

Essay Question 1

1. It was not permissible for Sam to deduct his entire rental payments as a business expense on his federal income tax returns. The problem for Sam is that he used his townhouse both as a business and as a personal residence. Generally, all ordinary and necessary business expenses may be deducted from income. Rental payments for office space are properly deducted as an ordinary and necessary business expense. Where, however, there is more than one use of space, the deduction must be apportioned according to the use of the space. Personal expenses, on the other hand, may not be deducted.

In this case, Sam had two floors in his townhouse. He used the entire second floor as a residence. The first floor was used half as a residence and half as a business. In summary, three quarters of his townhouse was used as a residence, and only one quarter was used as a business and thus properly deducted. Sam's use of the townhouse as a personal residence qualified as a personal expense and was not properly deducted. Consequently, three quarters of the rental payments were improperly deducted as a business expense, and only one quarter was properly deducted as an ordinary and necessary business expense.

2. Wilma's objection to the devises to Mr. & Mrs. North and Sam will not be successful because execution was proper and courts are unwilling to alter the plain language of a will if it can be determined that it is an accurate and fair representation of the decedent's wishes.

In this case Wilma is contesting the phrase "to my good friends and neighbors"....She argues that because the Norths and Sam are no longer good friends or neighbors, they should no longer receive their devises. But there is nothing in the wording of the document that suggests that Frank expressly intended as the testator to place any conditions on the devises. His devise to the Norths was specific and ascertainable. His devise to Sam is less specific but ascertainable. If Wilma questioned "Who Sam is?", extrinsic evidence would be permitted to show that Sam was Frank's neighbor & friend when the will was executed in 2000. One must look to the facts at the time the will was executed. These facts are clear and the statements are unambiguous and unconditional. "My good friends & neighbors" is a term of affection not a qualifying characteristic.

Wilma has standing to question the devises but she will fail in her claim because the will was properly written and executed and is clear on its face.

3. Frank must report the quarterly dividends as part of his 2005 gross income because he received the checks in 2005 without any restrictions as to his use of the checks.

Under the Internal Revenue Code (IRC) "Income" is any realized accession to wealth.

Here, the quarterly dividend checks were a clearly realized accession to wealth and therefore income to Frank. Frank was in constructive receipt of the checks because he received them without any restrictions as to their use, and he is a cash method taxpayer. He received the checks in 2005, and it is irrelevant that he forgot about them until 2006 because he was in

constructive receipt of the checks. He must therefore claim the checks as part of his 2005 gross income. Sally would not have any income because receipt of a gift is not considered income.

4. Sally is entitled to the Big Board Stock, despite the fact Frank had not given her the physical certificates.

In order for a transfer of stocks to be valid, there must be an intent to transfer, with the amount and type of stock clearly stated, as well as the name of the intended grantee. Additionally, there must be valid delivery, which normally involves the physical transfer of the certificates.

A transfer will not fail, however, because of a failed delivery of the physical certificates if there was clear intent of the grantor to transfer the certificates, this intent was made known to the grantee, and substantial steps were taken to transfer the stocks.

Here, Frank clearly expressed the intent to transfer the stock to Sally. Frank took the steps to have the certificates issued in her name, and Big Board complied with the request. Additionally, Frank had the certificates to deliver to Sally, and failed due to unforeseen circumstances – his death. It is clear from the facts it was unexpected, and so Frank had no reason to think he must turn them over immediately.

Essay Question 2

1. In this case, Officer is thinking about charging Bob with robbery which includes the elements of both theft by unlawful taking and simple assault. Consequently, Bob can be charged with robbery, simple assault, and theft by unlawful taking. Theft by unlawful taking means the taking and carrying away, however slight, of another's property without that person's consent and with the perpetrator's knowledge that the property is not his/her own. In this case, Bob used unlawful means (conduct threatening serious bodily injury or death) to take Fred's property without his consent. Bob carried the property away by taking it away from Fred. Additionally, Bob did not believe that the jewelry and wallet were rightfully his. Rather, Bob believed that he was entitled to the money that Fred owed him. It would be proper to charge Bob with theft by unlawful taking.

In Pennsylvania, simple assault means either causing reasonable apprehension of imminent, offensive (unpermitted) bodily injury or causing bodily injury through actual offensive physical contact with another person. In this case, Bob pulled a gun on Fred, pointed it at him and made demands. A reasonable person would likely be in reasonable apprehension of imminent bodily injury in such a situation. Consequently, Bob's actions are sufficient to meet the first definition of simple assault in Pennsylvania, and he may be properly charged for this crime.

Robbery is essentially a combination of theft and simple assault. It is the theft of another's property through the use of threats to cause bodily injury – it is essentially the following equation: Robbery = Assault + Theft. Because Officer should be able to bring valid charges against Bob for both assault and theft by unlawful taking, he should be able to prove the elements of robbery; thus, robbery is a proper charge to bring.

Recklessly endangering another person, on the other hand, is engaging in reckless conduct that places another at risk of serious bodily injury. Officer must first show that Bob engaged in reckless conduct. He should be able to prove this by showing that Bob pulled a gun on Fred and pointed it at him in an effort to recover money. This conduct is probably reckless conduct. Second, Officer must show that Fred was at risk of serious bodily injury. Bob had a loaded gun, had it pointed at Fred, and demanded money. The negative inference is that if Fred did not give the wallet and jewelry to Bob, then Bob would shoot him. This is sufficient to show that Fred was at risk of serious bodily injury.

Because Officer can make a good faith showing that the elements for each crime have been satisfied, he should be able to charge Bob with theft by unlawful taking, simple assault, robbery, and recklessly endangering another person.

2. The prosecutor should respond to the defendant's claims by stating that the officer has reasonable suspicion to stop Bob, to search him for his own safety, and that the evidence was found under the plain-touch doctrine, and thus should be admitted into evidence. Under the 4th Amendment, applied to the states via the 14th Amendment, a person has a right to be free from unreasonable searches and seizures. However, if a police officer has reasonable suspicion of a crime, he may infringe on the individual's rights to conduct a search or seizure. A police officer may stop an individual under reasonable suspicion that the person has committed a crime from information obtained over a radio call. The officer's reasonable suspicion is determined by a totality of the circumstances (TOC). Once the officer has made the stop under a reasonable suspicion, he may then order the driver out of the car if he believes under the TOC that the driver poses a danger to him. After ordering the individual out of the car, he may then conduct a frisk of the person to search for any weapons. This frisk must be limited to the outer clothing, and the officer cannot manipulate objects that he feels in the clothing. However, if the officer feels an object that he believes under the TOC to be a weapon or fruits or instruments of a crime, he may remove the object via the plain-touch doctrine.

In this case, the officer received a detailed radio call stating that a male had just taken a ring, watch, and a wallet from another at gun-point, and had departed in a blue van. The officer was just minutes from the scene, and the only vehicle that he saw coming from the direction of the report was a blue van with a male driver. Thus, the officer has reasonable suspicion (RS) to stop the vehicle from both the radio call and his observations. Once he stopped the vehicle, the officer was authorized to order the driver out of the car because he had reason to believe he was armed from the radio call, and the officer thus has a right to search the driver for weapons for his own safety. Upon the pat-down, when the officer felt the ring and watch in Bob's pocket, he could remove them under the plain-touch doctrine. If the officer knew upon feeling the items that they were the fruits of the crime as per information from the radio call, he would be entitled

to remove them from Bob. Finally, the evidence obtained from the pat-down should be admissible; as they were obtained within the law, under a valid pat-down of Bob.

3. The increase in the value of the shares of Cindy's stock should be considered marital property. The issue is whether the stock should be considered marital property. Equitable distribution is a method in PA in dividing up property between spouses when they decide to divorce. Each spouse can keep separate property, which can be property acquired before marriage, property acquired after separation, and gifts or inheritances to a specific spouse during the marriage. All other property is considered marital property and will be distributed accordingly. Here, Cindy received stock prior to her marriage with Bob and this was worth \$100. She also received stock in an inheritance from her father during the marriage worth \$1000. This \$100 and \$1000 stock will be separate property. However, any increase in value of this property during the marital period is to be considered marital property. Here, it is stated that both sets of stock increased in value during the marriage.

4. Alan has violated the Pennsylvania Rules of Professional Conduct, which prohibit a lawyer from making a false or misleading statement about the lawyer's services. Alan, by saying that every client that he represents has gotten an acquittal, has promised results, which an attorney is not permitted to do. Although he does not explicitly say so, Alan is creating an expectation in clients that he will win their case, even though, without hearing the facts of their cases, he might not be able to predict such a result with any accuracy at all.

Alan may also have violated the Rules of Professional Conduct by implying, through his advertisement, that he specializes in criminal law, when, since he has only had two clients in a criminal matter, this may be misleading. Therefore, Alan has violated the Rules of Professional Conduct in two different ways.

Essay Question 3

1. Paula must prove that Mel breached a duty to her, that his breach was the cause of her injury and that her injuries resulted in harm to her person.

In Pennsylvania, the basis of a negligence action is the establishment of duty, breach, causation and harm. To bring a successful negligence suit, a plaintiff must first establish a duty on the part of the defendant. The general duty standard in Pennsylvania is to provide the care that a reasonably prudent person would provide in a similar situation. There are, however, some instances where the duty of the defendant is different. In the instance of an entrant onto land suing the landowner, the duty of the landowner will depend upon the entrant's status while on the land – why they were there. If the landowner invited the entrant onto the land for commercial purposes or to be a potential customer, that entrant is called a business invitee and the invitee will be owed a high standard of care. If the invitee is injured by a defect on the land that the landowner knew or should have known about and the landowner did not act to warn the invitee or fix the defect, the landowner will be liable for those injuries.

Here, Paula came to the gym in response to Mel's newspaper advertisement. She was entering the gym as a potential customer and was entitled to the duty that a landowner owes to an invitee. Mel, as the landowner was required to warn her of any dangerous defects in the gym or to fix those defects so that injury could be avoided. As we see from the facts, Mel did not adequately warn Paula nor did he fix the defects in the weight rack. Mel had sufficient notice that the weight rack was unstable, it had just collapsed a few days before the accident. As the designer and builder of the rack, Mel would have known more than anyone why it was collapsing and what should be done to repair it. That it fell on Paula demonstrates that Mel's repair efforts were inadequate. While Mel additionally placed a warning next to the weight rack, this warning would not be sufficient to properly warn Paula of the danger. As the warning is written, gym occupants seem to be given advice about how to be polite to other gym members. The warning says "be courteous", but it doesn't explain that lifting near the rack could result in injury. Because Mel failed to adequately warn Paula and he did not repair a defect that he knew of, he has breached his duty to Paula. Paula was obviously injured by this breach and the failure of the weight rack was the direct result of her injuries. Presentation of this sort of proof would give Paula an excellent chance at recovery in a negligence action.

2. Contributory/Comparative Negligence

Mel may claim that Paula was contributorily or comparatively negligent in the accident, and if successful, this would reduce Paula's recovery. However, it is unlikely that he would prevail on the defense of Paula's negligence since she exercised a reasonable amount of care.

A defendant, at common law, could be freed from liability for negligence by showing that the plaintiff's own negligence was a cause in bringing about their injuries. In PA, the Legislature has adopted a framework of Comparative Negligence, which provides that the plaintiff may recover in proportion to the defendant's negligence as long as the plaintiff was not more than 50% negligent for their accident themselves. For example, if Plaintiff was 51% negligent, no recovery, but if Plaintiff was 48% negligent and Defendant was 52% negligent then Plaintiff would recover 52% of the damages.

Here, if a jury found that Paula was negligent in causing her injuries, this is, that she failed to use reasonable care, then she could be limited in her recovery. However, this is not likely here, because of the inadequacy of Mel's warning and because she took reasonable efforts to safely use the equipment, by looking to make sure there was no one else around while she worked out.

Therefore, Mel is not likely to have a valid defense of comparative negligence.

3. Relevant evidence is admissible as a general rule. Relevant evidence is any evidence which tends to prove or disprove any fact material to the claim or defense. Relevant evidence may be excluded where the rules so provide or where the evidence is more prejudicial than probative under the PA rules of evidence.

Here, Paula's attorney should argue that the other incidences where the rack collapsed do tend to prove elements of her case. First, the first time the rack collapsed, it provided notice to Mel that the rack, as designed, could not support the weight on it. It provided notice that he, as a reasonable prudent person, should inspect it and reconsider its design or placement or maybe he should replace it. Either way, it goes to show that Mel breached his duty to Paula by simply re-setting up the rack. Additionally, it goes to show that Mel, in designing the rack, was negligent because it couldn't support the weight Mel intended to put on it.

Paula's attorney should also argue the rack's collapse after her injury is relevant because it goes to the negligence of the design of the rack. The fact that the rack collapsed three times should be sufficient for the jury to infer that something about the rack was improperly done and that Mel could have and should have done something about it. Three collapses suggests that the rack was improperly designed and that Mel was negligent in designing and using the rack.

4. The effect of Paula cashing the check may preclude the ability of her to recover the remaining \$30,000 because it was an accord and satisfaction.

Under general contract theories, an offer to pay less than you already owe needs to be supported by additional consideration unless there is an accord. An accord happens when there is a dispute as to liability or an amount due and a party agrees to accept a lesser amount. In order for the accord to have the effect of extinguishing the original obligation there must be a satisfaction. A satisfaction is performance of the agreed upon accord.

Here, Mel's attorney's sending of the check marked "In full and final settlement" was an offer for an accord. This offer was supported by additional consideration because there was a dispute as the amount due and to liability. This is true as evidenced by Mel's appeal. Accordingly, Paula's cashing of the check was a satisfaction and Paula is now precluded from suing to enforce the original obligation.

Essay Question 4

1. Tom should assert the suspension was a violation of his First Amendment rights and he will likely be successful.

The First Amendment protects freedom of speech. Where a public employee is involved, the Court will balance the plaintiff's First Amendment rights with the government's need for professionalism and loyal employees. Like any employer, the government has a legitimate expectation that its employees will be loyal and will not subject it to public ridicule. Where the employee's speech involves matters of public concern, the employee's First Amendment rights will be weighed heavily against the government interests. Where the employee's free speech exercise is unreasonable in light of the circumstances, the employee may be sanctioned without a violation of his First Amendment rights. Where the employee's speech is reasonable, any sanction is retaliation in violation of the First Amendment.

Here, Tom wrote a letter as a private citizen to support his wife's position. The policies and litigation involved were the subject of newspaper articles and public hearing, indicating that they were of public concern. Further, he had a personal interest in the outcome of the litigation and changes in the policies. So, his First Amendment rights should be heavily weighed. On the other hand, the government's interest here is slight. Tom did not identify himself as a government employee, but wrote as a private citizen. Though the government has an interest in workplace efficiency and in keeping its employees from publicly ridiculing it, that interest is not great in light of Tom's personal stake in utilizing his First Amendment rights.

As a result Tom will likely be successful in a suit claiming the suspension was a violation of his First Amendment rights.

2. The search of Tom's desk and the seizure of the letter are not valid under the U.S. Constitution because the search was not reasonable in light of Tom's reasonable expectation of privacy and the government's lack of individualized suspicion of wrong-doing to support a search.

The Fourth Amendment protects against unreasonable search and seizure. Ordinarily, the government must have probable cause to search an area which is reasonably viewed as private. However, a government employer may, without suspicion equaling probable cause, search the desk of an employee. A court will balance the reasonable expectations of privacy with the government's interests in maintaining the workplace. To rightfully search an employee's desk, which the employee reasonably views as being subject to some level of privacy, the government must have some articulable reason to believe that such a search will yield evidence for a work related purpose or of wrong-doing which the employer has an interest in attempting to prevent.

Here, Stan entered Tom's office for a legitimate purpose. He opened the desk to find a disc that he needed and Tom was not available to give it to him. Therefore, that part of the search would have been justified. However, his further searching of the desk was not justified. He had no particularized reason to search for evidence of wrong-doing. Further, when he came upon the envelope marked "confidential", he could not justifiably open it. Having been marked confidential, Tom had a reasonable and elevated expectation that the envelope's contents were private. Stan had no justification to open it and therefore its search and seizure was unlawful.

3. An attorney may not be able to represent a client where there is a conflict of interest. A conflict of interest arises where the representation of a client will be directly adverse to another client. Where the interests are directly adverse, the clients may waive the conflict in writing after the attorney obtained informed consent if the attorney reasonably believes that the representation of one client will not be limited by representation of the other. However, where the conflict has not been waived or where the attorney feels his representation of one client might adversely affect his representation of another client, he may not simply pass one client along to his partner. The rule of imputation applies. One member of a firm cannot do what another member of the firm cannot do. If one attorney is conflicted out, all are conflicted out.

The facts indicate that Adam only worked on tax matters, matters completely unrelated to his representation of Tom. As a result, his representation of Tom would not involve using any

information he obtained through his government employment. The facts indicate that Adam does not feel that either the city or Tom would be adversely affected by his representing Tom. Rather, Adam is concerned about his representation of Tom adversely affecting his relationship with his client, the city. Thus it does not appear that the representation of C City would be materially limited by the representation of Tom.

Even though a conflict does exist, there is no problem with Partner representing Tom under these circumstances if informed consent is obtained.

4. Tom may state a claim for retaliation under Title VII because he was fired for participating in activity protected by Title VII.

Title VII broadly prevents employment discrimination on the basis of sex, religion, national origin, or race. Title VII also specifies that employer may not retaliate against an employee for participation in a Title VII enforcement proceeding or in protesting Title VII violations. Such activity is protected by the statute. A cause of action for retaliation requires proof of protected activity, an adverse action, and causation. The plaintiff must show that he was engaged in activity protected under Title VII and was subject to adverse action because of that protected activity.

Here, Tom wrote a letter to the EEOC supporting his wife's claims of discrimination. Such activity is privileged under Title VII as participation in Title VII litigation and opposition to employment discrimination is protected. Further, Tom did not breach any of the city's confidentiality as he only used public information in the letter. Additionally, the facts indicate that he was fired solely as a result of the letter. So, he suffered an adverse employment action as a result of his protected activity.

Essay Question 5

1. Christine should raise the defense that she was a minor when she entered into the contract and Donna should defend by saying that she provided necessities and that Christine affirmed the contract.

A contract entered into by a minor is voidable by the minor (not the other party). However, after a reasonable period of time of reaching majority, the minor can affirm the contract. This can be done simply if the minor performs or continues to perform under the contract. Additionally, a minor can be held liable for any necessities that are provided on her behalf.

In this case, Christine will claim that she was a minor, which she was, when she entered into the contract. She will then argue that the contract was voidable. Thus, she will state that she was entitled to void the contract on November 1, 2005.

Donna, however, will say that Christine affirmed the contract. On April 1, 2005, Christine turned 18. She continued to drive the car until November 1, 2005, or 7 months. Donna will say that this affirmation of the contract, through the repeated use of the car, precludes Christine from voiding the contract.

Additionally, Donna will state that this car was a necessary. Minors do owe money for necessities of their contracts. Necessaries are food, clothing, etc. Here, Donna will argue that Christine needed the car to get to work. Since her transportation was so difficult otherwise (and dangerous), Donna will say that this car was necessary for Christine's well-being. Thus, she will say that she should get the value of the car.

In conclusion, Christine will claim the ability to void, and Donna will state that she provided necessities and that the contract was non-voidable because of Christine's affirmance.

2. Donna can claim violations of the implied covenant of quiet enjoyment and implied warranty of habitability. She will be successful on both defenses.

Implied Covenant of Quiet Enjoyment:

Donna should bring a claim for violation of the implied covenant of quiet enjoyment and she will be successful. At common law, where a person leases property from the owner, the owner is subject to an implied covenant of quiet enjoyment. Under the covenant, an owner of property is implicitly guaranteeing that the lessee will be able to reasonably make use of the premises without substantial interference. The implied covenant of quiet enjoyment can be violated in two ways: 1) actual eviction, and 2) constructive eviction. Because Donna was not actively evicted from the premises by Andy or Bill, she must show constructive eviction.

Constructive eviction occurs where there is 1) substantial interference with the lessee's use and enjoyment of the property, 2) notice to the landlord or owner of the substantial interference, 3) landlord refuses or fails to fix the substantial interference, and 4) the lessee vacates the premises. Here, all the elements of constructive eviction have been met. The failure to provide heat and the lack of running water certainly qualifies as substantial interference with Donna's use and enjoyment of the apartment. Further, on several occasions, Donna provided notice to Andy and Bill; neither of which attempted to fix the problem. Thereafter, Donna was finally forced to vacate the premises. Therefore, because Donna has met all of the elements for constructive eviction, she should bring a claim for violation of the implied covenant of quiet enjoyment. She may do so as an affirmative defense against Bill and Andy's claim for unpaid rent.

Implied Warranty of Habitability:

Donna should also bring a claim for violation of implied warranty of habitability. This occurs where a defect in the property has rendered it uninhabitable, the lessee has notified the lessor, and, after a reasonable time, the lessor has failed to fix the problem. Here, caselaw has held that the absence of heat in winter or lack of running water is sufficient to render a premise uninhabitable. Further, Donna provided Andy and Bill with notice and a reasonable time to fix the problem. After failing to do so, Donna is entitled to move out and withhold rent until the problem is fixed.

3. Yes, Ellen can probably make a valid transfer of Whitacre to “Losing Bet” because Andy’s restriction on the transfer of Whiteacre is probably unreasonable.

In general, restrictions on the ability of a landowner to transfer her property are disfavored. Restrictions will typically be upheld only where the conditions are reasonable, specifically in relation to the length of time of the restriction. Here, Andy has placed a condition on Whiteacre that restricts Ellen’s ability to transfer it until a gambling license is awarded in Big City. Because Big City imposed a two-year moratorium on the award of gambling licenses, the restriction on Whiteacre is for a minimum period of two years. While the ultimate decision on the reasonableness of the restriction will lie in the fact finder, it seems that a complete restriction on the transferability of Whiteacre for two years will be unreasonable. This would definitely be true if there is no guarantee that the moratorium on gambling licenses will be lifted in two years. Where the restriction on alienability is unreasonable, the restriction will be struck, and the owner will be able to freely transfer her interest in the land.

Because the restriction of the alienability of Whitacre is probably unreasonable, Ellen should be able to transfer Whiteacre to “Losing Bet” immediately.

4. Ellen and Bill own Blackacre as tenants in common. A joint tenancy is created when title is conveyed to two or more people that occurs at the same time, under the same interest, grants the same percentage of ownership, and gives each an equal right of possession. Andy and Bill purchased Blackacre by a deed, conveying the title as joint tenants with right of survivorship. The right of survivorship prevents a joint tenant from conveying the property by will or intestacy, but instead upon death, the interest disappears and the remaining joint tenants own the property. Under PA law, a joint tenancy is destroyed if one joint tenant, without knowledge or consent of the others, mortgages the property. This is accomplished under the title theory of mortgages. When Andy mortgaged Blackacre on February 1, 2005, he destroyed the joint tenancy and created a tenancy in common. A tenancy in common gives each an undivided interest in the property, but it allows for a common tenant to bequeath the property. Andy bequeathed his interest in Blackacre to Ellen, so Ellen and Bill now own Blackacre as tenants in common.

Essay Question 6

1. The warranties of implied warranty of merchantability and fitness for particular purpose and express warranty are available under the UCC.

The UCC covers transactions in goods. Goods are tangible moveable property. The bulldozer is a good. The implied warranty of merchantability provides anyone who buys goods from a merchant dealing in goods of this kind is warranted the goods will be fit for their ordinary purpose unless disclaimed effectively.

Here, Smallco is a merchant because it regularly sells and services construction equipment such as a bulldozer. The warranty attaches even though goods being sold are used goods. Here, the fact that the mechanic believes it is even unsafe to start the bulldozer shows it is not fit for its ordinary purpose.

Implied warranty of fitness for particular purpose warrants goods for the buyer's particular needs provided the seller knows of the buyer's needs and the buyer's relying on the seller's skill, knowledge and expertise to select the goods. There is no merchant requirement.

Here, it is unclear whether there was a specific purpose for which the buyer was buying goods. However, since it is a bulldozer it is reasonably presumed. Furthermore, Paul specifically asked if the bulldozer had passed their inspection and was mechanically sound, and ready for normal use. Under these facts however it does not appear the buyer was relying on Smallco's skill to select the proper goods. Accordingly, it is unlikely the warranty of fitness for a particular purpose would apply here.

The UCC also provides that an express warranty is created, by any statement of fact, description or sample provided by the seller which is part of the basis of the bargain. An express warranty cannot be disclaimed.

Here, Al the salesman provided a copy of a certificate of condition for the bulldozer being mechanically sound and in working condition for normal use. Further, Al directly responded to a question by Paul, confirming the facts stated in the certificate. Clearly, this certificate and statement by Al went to the basis of the bargain because it is unlikely Paul would have bought a bulldozer he knew had been extensively damaged previously.

As such, the statement of fact by Al and in the certificate created an express warranty. Even if the "as is-where is" disclaimer is found to effectively disclaim the implied warranties, it will not effect Paul's rights under the express warranty.

The fact the bulldozer needs \$10,000 in repairs before it should even be started let alone used is a breach of the express warranty created.

2. Al should argue that he disclaimed the warranties by the statement at the time of making the deal as well as his statement in the acknowledgement letter that the bulldozer was being provided as is. The phrase "as is" will probably be sufficient to disclaim the implied warranty of merchantability, but will not be effective to disclaim any other warranties, because that will create inconsistent terms in the contract, since there is a certificate (effectively a warranty) stating that the bulldozer is in good working order from Al's mechanic. Where there are inconsistent terms in the contract, a court will try to determine the parties intentions, and in this case, it is relatively clear that the parties intended that there be a certification that the bulldozer was in good working order. The contract will be viewed as creating an express warranty, and therefore it will not be disclaimable.

3. Carol's Rights

As a dissenting shareholder, Carol can require the corporation to purchase her shares at fair market value. Under the Pennsylvania Business Corporation Law, a dissenting shareholder can exercise this right whenever the corporation undergoes a fundamental change so long as the corporation is not publicly traded or held by a large number of shareholders.

Here, Smallco would be merging with another corporation, which is a fundamental change, giving rise to dissenting shareholder's rights. Smallco only has limited shareholders and is not publicly traded so there is no bar to dissenting shareholder rights.

In order to preserve her rights, Carol needs to notify the corporation in writing of her intention to exercise her right to require the corporation to buy her shares at fair market value. She must do so before the shareholder vote is held. She then needs to vote against the proposed merger. After the vote is taken, she needs to again notify the corporation in writing of her demand to be bought out.

4. The merger will not affect Paul's ability to file a breach of warranty suit.

When two corporations merge, the rights and liabilities transfer to the surviving corporation under operation of law. Any existing liabilities are unaffected by the fact that one corporation ceases to exist. Its rights and liabilities survive in the acquiring corporation.

Under these facts, Bigco acquires Smallco. As a result, Bigco acquires all of Smallco's property, rights and liabilities by operation of law. Therefore, any claims Paul had against Smallco continue as claims against Bigco.

Essay Question PT

Dear Mr. Owens,

You have requested an opinion regarding 1) whether Mr. Brown is an "employee" under the ADEA, and 2) assuming Mr. Brown is an employee under the ADEA, whether he would be successful in establishing a claim of age discrimination against Cool Cuts. While Mr. Brown will be considered an employee for purposes of the ADEA, he will not be able to meet the applicable ADEA standards as established by previous court decisions. I would therefore recommend that we either not settle this case or offer to settle this case for less than Mr. Brown requests and to implement company policies designed to reduce the likelihood of future lawsuits. I will address the above issues in order.

Whether Mr. Brown is an Employee:

Mr. Brown will be considered an employee of Cool Cut, Inc. Under section 631 of the ADEA, an employee is defined as “an individual employed by any employer.” While this definition provides little if any guidance, recent court decisions will give us a more clear picture. In a 2002 case, *Battistone v. Sam Jon Corporation*, the court held that the decision of whether an individual is considered an employee is determined by the common-law agency test. This merely means that the decision of whether Mr. Brown is an employee is not based on the statute, but upon previous court rulings. In *Battistone*, the court held that certain factors must be considered in determining whether an individual is considered an employee. Some of these factors weigh in favor of Mr. Brown’s status as an employee and some do not. However, when you consider these factors both qualitatively and quantitatively, Mr. Brown will be considered an employee. Ultimately, because of the length of the relationship, the level of control that Cool Cuts maintained over the barbers, and the level of skill necessary to be a barber, Mr. Brown will be considered an employee of Cool Cuts.

The factors a court will consider are:

- 1) the extent of Cool Cuts control over the manner in which Mr. Brown performed his job
- 2) the skill required by Mr. Brown.
- 3) the source of the tools used by Mr. Brown, i.e., whether Cool Cuts supplied Mr. Browns’ scissors, etc.
- 4) the location of Mr. Brown’s work, i.e., whether it was on Cool Cuts’ property
- 5) the duration of the relationship.
- 6) whether Cool Cuts has the right to assign additional work to Mr. Brown.
- 7) extent of Mr. Brown’s discretion over when and how long to work;
- 8) the method of payment, i.e., commission or salary based.
- 9) Mr. Brown’s role in hiring and paying assistants.
- 10) whether Mr. Brown’s work is part of the regular business of Cool Cuts.
- 11) whether Cool Cuts is in business.
- 12) whether Cool Cuts provided benefits to Mr. Brown.
- 13) the tax treatment of Mr. Brown.

I will address each of these factors in turn.

1) Under the notice of terms provided to all barbers, including Mr. Brown, Cool Cuts requires that barbers wear uniforms, that barbers only use Cool Cut products, and that prices are determined by Cool Cuts. These aspects of Mr. Brown’s relationship with Cool Cuts weigh in favor of the court determining that an agency or employment relationship existed.

2) Mr. Brown was a skilled rather than an unskilled “employee.” That is, Mr. Brown was properly trained and licensed as a barber. He would therefore qualify as a skilled laborer; which weighs in favor of an employment determination.

3) The notice of terms provided to Mr. Brown states that each barber is expected to provide their own scissors and other tools, this fact weighs in favor of an independent contractor determination.

4) Mr. Brown, since selling his barber shop to Cool Cuts, has been working on Cool Cuts' property. This factor would support an employment relationship.

5) In the information provided to our office, it states that Cool Cuts purchased Mr. Brown's barbershop in 1995 and he has been working with or for Cool Cuts since then. This means that Mr. Brown has been working for Cool Cuts for 11 years. This is substantial period of time and will weigh in favor of an employment or agency relationship.

6) It does not appear from the information provided that Cool Cuts or its management had the ability to assign additional work to Mr. Brown. Instead, Mr. Brown determined who his customers were and was free to reject or accept customers as he determined. Therefore, this will weigh in favor of independent contractor relationship.

7) Under the notice of terms provided to Mr. Brown, he was free to schedule his own hours, but must work a minimum of 30 hours per week. Further, barbers may work more than 30 hours if they so choose. These factors will weigh in favor of an employment relationship. While Mr. Brown was entitled to make his own hours, he was required to work at least 30 hours and those hours could only fall between 9:00am and 8:00pm. Therefore, while a court could go either way on this factor, it will likely weigh in favor of an employee relationship.

8) Mr. Brown is paid through a commissions based on his level of experience. This factor will weigh in favor of an independent contractor relationship. That is, Mr. Brown was not a salaried employee but was compensated based on his productivity.

9) Mr. Brown had little if any say in how assistants were hired. Therefore, this factor weighs in favor of an employment relationship. That is, an independent contractor is typically permitted to hire whomever he sees fit to help him. Therefore, the fact that Cool Cuts, rather than Mr. Brown hired the assistants, it is more likely to be considered an employment relationship.

10) Mr. Brown's work is a part of the regular business of Cool Cuts and thus supports an employment determination.

11) Cool Cuts remains in business and this supports an employment determination (although this factor is not likely to be granted much weight)

12) Cool Cuts did not provide any health or welfare benefits to barbers. However, Cool Cuts did provide professional liability insurance for all barbers. The barbers were required to pay a premium to cover the expense of the insurance. The lack of formal benefits and the requirement of a premium will likely support an independent contractor relationship.

13) Cool Cuts did not remove taxes or other deductions from any checks paid to barbers. Further, barbers were issued I.R.S. 1099 forms, rather than W-2 forms. This supports a finding to an independent contractor relationship.

Assuming Mr. Brown is an employee, will Mr. Brown be successful?:

In Battistone, the court applied what is called the McDonnell Douglas framework to determine liability. This framework is as follows: 1) the plaintiff must first prove the elements of a prima facie case, which raises an inference of discrimination, 2) the burden then shifts to the defendant to advance a legitimate nondiscriminatory reason for their action (i.e., the transfer), and 3) if the employer is successful in showing a legitimate reason, the plaintiff must show that the nondiscriminatory reason was pretextual. That is, he must show that the discriminatory reason advanced by the plaintiff was a substantial or predominant factor in the decision.

ADEA Case:

To prove the elements of a prima facie case for an ADEA claim, Mr. Brown must be able to show that 1) he was a member of the protected group, i.e., that he was over forty years of age, which he was and is, 2) he was qualified for the job; there is a little question that Mr. Brown was qualified to work as a barber, 3) an adverse employment action; a transfer is a sufficient adverse employment action, and 4) replacement by a younger person or anything supporting an inference of discrimination. Here, assuming that only barbers younger than Mr. Brown will work at the new facility, Mr. Brown is likely to meet all four elements of prima facie ADEA case. The fact that Mr. Brown retained a position with Cool Cuts and was permitted to retain his “first chair” status will not prevent Mr. Brown from showing an adverse employment action. The statute and previous court decision have held that a transfer to a less desirable location or position is a sufficient adverse employment action to satisfy the ADEA. Therefore, the question becomes whether we can advance a legitimate nondiscriminatory reason for the transfer (also known as a “LNDR”).

LNDR:

To show a legitimate nondiscriminatory reason for the transfer, we will argue that Mr. Brown was transferred because he refuses to perform trendier style haircuts and was actively turning customers away. Further, the new facility being opened up was expected to be patronized by an increasing number of young adults or young professionals, who often request the more trendier haircuts. Finally, we will note that it is Cool Cuts business plan and intent to market itself towards a younger crowd who request new and non-traditional haircuts. This will be sufficient to support a legitimate non-discriminatory reason.

Pretext:

Mr. Brown will then attempt to show that this reason for the transfer was just a pretext. That is, Mr. Brown will attempt to show that a substantial or predominant reason for his transfer was his age or that the LNDR submitted by Cool Cuts is untrue. While Mr. Brown’s age may have been the cause of Mr. Brown’s beliefs and work attitude, it is not the reason for his transfer. That is, if a younger employee refused to do trendier style haircuts, he would have similarly been transferred or fired. Therefore, because there is no reason or evidence to show that Mr. Brown’s age was a substantial reason for his transfer, Mr. Brown will not be able to meet the third prong of the McDonnell Douglas test.

In conclusion Mr. Owens, you have asked our firm if there is a reasonable possibility that Mr. Brown will be found to be an employee under the ADEA and his age discrimination claim would be successful. As I have explained, he likely is an employee, but you have not engaged in age discrimination. Based on your likelihood of success in asserting or defending the claim, the

potential damages that could be awarded, the potential for future liability if the claim succeeds, and your interests in settling the claim, we at William Jones & Associates recommend that you fight this claim and refuse settlement with Mr. Brown. You have excellent chances for success and a victory against Mr. Brown will discourage future lawsuits of this nature. I hope this information has been helpful and I look forward to hearing from you soon. If you have any questions whatsoever feel free to contact myself or Mr. Jones. We look forward to your business and a successful outcome in this case.