The Lemon Law defines a new motor vehicle as any new vehicle, which was purchased and is registered in the Commonwealth and is used or bought for use primarily for personal, family or household purposes including a vehicle which was used by a dealer as a demonstrator prior to its sale. (73 P.S. Section 1952)
- On April 7, 2004, Plaintiff, Phil Klemp, purchased a Mitey Motors Crawler convertible from Pesky Cars of Pennsylvania. (Invoice, dated April 7, 2004).
- The Crawler convertible was registered to Phil Klemp in Pennsylvania. (Invoice, dated April 7, 2004).
- Mr. Klemp purchased the Crawler convertible for family purposes since it was purchased for his son, Aaron, who lived at home, to use to commute to college.
- At the time of the purchase by Mr. Klemp, the Crawler convertible was used as a demonstrator vehicle by Pesky Cars and had 3,400 miles on the odometer.
- Pesky Cars of Pennsylvania is an authorized Mitey Motors dealer, as defined in the Lemon Law, 73 P.S. Section 1952, because it is in the business of selling vehicles in Pennsylvania. (Invoice, dated April 7, 2004)
- The manufacturer, Mitey Motors, Inc. failed to repair or correct a nonconformity in the Crawler after a reasonable number of attempts, resulting in a loss to Plaintiff.
- Mitey Motors, Inc. is a manufacturer as defined in the Lemon Law (73 P.S. Section 1952) because it is in the business of constructing and distributing new motor vehicles to motor vehicle dealers in Pennsylvania. (Arbitration Agreement)
- The manufacturer of a new motor vehicle sold and registered in the Commonwealth is required to repair or correct, at no cost to the purchaser, a nonconformity which substantially impairs the use, value or safety of said motor vehicle which may occur within a period of one year following the actual delivery of the vehicle to the purchaser, within the first 12,000 miles of use or during the terms of the warranty, whichever may occur first. (73 P.S. Section 1954(a)).

- A nonconformity is defined by the Lemon Law as a defect or condition, which substantially impairs the use, value or safety of a new motor vehicle and does not conform to the manufacturer's express warranty. (73 P.S. Section 1952; Gambrill).
- The Crawler convertible had problems and defects in connection with the transmission, convertible top, wipers and side molding.
- The transmission problem constituted a nonconformity as defined in the Lemon Law because it substantially impaired the use, value and safety of the Crawler and did not conform to the manufacturer's express warranty.
- The transmission slid into neutral while being driven on the highway. (Repair Order, May 13, 2004)
- The transmission did not shift into high on the highway. (Repair Order, December 7, 2004)
- Mr. Klemp and/or Aaron were unable to use the Crawler convertible because of the problems with the transmission.
- The problem with the transmission was a safety issue because a damaged torque converter causes damage to the transmission, which could result in a loss of power at a crucial time. (Affidavit, dated February 9, 2005)
- The manufacturer's express warranty provided that the vehicle was free of any manufacturing defects for 36 months or 36,000 miles, excluding any failures or damage caused by misuse, fire, accident or improper repairs. (General Warranty)
- The transmission problem did not comply with the manufacturer's warranty because it occurred when the vehicle was only several months old and had 4,100 miles on it and was not caused by any damage or misuse.
- The problem with transmission impacts the value of the vehicle.
- The transmission problem was not corrected by the manufacturer in a reasonable number of attempts.
- A presumption of a reasonable number of attempts to repair or correct a nonconformity is permitted if the same nonconformity has been subject to repair three times by the manufacturer, its agents or authorized dealers and the nonconformity still exists. (73 P.S. Section 1956(1))
- The purchaser must bring the vehicle to an authorized dealer for service. (73 P.S. Section 1954(b))
- Mr. Klemp brought the Crawler convertible to Pesky Cars, an authorized Mitey Motors dealership for all repairs.

- Mr. Klemp brought the Crawler in to Pesky Cars to be repaired for the problem with the transmission 3 times. (Repair Orders, May 13, 2004, August 3, 2004, and December 7, 2004)
- The transmission problem still existed after the 3<sup>rd</sup> attempt at repair by Pesky Cars. (Affidavit, February 9, 2005)
- When Mr. Klemp brought in the vehicle to be repaired in December 2004, the odometer read 6,712 miles.

(b) If a cause of action is established under the Pennsylvania Automobile Lemon Law, Plaintiff is entitled to return the vehicle and receive a refund of the full purchase price plus collateral charges, minus a statutory deduction for reasonable use of the vehicle, plus attorney fees and court costs.

**Analysis:**

**15%**

- Mr. Klemp wants a refund and all of the relief he is entitled to receive.
- If the manufacturer is unable to repair or correct the nonconformity within the time provided in the Act, the purchaser has the option of a comparable motor vehicle of equal value or upon return of the vehicle a refund of the full purchase price, including all collateral charges, less a reasonable allowance for the purchaser's use of the vehicle. (73 P.S. Section 1955; Gambrill)
- The cost of this vehicle, including collateral charges for tags, processing, registration, and sales tax was \$16,112.00. (Invoice, dated April 7, 2004)
- The cost of the vehicle would be reduced by 10 cents per mile or 10% of the purchase price of the vehicle, whichever is less, to reflect a reasonable allowance for the owner's use of the vehicle. (73 P.S. Section 1955)
- A reasonable allowance for use is that amount directly attributable to use by the purchaser prior to his first report of nonconformity to the manufacturer. (73 P.S. Section 1955)
- Plaintiff first reported the nonconformity on May 13, 2004, when the Crawler had 4,100 miles on it. (Repair Order No. 121)
- There would be an offset of \$70.00 for reasonable use by the plaintiff (700 miles @ 10 cents per mile).
- Plaintiff is entitled to reasonable counsel fees and court costs pursuant to the Automobile Lemon Law. (73 P.S. Section 1958; Gambrill)