

FEBRUARY 2007 PENNSYLVANIA BAR EXAMINATION

Essay Questions and Examiners' Analyses and Performance Test



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Question No. 1: Facts and Interrogatories

Frank, a widower, was terminally ill with a progressive and degenerative disease. He wanted to live his remaining weeks to the fullest but also wanted to control when he died to avoid what he believed would be unnecessary pain and discomfort. In planning for his death, Frank asked his oldest child Sam to assist by overdosing Frank upon Frank's request with the drugs which Frank's doctor was prescribing for him. Sam was hesitant but agreed after Frank handed him \$10,000 in cash and a signed note to him reading, "This is a down payment on your or your son's inheritance." Frank also had a daughter Darla who was vehemently opposed to Frank's plan to end his life.

Frank also asked Sam to obtain from Able, who was Sam's attorney, a standard medical power of attorney from Frank to Sam so that Sam would be in a position as Frank's agent to make medical decisions for Frank. Accordingly, Sam went to Able, who was a licensed Pennsylvania attorney, for such a medical power of attorney from Frank to Sam. Sam shared with Able how he was prepared to assist Frank in dying when the time came. Sam also asked Able to explain the consequences of the power of attorney and the federal tax consequences of the \$10,000 payment.

Able prepared a standard medical power of attorney from Frank to Sam and met with them to have it properly executed. Before that, he took it upon himself to contact Frank's doctor whom he knew personally to confirm his impression that Frank was competent to execute such a power. In addition, Able, without Sam's permission, told the doctor how Sam might assist Frank in his death if asked.

Within weeks, Frank's condition worsened to the point where he signaled Sam to administer an overdose. Sam obliged and Frank died comfortably as he had wished. However, Frank's doctor told the local coroner to check for a drug overdose. As a result, an investigation occurred which led to Sam being convicted for the willful and unlawful taking of his father's life. All of the foregoing occurred in 2006.

Frank left no will. He was survived by both Sam and Darla as well as Sam's spouse Wendy, and their adult child Junior. After the \$10,000 cash payment to Sam, Frank's net probate estate after debts, taxes, and all other death costs was \$100,000 (hereinafter "the \$100,000").

1. Did Able's disclosure to Frank's doctor about how Sam might overdose Frank violate any Pennsylvania Rule of Professional Conduct?
2. How should the \$100,000 be distributed?
3. What argument(s) can be made to support a finding that for federal income tax purposes, the \$10,000 payment from Frank to Sam was:
 - (a) not gross income to Sam; and alternatively
 - (b) gross income to Sam in 2006?

Question No. 1 - Examiner's Analysis

1. **Able violated Rule 1.6, Confidentiality of Information, of the PA Rules of Professional Conduct (Pa. R.P.C.) unless he reasonably believed that it was necessary to inform Frank's doctor of Sam's intentions so as to prevent the death of Frank.**

Rule 1.6, Confidentiality of Information, of Pa. R.P.C. provides:

- (a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

The facts indicate that Able as Sam's attorney did not have Sam's permission to make the disclosure and therefore informed consent was not present. Additionally, the disclosure to Frank's doctor by Able was not impliedly authorized in order to carry out the representation of Sam. "Impliedly authorized" disclosures would be those reasonably necessary for the lawyer to perform an agreed upon task. For example, a lawyer setting up a corporation for a client might be impliedly authorized to disclose the details of the amount invested, number of shares of stock, type of stock, etc. to the client's accountant who is to design the corporation's accounting system and prepare its tax returns. However, disclosures that are not impliedly authorized, and for which informed consent has not been obtained, must fall within subsections (b) and (c) of Rule 1.6 to avoid a violation of Rule 1.6.

Rule 1.6 (b) relates to Rule 3.3, Candor Toward the Tribunal. Thus, subsection (b) is not applicable.

On the other hand, Rule 1.6 (c) is applicable. It provides as follows:

- (c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interests or property of another; (3) to prevent or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services are being or have been used....

In our case, if Able reasonably believes Sam is about to commit the criminal act of assisting or aiding suicide which is likely to result in Frank's death, Able is probably justified in revealing same to Frank's doctor who appears to have been treating his terminal disease and who was prescribing the medications which apparently would be used to accelerate Frank's death. Able's action would fall within the so called "prevent future harms" exception to the general rule of client confidentiality.

On the other hand, one could conclude that Able's disclosure to Frank's doctor without more (such as going to the police or asking the doctor to take steps to prevent Frank's suicide by

cutting off his medication) was more conversational than a serious attempt to actually save Frank from Sam's assisting in Frank's suicide. If Able did not come within the "prevent future harms" exception nor within the consent exceptions then Able did violate the confidentiality rule.

2. The \$100,000 is under the intestacy laws and laws applicable to advancements and slaying payable \$55,000 to Darla and \$45,000 to Junior.

Since Frank died without a will, the \$100,000 will be distributed under the laws of intestacy found generally in Chapter 21 of the Pennsylvania Probate, Estates and Fiduciaries Code (PEF Code), 20 Pa. C.S.A. Section 2101 et seq. Since Frank left no surviving spouse, 20 Pa. C.S.A. Section 2103(1) is applicable. It provides that Frank's intestate estate would pass to his issue which in this case would normally mean in equal shares to Darla and Sam. See also 20 Pa. C.S.A. Section 2104(2). However, there are two major complicating factors.

The first complication surrounds the fact that Sam received \$10,000 before Frank's death with a note describing the payment basically as an advancement on his or Junior's inheritance. This payment is covered by 20 Pa. C.S.A. Section 2109.1, Advancements, as follows:

If a person dies intestate as to all or any part of his estate, property which he gave in his lifetime to an heir is treated as an advancement against the latter's share of the estate only if declared in a writing by the decedent or acknowledged in writing by the heir to be an advancement If the recipient of the property fails to survive the decedent, the property is not taken into account in computing the intestate share to be received by the recipient's issue unless the declaration or acknowledgment so provides.

Thus, since Sam has already received \$10,000 before distribution of the \$100,000 and since the \$10,000 is according to written instructions from Frank to be treated as an advancement on Sam's or Junior's inheritance, Darla will receive an equalizing \$10,000 out of the \$100,000 and Darla and Sam would equally split the \$90,000 remainder but for the second complication.¹ But for the second complication, Darla would then receive \$55,000 out of the \$100,000 and Sam only \$45,000. Note that Frank made it clear in his note that the \$10,000 payment was an advancement even on Junior's inheritance which would be applicable if Sam predeceased Frank.

The second complication is the Slayer's Act. Since the facts indicate that Sam was convicted for the willful and unlawful taking of his father's life, 20 Pa. C.S.A. Section 8802 of the PEF Code is applicable and provides:

No slayer shall in any way acquire any property or receive any benefit as a result of the death of the decedent, but such property shall pass as provided in the sections following.

"Slayer" is defined in Section 8801 as "any person who participates, either as a principal or as an accessory before the fact, in the willful and unlawful killing of any other person." Inasmuch as

¹ Note that another way to compute the division of \$55,000 to Darla and \$45,000 to Sam is to add the \$10,000 advancement to the \$100,000 and equally divide the \$110,000 sum into \$55,000 for Darla and \$55,000 for Sam, where Sam gets his \$55,000 by taking \$45,000 from the estate and \$10,000 from the advancement.

the facts state that Sam was convicted of such a killing of Frank, the Act is applicable. Specifically, 20 Pa. C.S.A. Section 8803 therein in turn provides:

The slayer shall be deemed to have predeceased the decedent as to property which would have passed from the decedent or his estate to the slayer under the statutes of descent and distribution or have been acquired by dower, by curtesy or by statutory right as surviving spouse.

This section basically provides that Sam's intestate share shall pass not to Sam but to the person qualified to take Sam's share as if Sam had predeceased Frank. This person is Junior, Sam's son, under 20 Pa. C.S.A. Section 2104(1). Thus, the share of the \$100,000 which was going to Sam is on account of the Slayer's Act instead going to pass to Junior. Sam's son Junior will only get the \$45,000 to which Sam would have been entitled because Frank's note specifically stated that the \$10,000 was an advancement on both Sam's and Junior's inheritance.

If Frank had not indicated in his note to Sam that the \$10,000 payment was an advancement, the \$100,000 would have simply been split into equal shares for Darla and Sam of \$50,000 each and Sam's intestate share would under the Slayer's Act have been forfeited in favor of his son, Junior.

- 3. (a) The \$10,000 payment by Frank to Sam was an advancement on Sam's inheritance and as an inheritance does not constitute gross income for federal income tax purposes. Alternatively, the \$10,000 advancement could be considered an inter vivos gift not includable in gross income.**

The \$10,000 payment was an advancement of an inheritance under a statutory definition of an advancement. An inheritance is not includable in gross income for federal income tax purposes under Section 102(a) of the Internal Revenue Code of 1986, as amended (IRC). This section provides:

- (a) General Rules. Gross income does not include the value of property acquired by gift, bequest, devise or inheritance.

The exceptions set forth in Section 102 embrace all acquisitions in the devolution of a decedent's estate. *Lyeth v. Hoey*, 305 U.S. 188, 59 S.Ct. 155 (1938). As noted by Frank, the \$10,000 which Sam received from Frank was an advancement on his inheritance, and if found to be a part of his inheritance it would not be gross income under Section 102(a).

In the alternative, the advancement given before Frank's death could be considered to be an inter vivos gift which is intended to also be a down payment on an inheritance. Since a gift is not included in gross income under Section 102(a), an advancement (being a form of a gift) is not includable in gross income.

- (b) The \$10,000 payment from Frank to Sam is compensation for services rendered in administering an overdose at Frank's request which would be gross income to Sam for federal income tax purposes.**

The \$10,000 payment from Frank to Sam is includable in gross income because it was made for services to be and actually rendered (the services being assistance in a suicide). Compensation for services is includable in gross income under IRC Section 61(a)(1). The issue is whether the circumstance under which the advancement was made converted the payment from a nontaxable advancement into a payment for compensation. This might not occur here because the money was going to go to Sam anyway as an inheritance under the intestacy law and Frank did not intend to pay Sam \$10,000 more than he was otherwise going to get. However, since Sam both agreed to perform and actually did perform the service in 2006, he should have to include the \$10,000 in his 2006 gross income (assuming he is on a calendar year basis of income tax reporting).

Additionally, by assisting in Frank's suicide, Sam was essentially agreeing to forfeit his right to any inheritance and thus the payment could not be a non-taxable advancement on same. Since Sam received and was able to retain the \$10,000 even though he was otherwise prohibited from receiving any property from Frank's estate as a result of assisting in the suicide, the \$10,000 payment should be characterized as compensation includable in gross income rather than an advancement which is not includable in gross income.

Question No. 2: Facts and Interrogatories

Al was madly in love with Amy, who only considered Al to be a close friend. In order to show his love for Amy, Al decided to commit a robbery at the First National Bank (Bank) in X City, Pennsylvania, so that they would have a large sum of money to start a life together. Al believed that if Amy witnessed the robbery she would go with him to a neighboring state where they would marry and start that life together.

Al's friend Fred was employed as a private security guard at Bank. Al convinced Fred to fail to change the tape in the video surveillance machine so that it would malfunction, and also to take an unscheduled break so that no security was in place on the day of the robbery.

On the day of the robbery, using the pretext that he was taking her to lunch at a new restaurant, Al picked up Amy in his car. Telling Amy he needed to make a quick stop, Al stopped his car in front of Bank, exited the car, and entered Bank. Once inside Bank, Al pointed a gun at a teller and demanded cash. Al took a substantial amount of cash from the teller and fled from Bank. Upon re-entering the car, Al told Amy that he had robbed the Bank so that they would have money to start their life together. Amy panicked and tried to get out of the car, but Al held her by one arm as he quickly drove away, ignoring Amy's pleas to release her. Al continued to ignore Amy's pleas to be released because he was afraid that she would identify him as the robber.

Al traveled about ten miles at a high rate of speed when he lost control of the car, ran a stop sign, and crashed into several parked vehicles. Amy sustained injuries in the accident that ultimately resulted in her death at the accident scene. Immediately prior to her death, Amy told Carl, a paramedic, what Al had told her about the robbery, that Al had prevented her from exiting his car and about the flight after the robbery.

1. In addition to several other charges, Officer has identified the charges of kidnapping, first degree murder, and second degree murder as possible criminal charges that should be filed against Al based on his conduct toward Amy. Which of these charges, if any, are supported by the facts?

The Bank security chief (Chief), Fred's supervisor, became suspicious when he discovered Fred's activities on the robbery date. Chief called Fred into his office and locked the door. Chief told Fred that he was not free to leave the office until he admitted his involvement in the robbery. Within an hour, Fred signed a full confession. Fred was never given his Miranda warnings by Chief. Chief turned the confession over to the X City police, who filed criminal charges against Fred.

Al is arrested and posts bond pending the trial of the case. Soon thereafter his former wife Sue, a wealthy heiress, stopped his alimony payments. Al telephoned Sue and told her that if she failed to resume the alimony payments, she would not live to celebrate her next birthday. Sue is concerned for her safety since she believes, based upon Al's history of domestic violence and his recent irrational behavior, she may be in danger of serious injury from Al.

2. If Fred's attorney filed a Motion to Suppress the admissibility of Fred's confession to Chief based on a failure to advise Fred of his Miranda warnings prior to the Chief obtaining a confession, what arguments should the Prosecutor make in response to the Motion and how should the Court rule?
3. What civil action should Sue file against Al to address her concerns for her personal safety raised by Al's threat against her, and with what likely result?
4. Prior to Al's criminal trial, Carl died of natural causes but not before he told Officer what Amy had told him. Carl was aware that he had only minutes to live when he spoke to Officer. Assuming no violation of the Confrontation Clause, how should the Court rule on the District Attorney's offer of proof to introduce Carl's statement to Officer under the dying declaration exception to the hearsay rule?

Question No. 2 – Examiner's Analysis

1. **The criminal offenses of kidnapping and second degree murder (felony murder) are supported by the facts and should be filed against Al in addition to the other offenses the police already plan to file against him. The criminal offense of first degree murder is not supported by the facts.**

Al picked up Amy using the pretext that he was going to take her to lunch at a new restaurant. Amy willingly entered Al's car and traveled with him to the Bank. When Al returned to the car after committing the robbery and told Amy what he had done, Amy panicked and attempted to get out of the car. She begged Al to let her out of the car but he grabbed her arm and continued driving away from the Bank. Al refused to let Amy out of his car to preclude his identification as the bank robber. Al's car was involved in an accident during his flight about ten miles from the Bank. Amy died as a result of the injuries sustained in the accident which was caused by Al's improper operation of the car.

A charge of Kidnapping is supported by the facts. Kidnapping is defined in Pennsylvania as follows at 18 Pa.C.S.A. 2901:

- a) Offense defined. - - A person is guilty of kidnapping if he unlawfully removes another a substantial distance under the circumstances from the place where he is found, or if he unlawfully confines another for a substantial period in a place of isolation, with any of the following intentions:

* * *

- (2) To facilitate commission of any felony or flight thereafter.

* * *

- b) . . . A removal or confinement is unlawful within the meaning of this section if it is accomplished by force.

Here Al transported Amy for a substantial distance (ten miles before the accident) as he was fleeing the robbery scene at the Bank. Amy was held in the vehicle by force against her will when Al grabbed her arm and ignored her pleas to be released. He did this to prevent Amy from identifying him. The statute does not give a specific linear distance as a definition of substantial distance. The Courts have found that the movement of a victim to a different locale where the risk of harm to the victim increases meets the statutory definition of substantial distance. *In the Interest of T.G.*, 2003 PA Super. 436, 836 A.2d 1003. Al removed Amy from the area of the Bank which was relatively safe and traveled about ten miles at a high rate of speed in his flight after committing the robbery (a felony). Amy was taken from a position of safety and put at risk to the extent that she did suffer fatal injuries.

Amy's removal from the Bank was intended to facilitate Al's flight after the robbery so that Amy would not identify him. Al had hoped to flee from the Bank with Amy, using the money to start a life together. However, after the Bank robbery, Amy protested and Al wanted to stop Amy from identifying him as the person who robbed the Bank. The Courts have held that the removal of a victim for two miles where the removal increased the victim's risk of harm to be sufficient to constitute a substantial distance. *Commonwealth v. Hughes*, 264 Pa. Super. 118, 399 A.2d 694 (1979). Here Al's intention was to remove Amy even further than ten miles had he not been involved in the accident.

A charge of second degree murder (felony murder) under 18 Pa.C.S.A. 2502(b) is also supported by the facts. Al's conduct of fleeing the scene of the robbery placed Amy in the position she was in at the time of the accident. Pennsylvania law provides at 18 Pa.C.S.A. 2502(b) that "A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or accomplice in the perpetration of a felony." The term "perpetration of a felony" is defined at 18 Pa.C.S.A. 2502(d) as "The act of the defendant in engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping." Here, both the robbery of the Bank and Al's kidnapping of Amy served as the required felony for second degree murder. The law does not require that Al intend to kill Amy or anyone else. Al was in the process of kidnapping Amy while fleeing after committing the robbery when he caused the automobile accident. The fatal injuries occurred as a result of the accident. Al should be charged with second degree murder because it was Al's conduct relating to the robbery and kidnapping that put Amy in the position of sustaining the fatal injuries.

A charge of first degree murder under 18 Pa.C.S.A. 2502(a) is not supported by the facts. A homicide constitutes murder of the first degree when it is committed by an intentional killing. The phrase "intentional killing" is defined at 18 Pa.C.S.A. 2502(d) as a "willful, deliberate and premeditated killing". Pennsylvania Courts have held that a willful, deliberate and premeditated killing is one where the actor has a specific intent to bring about the death of the victim. *Commonwealth v. Nelson*, 514 Pa. 262, 523 A.2d 728 (1987).

Al's purpose in kidnapping Amy was to keep her from identifying him as the bank robber. The accident occurred due to Al's operation of the vehicle during flight after committing the robbery. It is required that an actor have the conscious object or purpose of intending to end the victim's life in order to qualify as first degree murder. *Commonwealth v. Stewart*, 461 Pa.

274, 336 A.2d 282 (1975). Since Al never formulated the specific intention to kill Amy, the first degree murder charge is not supported by the facts and should not be filed.

2. The Prosecutor should argue that Fred's protections under the United States Constitution were not violated by the action of Chief, who acted as a private citizen and not a governmental agent and the court will likely deny the Motion to Suppress the confession.

It is well settled that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from a custodial interrogation of the defendant by a law enforcement officer unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). Fred's counsel could argue that Fred's Miranda rights were violated because the interrogation of Fred was custodial in nature since it appears that Fred was not free to leave Chief's office until he admitted his criminal involvement in robbery.

Here, Fred was employed as a private security guard by Bank. Chief was Fred's supervisor at Bank and was not a municipal police officer for X City or any other governmental agent. If Chief was a police officer the above factors would be relevant to the issue of suppression of evidence, when coupled with the Chief's failure to advise Fred of his Miranda warnings. Here, however, the Federal Constitutional protections afforded a citizen from governmental action are inapplicable. See *Burdeau v. McDowell*, 256 U.S. 465, 41 S.Ct. 574 (1921). The Prosecutor should argue that Fred's protections under the United States Constitution were not violated, and the statement is admissible in court since Chief was not a law enforcement officer or governmental agent even though he turned the statement over to the police. It has been held that private security guards are private citizens and the restraints that are imposed upon governmental activities are not applicable to actions by private citizens. *United States v. Antonelli*, 434 F. 2d 335 (2nd Cir. 1970). The evidence should not be suppressed.

3. Sue should file a petition for relief under the Protection From Abuse Act and the court would likely prohibit Al from any contact with her.

The petition under the Protection From Abuse Act (PFA), 23 Pa.C.S.A. 6101, et seq is a civil action that can be filed by Sue against Al. The PFA law is intended to protect family or household members from future abuse based upon current or past abusive actions. The statute defines abuse to include the "placing of another in reasonable fear of imminent serious bodily injury." 23 Pa.C.S.A. 6102(a)(2). Here the statement made by Al that Sue would not live to see her next birthday coupled with his past history of domestic violence falls within the above definition.

Also, Sue fits within the definition of a family or household member which includes persons who have been spouses or former sexual partners. Therefore the fact that Al and Sue are divorced is not relevant to whether the PFA is available to Sue. If Sue is successful in obtaining a protection order, the relief would most likely mandate that Al not abuse her and have no contact with her. 23 Pa. C.S.A. §6108. A violation of the protection order is enforceable by the Court's contempt power.

4. The Court should find that Carl's statement to Officer is hearsay and does not fall within the dying declaration exception; thus the Court should rule against the request by the District Attorney contained in the offer of proof.

Carl was a paramedic who arrived at the scene of the fatal accident involving Al's vehicle. Shortly before her death Amy told Carl about the robbery, Al's actions in preventing her from leaving the car and Al's flight after the robbery. Carl would have been a Commonwealth witness who could have related Amy's statement to him that related to her death under the Statement Under Belief of Impending Death or Dying Declaration Exception to the hearsay rule.

Carl died prior to Al's trial but he had related to Officer what Amy had told him. The District Attorney desires to use this statement since Carl's death makes him unavailable to testify within the definition of Pa.R.E. 804(a). Officer's testimony as to what Carl told him is double hearsay because it involves Amy's statement to Carl, which was repeated by Carl to Officer. Pursuant to Pa. R.E. 805 both statements (Amy's statement to Carl and Carl's repeating her statement to Officer) must fall within an exception to the hearsay rule in order for the District Attorney to be successful.

In the offer of proof, the District Attorney relied upon the Statement Under Belief of Impending Death (dying declaration) Exception to the hearsay rule. Pa.R.E. 804(b)(2). In order for Carl's statement to fall within this exception to hearsay, the Commonwealth must show that the declarant (Carl) believed his death was imminent and the statement pertains to the cause or circumstances of what Carl believed to be impending death. Pa. R.E. 804(b)(2).

Hearsay evidence is presumed to be unreliable because the original declarant is not before the trier of fact and the information conveyed cannot be challenged. *Commonwealth v. Chamberlain*, 557 Pa. 34, 731 A.2d 593- 595 (1999). The solemn nature of the situation where the declarant is aware that death is imminent justifies giving the statement the same weight as sworn testimony and the statement would be an exception to the hearsay rule. *Commonwealth v. Riggins*, 478 Pa. 222, 386 A.2d 520 (1978). Here the statement Officer would give in court as related to him by Carl had nothing to do with Carl's death. Even though Carl made his statement to Officer knowing that his death was imminent, the statement relates to something Carl was told and not what he saw. Also, the proposed testimony does not relate to the declarant's cause of death or the circumstances surrounding his death but rather relates to Amy's death. While Amy's statement to Carl relating to the circumstances surrounding her death may well fall within this exception to the hearsay rule, Carl's statement to Officer will not. Since the proffered testimony by Officer was not within his personal knowledge but was based on what Carl had told him, the testimony is hearsay and would have to fall within its own exception to the hearsay rule in order to be admissible.

The Court should determine that the statement is not admissible because it hearsay and does not fall within the dying declaration exception.

Question No. 3: Facts and Interrogatories

Sandy was a 22-year-old bicycle racer living in Smallville, Pennsylvania. In July of 2006, she decided to test her skills and enter the Tour of Pennsylvania (Tour), a premier cycling competition, which crossed the Commonwealth of Pennsylvania over a period of five days.

In preparation for the Tour, Sandy went to Bike, Inc., a retail seller of racing bicycles in Smallville, to purchase a new racing bike. She told Mike, a salesperson for Bike, Inc., that she was entering the Tour and needed a new racing bike for the competition. Mike, who was familiar with the Tour and knew cyclists often exceeded 50 miles per hour, showed Sandy the "Rocket," the newest racing bike designed, manufactured, and distributed by Whirlwind, Inc. (Whirlwind), which was headquartered in Smallville. The Rocket was advertised by Whirlwind as "Whirlwind's sleekest racing bike."

Unbeknownst to Mike or Bike, Inc. at the time of the sale, the front wheel assembly had failed on three different Rocket test bikes during Whirlwind's development of the Rocket. In particular, when the bike reached speeds of 40 miles per hour, the front wheel assembly catastrophically failed. Whirlwind was aware of a safer configuration for the wheel assembly due to previous racing bikes that it had designed and manufactured. Nevertheless, Whirlwind declined to change the wheel assembly in order to preserve the sleek look of the Rocket. Instead, Whirlwind conspicuously placed on the handlebar of all manufactured models of the Rocket, including the bike purchased by Sandy, a statement which read, "Be careful at high speeds." No other information concerning the Rocket's speed limitations was provided in the written literature accompanying the Rocket.

After purchasing the Rocket from Bike, Inc., Sandy entered the Tour as planned. On the third day of the Tour Sandy was descending a mountain in eastern Pennsylvania. As she approached 40 miles per hour, a speed often reached by racers, she calmly remarked to Jody, a nearby competitor, "My front wheel feels loose." A few seconds later, as her bike reached a speed of approximately 50 miles per hour, the front wheel assembly of the Rocket failed. Jody witnessed the catastrophic front wheel assembly failure. As a result of the failure, Sandy immediately lost control of the Rocket and was catapulted over a guardrail and down an embankment which caused her serious personal injuries.

1. In addition to potential negligence or warranty claims arising under the sales contract or the U.C.C., what cause(s) of action should be brought against Whirlwind and/or Bike, Inc. for Sandy's injuries, and with what likelihood of success?

Assume that a negligence suit for Sandy's personal injuries is eventually filed against Whirlwind and Bike, Inc. by Attorney Big in the Pennsylvania Court of Common Pleas for X County, which encompasses Smallville. The day after filing the Complaint, Attorney Big's secretary handed a copy of the Complaint to a proper representative of Whirlwind at its headquarters, and Attorney Big filed a Certificate of Service confirming said service. The Complaint, which did not assert punitive damage claims, included allegations in the negligence count that Whirlwind executives were a bunch of "money hungry scoundrels and crooks" and "robbed the public to fatten the pockets of its stockholders."

2. What objections should be raised by Whirlwind concerning the Complaint filed against it and served upon it by Attorney Big, how should the objections be raised, and with what likelihood of success?

Assume the case proceeds to trial against Whirlwind for Sandy's injuries and Attorney Big calls Jody to the stand. Attorney Big attempts to introduce Sandy's statement to Jody that "My front wheel feels loose" to corroborate the front wheel failure, when Whirlwind's counsel objects on the grounds that the statement is hearsay.

3. How should Attorney Big respond to the hearsay objection by Whirlwind's counsel, and how should the court rule?

Question No. 3 - Examiner's Analysis

1. **A strict products liability action should be filed against Whirlwind and Bike, Inc. and there will be a strong likelihood of success on both claims.**

Section 402A of the Restatement (Second) of Torts was adopted as the law of Pennsylvania by the Supreme Court in *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966). This section imposes liability on the manufacturer and seller of a defective product regardless of the lack of proven negligence or the lack of contractual relationship between the parties. *Salvador v. Atlantic Steel Boiler Co.*, 457 Pa. 24, 30, 319 A.2d 903, 906 (1974). It has been reasoned that the seller or manufacturer are best able to shoulder the cost and administer the risks involved in releasing products into the stream of commerce. *Walton v. Avco Corp.*, 530 Pa. 568, 610 A.2d 454 (1992). The Pennsylvania Supreme Court in *Walton* discussed the rationale for adopting the doctrine as follows:

The exigencies of our complex technologies required the development and adoption of strict liability when it became clear that the circumstances behind some injuries would make negligence practically impossible for an injured plaintiff to prove. See *Azzarello v. Black Brothers, Inc.*, 480 Pa. 547, 391 A.2d 1020 (1978). Section 402A, therefore, requires only proof that a product was sold in a defective condition unreasonably dangerous to the user or consumer, and that the defect was the proximate cause of plaintiff's injuries. *Berkebile v. Brantly Helicopter Corp.* 462 Pa. 83, 337 A.2d 893 (1975). The 402A burden for proving that a product sold was "unreasonably dangerous" as to the user is met by proving both the defect and the causation. *Id.* It has long been the law in Pennsylvania that a "defective condition" includes the lack of adequate warnings or instructions required for a product's safe use. *Id.*; See *Jacobini v. V&O Press Company*, 527 Pa. 32, 588 A.2d 476 (1991); *Thomas v. Arvon Products Co.*, 424 Pa. 365, 227 A.2d 897 (1967). In *Berkebile*, a Pennsylvania case involving the strict liability of a helicopter manufacturer, this Court in its plurality opinion, wrote,

A "defective condition" is not limited to defects in design or manufacture. The seller must provide with the product every element necessary to make it safe for use. One such element may be warnings and/or instructions concerning use of the product. A

seller must give such warnings and instructions as are required to inform the user or consumer of the possible risks and inherent limitations of his product. Restatement (Second) of Torts Section 402A, comment h. If the product is defective absent such warnings, and the defect is a proximate cause of the plaintiff's injury, the seller is strictly liable without proof of negligence....Where warnings or instructions are required to make a product non-defective, it is the duty of the manufacturer to provide such warnings in a form that will reach that ultimate consumer and inform of the risks and inherent limits of the product. The duty to provide a non-defective product is non-delegable....

To prevail in a products liability case, a plaintiff must prove: (1) that the product was defective; (2) that the defect existed when it left the hands of the defendant; and (3) that the defect caused the harm. *Putt v. Yates-American Machine Company*, 722 A.2d 217 (Pa. Super. 1998). Specifically, in a design defect case, the question is whether the product should have been designed more safely. *Dambacher by Dambacher v. Mallis*, 336 Pa. Super. 22, 485 A.2d 408 (1984), *appeal denied*, 508 Pa. 643, 500 A.2d 428 (1985). A supplier must provide a product which is designed to be safe for its intended use. Under this standard, a defect may be found where the product left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use. *Azzarello v. Black Brothers Company, Inc.*, 391 A. 2d 1020 (Pa. 1978).

With regard to Whirlwind it will be liable for Sandy's injuries on the products liability theories of design defect and lack of proper warnings.

Initially, it is clear from the facts that Whirlwind designed the Rocket. During testing Whirlwind learned that the Rocket's front wheel assembly failed on three occasions on three separate Rocket bikes while approaching speeds of 40 miles per hour. Whirlwind knew that this was a racing bike which would be operated by cyclists at high speeds and in fact had successfully used a front wheel assembly which had proven to be safe on other Whirlwind models in the past. Despite this knowledge of a safer design for the front wheel assembly they proceeded to design the Rocket with the faulty wheel problem.

If the defective condition was the proximate cause of Sandy's injuries, Whirlwind will be held strictly liable. Proximate cause is established where the defective condition is a substantial factor in bringing about the harm suffered. *Mietelski v. Banks*, 854 A.2d 579 (Pa. Super. 2004). This defect was a substantial factor in causing Sandy's injuries. Namely, Sandy felt the front wheel become loose while she was operating the bike at forty miles per hour and Jody witnessed the front wheel assembly fail a few seconds later as Sandy approached fifty miles per hour. This ultimately resulted in Sandy losing control of her bike and being catapulted over the guardrail causing her injuries. Thus, it appears that Sandy will be able to succeed on a design defect theory against Whirlwind.

To establish a prima facie case of strict liability for failure to warn, the Plaintiff must prove that the lack of an adequate warning rendered the product dangerous and that the lack of an adequate warning was the proximate cause of the accident. *Morris v. Pathmark Corp.*, 405 Pa. Super. 274, 277, 592 A.2d 331, 333 (1991), *allocatur granted*, 530 Pa. 644, 607 A.2d 254 (1991), *appeal dismissed*, 536 Pa. 104, 638 A.2d 193 (1994). Although the failure to warn of a dangerous condition is an independent basis for liability, it has been stated that the failure to warn is basically a form of defective design in which the defect exists because the user was not adequately instructed on how to use the product as it was designed. *Fraust v. Swift & Co.*, 610 F. Supp. 711, 713 (W. D.Pa. 1985); *Weiner v. American Honda Motor Co.*, 718 A.2d 305, 309 (Pa. Super. 1998). In claims involving failure-to-warn defect, the plaintiff must first show that the hazardous condition of the product was a cause in fact of the injury, and then that the absence or inadequacy of warnings addressing that condition was the legal cause of the injury. *Moroney v. General Motors Corporation*, 850 A.2d 629 (Pa. Super. 2004).

In this case it appears that the defect in the front wheel assembly was the cause of Sandy's injuries. Sandy felt the front wheel begin to fail and Jody witnessed it. The failure was consistent with the failures which had occurred in the testing of the Rocket. It is likely that Sandy will be able to show that this dangerous condition caused her injuries. Although Whirlwind knew that the Rocket had specific maximum speed limitations, namely that the front wheel failed when it reached a speed of 40 miles per hour, the only warning that it placed on the Rocket was that the rider should "Be careful at high speeds". Whirlwind did not expressly define the speed limitation or indicate that there were any prior failures or defects. Further, the product literature, which accompanied the bike, did not address the speed limitations of the Rocket. The only warning given by Whirlwind would have likely been construed by purchasers as a general precaution when riding at high speeds. Racers, like Sandy, were accustomed to riding at speeds of 40 miles per hour and would not have perceived that speed as being dangerous unless otherwise warned. To be effective Whirlwind should have specifically informed the consumer of the bike's specific speed limitations especially since it was a racing bike and was specifically advertised as such. Further, Whirlwind should have warned users of the bike that serious personal injuries could result if they exceeded the expressly stated speed limitations of the bike. Whirlwind manufactured and placed the bike in the stream of commerce with a known dangerous condition and failed to provide an adequate warning to its customers. Whirlwind's failure to provide adequate warnings regarding Whirlwind's speed limitations was a substantial factor in causing Sandy's injuries, and Whirlwind will likely be found to be liable for failure to properly warn under a products liability theory.

A seller who enters into the business of supplying a product that may endanger the safety of persons or property undertakes a special responsibility for the safety of the public and is subject to strict liability. Restatement, Torts 2d Section 402A (1)(a)(1965); *Francioni v. Gibsonia Truck Corp.*, 472 Pa. 362, 368, 372 A.2d 736, 739-40 (1977). Strict liability in tort applies to all suppliers in the business of selling products regardless of fault on their part. *Moran v. G.&W.H. Corson, Inc.*, 402 Pa. Super. 101, 122, 586 A.2d 416, 427 (1991); *allocatur denied*, 529 Pa. 650, 602 A.2d 860 (1992). As applied here, Bike, Inc will be classified as a seller of the Rocket as they were engaged in the business of selling racing bicycles to the public. Despite the fact that they were not informed of the limitations of the bike, Bike, Inc. would still be liable as it sold the Rocket to Sandy.

2. Preliminary Objections should be raised to the complaint raising lack of personal jurisdiction due to improper service of the complaint on Whirlwind and an objection to the inclusion of scandalous and impertinent matters and both objections will likely be successful.

Pa. R.C.P. No. 1028 provides that Preliminary Objections may be filed by any party to any pleading and are limited to a number of grounds including lack of jurisdiction over the person of the Defendant, improper service of a complaint (Pa. R.C.P. No. 1028(1)) and inclusion of scandalous or impertinent matter (Pa. R.C.P. No.1028(2)). Pa. Rule of Civil Procedure No. 400, with certain exceptions which are not applicable to this fact situation, provides that original process shall be served within the Commonwealth only by the Sheriff. The Pennsylvania Supreme Court has held that the rules relating to service of process must be strictly followed. *Sharp v. Valley Forge Medical Center and Heart Hospital, Inc.*, 422 Pa. 124, 127, 221 A.2d 185, 187 (1966). Service of process is the mechanism by which a Court obtains jurisdiction over a Defendant. The rules relating to service of process must be strictly followed. In the absence of valid service of process, a Court lacks personal jurisdiction over the party invalidly served, and is powerless to enter judgment against that party. Where service of process is defective, the remedy is to set aside the service; however, in such a case, the action remains open and the Court must allow the Plaintiff to attempt to make proper service of process on the Defendant which would properly vest jurisdiction in the Court. *City of Philadelphia v. Berman*, 863 A.2d 156 (Cmwlth. Ct. 2004).

As indicated above, Rule 1028(a)(2) provides that Preliminary Objections may be filed for “inclusion of scandalous or impertinent matter.” To be scandalous and impertinent, the allegations must be immaterial and inappropriate to the proof of the cause of action. *Common Cause/ Pennsylvania v. Commonwealth*, 710 A.2d 108 (Cmwlth. Ct. 1998) citing *Department of Environmental Resources v. Peggs Run Coal Company*, 55 Pa. Cmwlth. 312, 423 A.2d 765 (1980).

Initially, it is clear that Attorney Big failed to take steps to properly effectuate service upon Whirlwind at its headquarters. In particular, the facts indicate that his secretary served Whirlwind at its headquarters and Attorney Big filed a Certificate of Service confirming this method of service. This is clearly contrary to the Rules of Civil Procedure which require original process to be served by the Sheriff. Because service was not performed in accordance with the rules, the Court would not have personal jurisdiction over Whirlwind, Inc. and the Preliminary Objection asserting improper service of the complaint would likely be sustained. The Court will likely afford Attorney Big time to effectuate proper service on Whirlwind, Inc. in order to obtain the necessary personal jurisdiction over this entity.

The facts indicate that the complaint included allegations that Whirlwind, Inc. executives were a bunch of “money hungry scoundrels and crooks” and “robbed the public to fatten the pockets of its stockholders”. These claims were included in the negligence count of the complaint. These allegations are not material to the claim of negligence and would likely be deemed by the court to be inappropriate to prove this claim. Accordingly, it is likely that these allegations would be stricken from the complaint.

3. Attorney Big should argue that the statement will be admitted as a present sense impression exception to the hearsay rule, and the trial judge will likely overrule the objection.

Pa. R. E. 801(c) defines hearsay as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. A statement can be an oral assertion (Pa.R. E. 801(a)(1)) and a declarant is a person who makes a statement. (Pa.R.E. 801(b)). Hearsay is not admissible except as provided by the Pennsylvania Rules of Evidence, by other Rules prescribed by the Pennsylvania Supreme Court, or by statute. Pa.R.E.802. Certain statements are not excluded by the hearsay rule, even though the declarant is available as a witness including statements which constitute a present sense impression which is a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter. Pa. R. E. 803 (1). The present sense impression exception to the hearsay rule permits testimony of declarations concerning conditions or non-exciting events which declarant is observing at the time of his declaration. *Commonwealth v. Harper*, 419 Pa. Super. 1, 614 A.2d 1180 (1992). The rationale for this exception is that the relative immediacy of the declaration insures that there will have been little opportunity for reflection or calculated misstatement. *Commonwealth v. Coleman*, 458 Pa. 112, 116, 326 A.2d 387, 389 (1974).

As applied here, Attorney Big has called Sandy's fellow bike competitor to the stand to testify as to Sandy's statement made to Jody that "My front wheel feels loose" to corroborate the front wheel failure. This would be defined as hearsay as it is an oral assertion (statement) other than one made by the declarant (Sandy) while testifying at the trial which is being offered in evidence to prove the truth of the matter asserted. Generally such a statement would be inadmissible. However, Attorney Big would likely argue that the statement described the condition of the front wheel made while Sandy, the declarant, was perceiving the condition. Sandy calmly made this statement, at a speed which was customary for her as a bike racer to be traveling, to Jody who was a competitor nearby. This would not likely be deemed to be an excited utterance as there is no indication that Sandy was excited or startled at the time she made the statement. See Pa. R. E. 803 (2). Because the statement appears to fall within the present sense exception to the hearsay rule, it is likely that the trial court would overrule the objection by Whirlwind's counsel and permit the statement to be admitted.

Question No. 4: Facts and Interrogatories

Waste Control, Inc. (“WCI”), owns and operates a landfill for disposal of solid waste in C County, Pennsylvania. WCI also operates a fleet of trucks used to collect solid waste from residential and commercial customers, all of which are located within C County. WCI deposits the waste it collects in its landfill and also accepts waste collected by other firms, including firms which collect waste generated in other counties within Pennsylvania, but not from other states. WCI has 150 employees.

There are two other solid waste disposal landfills within C County. These landfills accept solid waste generated within C County, as well as waste from other Pennsylvania counties and the neighboring state O. C County regularly inspects all three landfills to ensure compliance with health and safety standards applicable to disposal of solid waste. The County ordinance that promulgates these standards and implements the inspection program also imposes a fee, payable by the landfill operator, of one dollar for each ton of solid waste deposited in the landfills, which is used to pay the costs of the inspection program. Concerned about preserving capacity of the three landfills for local residents, C County recently amended the ordinance to impose a fee of five dollars per ton on all waste deposited in the three landfills which is generated outside of C County, with the intent of discouraging use of these landfills for waste collected elsewhere.

The C County ordinance also requires solid waste collectors to obtain an annual license in order to ensure that companies engaging in collection activities have adequate equipment, personnel, and facilities to serve C County residents. The ordinance specifies that licensees must require employees who are exposed to solid waste as part of their regular employment duties to obtain an annual medical examination from a licensed physician to help protect employee health. To ensure compliance with this requirement, C County requires that a copy of the medical record documenting each employee’s medical condition be submitted with the application for license renewal. The records are stored by C County in an unlocked filing cabinet and are accessible by virtually any C County employee. WCI complies with this requirement each year.

WCI’s fee payments to C County have substantially increased as a result of the ordinance amendment. Paul, president of WCI, has retained you as counsel to explore any legal remedies available to WCI as to the \$5.00 per ton fee. While reviewing this matter with you, Paul mentions that he also needs advice about an employee, Eli, who was recently injured in an automobile accident. Prior to the accident, Eli drove a trash collection truck for WCI. Eli suffered a severe injury to his right arm in the accident, resulting in loss of use of his arm which his physician has determined is permanent. Although Eli is otherwise ready to return to work, his physician has advised Eli that he cannot operate a trash collection truck because two functional arms are required to steer and operate the front-end lift simultaneously, and there are no known devices that would be able to assist him in doing this. Eli has requested a workplace accommodation because of his disability and Paul has determined that Eli could operate the trash compacting machine located at the landfill with only one functioning arm. That position is currently held by another employee, Mary, who has been employed by WCI for many years in that capacity.

1. What claim(s) based upon the United States Constitution should be asserted by an appropriate plaintiff to challenge the new five dollar fee imposed by C County on solid waste generated outside C County and deposited in C County landfills and with what likely result?
2. Advise WCI as to the likelihood that it would have standing to assert such claim(s) in federal court.
3. If Eli is terminated, would he be successful if he brought a claim of discrimination under the Americans with Disabilities Act (“ADA”) against WCI?
4. What claim(s) based upon the United States Constitution should be asserted by an employee of WCI against C County relating to its collection and storage of the employee’s medical information, and with what likely result?

Question No. 4 - Examiner’s Analysis

- 1. An appropriate plaintiff should challenge the assessment of a five dollar per ton fee on waste generated from State O as a violation of the Commerce Clause, and such challenge would likely be successful.**

The dormant Commerce Clause, Article I, Section 8, Cl. 3 operates to restrict states from imposing differential treatment of in-state and out-of-state economic interests which operate to benefit local businesses at the expense of non-resident businesses. “This rule is essential to the foundations of the Union. The mere fact of non-residence should not foreclose a producer in one state from access to markets in other states.” *Granholm v. Heald*, 544 U.S. 460 at 470, 125 S. Ct. 1885,1895 (2005). In this instance, C County has imposed a disposal fee of \$1.00 on solid waste generated within C County, but a significantly larger fee of \$5.00 per ton on solid waste generated outside of C County. In practice, two of the landfills operating within C County accept solid waste from neighboring State O, and that solid waste would be subject to the higher fee.

In *Oregon Waste Systems v. Department of Environmental Quality*, 511 U.S. 93, 114 S. Ct. 1345 (1994), the Supreme Court considered a similar fee differential between in-state and out-of-state waste. As in *Oregon Waste Systems* the higher fee discriminates explicitly against out-of-state waste, given that by definition out-of-state waste would not be generated within C County. Moreover, the fact that the ordinance also discriminates against waste transported from other Pennsylvania counties does not mitigate the burden on interstate commerce. *Fort Gratiot Landfill v. Michigan Department of Natural Resources*, 504 U.S. 353, 362, 112 S. Ct. 2019, 2025 (1992).

Because the C County ordinance is discriminatory on its face, it is virtually *per se* invalid under the Commerce Clause. *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 344, 112 S. Ct. 2009, 2015 (1992). Hence, the fee differential imposed by the C County ordinance must be invalidated unless C County can demonstrate that it advances a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives. *Oregon Waste Systems, supra*, 511 U.S. at 101, 114 S. Ct. at 1351.

Here, the local purpose is to discourage the use of local landfills for waste collected elsewhere, in order to preserve capacity for local residents. This purpose may not be legitimate in the first instance, because its intention is discriminatory on its face. Even if it is a legitimate local purpose, however, it could be adequately served by reasonable non-discriminatory alternatives. For example, a uniform \$5 fee, applicable to waste from whatever source, would serve to reduce deposits in C County landfills if less expensive alternatives were available elsewhere. Accordingly, a claim asserting that the fee differential violates the Commerce Clause would likely be successful.

2. WCI can demonstrate an injury in fact sufficient to satisfy Article III standing requirements, but may not be able to satisfy the prudential standing requirements for asserting a claim in federal court.

Constitutional standing is required in order for a plaintiff to assert a claim in Federal court. To satisfy the standing requirement, a plaintiff must show (1) an injury in fact, (2) that is fairly traceable to the actions of the defendant and (3) that likely will be redressed by a favorable decision. *Bennett v. Spear*, 520 U.S. 154, 162, 117 S. Ct. 1154, 1161 (1997). These requirements arise out of the “case” or “controversy” requirements of Article III of the United States Constitution.

Here, WCI would incur a higher fee when it accepts waste from outside of C County. Thus, WCI has an injury (higher operating cost) that is traceable to the C County ordinance and which would be remedied if the ordinance is unconstitutional under the Commerce Clause.

Even though the Article III requirements for standing may be satisfied, the fact that WCI does not accept out-of state waste may preclude standing under the judicially created prudential standing requirement, which considers whether a particular plaintiff “is a proper party to invoke judicial resolution of the dispute and the exercise of the Court’s remedial powers.” *Bender v. Williamsport Area School District*, 475 U.S. 534, 546 n.8, 106 S. Ct. 1326, 1334 n.8 (1986). The key question is whether the injury of which the plaintiff’s complain is “arguably within the zone of interests to be protected” by the constitutional guarantee in question, which is in this case the dormant Commerce Clause. *National Solid Waste Management Association v. Pine Belt Regional Solid Waste Management Authority*, 389 F.3d 491, 499 (5th Cir. 2004), quoting in part *Association of Data Processing Cir. v. Organizations, Inc. v. Camp*, 397 U.S. 150, 153, 90 S. Ct. 827, 830 (1970). WCI presently accepts no waste transported from other states. Consequently, WCI is not paying the \$5.00 fee on out-of-state waste and suffers no direct injury from the Ordinance’s impact on *interstate* commerce.

Courts have reached differing conclusions as to whether a plaintiff which does not engage in interstate transport or receipt of waste satisfies this prudential standing requirement. Contrast *National Solid Waste Management Association*, *supra*, 389 F.3d at 499-500, with *On the Green Apartments, LLC v. City of Tacoma*, 241 F.3d 1235, at 1241 (9th Cir. 2001). Accordingly, WCI should be advised that its ability to demonstrate standing to challenge C County’s ordinance is uncertain, but at least possible.

3. Eli would not be successful in bringing a claim of discrimination under the ADA.

The non-discrimination obligations of the Americans With Disabilities Act of 1990 (“ADA”) (42 U.S.C. § 12101 *et seq.*) presently apply to employers who have 15 or more employees, so WCI is an employer as defined by the ADA. (See 42 U.S.C. §12111).

The ADA prohibits discrimination by covered entities, including WCI in this instance, against qualified individuals with a disability. Specifically, it provides that no covered employer “shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a). A “qualified individual with a disability” is defined as “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” 42 U.S.C. § 12111(8). Finally, a “disability” is defined as:

“(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. § 12102(2).

The ADA also requires that disabilities be evaluated with respect to an individual, and be determined based on whether an impairment substantially limits the “major life activities of such individual.” 42 U.S.C. §12102(2). “Thus, whether a person has a disability under the ADA is an individualized inquiry.” *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 483, 119 S. Ct. 2139, 2147 (1999).

To establish a prima facie case of discrimination under the ADA, a plaintiff must demonstrate that (1) he is a disabled person within the meaning of the ADA; (2) he is otherwise qualified to perform the essential functions of the job; and (3) he has suffered an otherwise adverse employment decision as a result of the discrimination. *Gaul v. Lucent Technologies, Inc.*, 134 F.3d 576 (3d Cir. 1998).

Here, it is clear that Eli has a disability within the meaning of the ADA. The loss of use of one arm would substantially limit one or more of Eli’s major life activities (e.g., dressing, use of tools, performing manual tasks). Accordingly, WCI could not discriminate against Eli based on this disability if, with or without reasonable accommodation, he can perform the essential functions of his position. An essential function of the driver is to simultaneously steer and operate the front-end lift and Eli’s physician has advised him that he can no longer perform those functions. WCI must also consider whether there is an accommodation which could allow Eli to continue his present position notwithstanding the limitations imposed by his disability. Given the physical requirements of the position of truck driver, however, there is no readily discernable basis on which Eli could be accommodated in a manner allowing him to continue his current

position. On this basis, removal of Eli from his position of truck driver would not constitute discrimination under the ADA.

Courts have recognized that the duty to accommodate also includes consideration of reassignment of an employee to an appropriate position. *Cravens v. Blue Cross & Blue Shield of Kansas City*, 214 F.3d 1011, 1017 (8th Cir. 2000); *Burns v. Coca Cola Enterprises, Inc.*, 222 F.3d 247, 256 (6th Cir. 2000).

In *Taylor v. Phoenixville School District*, 184 F.3d 296 (3rd Cir. 1999), the Third Circuit stated that “While an employee who wants a transfer to another position ultimately has the burden of showing that he or she can perform the essential functions of an open position, the employee does not have the burden of identifying open positions without the employer’s assistance.” *Id.* at 316. Rather, both the disabled employee and the employer must engage in an “interactive process” to determine appropriate accommodations for the employee. *Id.* at 312. In this instance, therefore, WCI must consider whether Eli could be transferred to a different position in which the essential functions could be performed by an employee with the functional use of only one arm. Here, operation of the trash compacting machine would be possible with only one functioning arm, and Eli would otherwise meet the requirements of that position. The trash compacting machine position, however, is currently held by Mary. Generally, an employer is not required to accommodate a disabled employee by “bumping” another employee from his or her position. See, e.g., *Pond v. Michelin North America, Inc.*, 183 F.3d 592, 596 (7th Cir. 1999); *McCreary v. Libbey-Owens-Ford Company*, 132 F.3d 1159, 1165 (7th Cir. 1997). Accordingly, without a vacant position for which Eli is qualified, there would be no obligation to transfer him, and since no other form of accommodation is available, his termination from his position as truck driver did not violate the non-discrimination obligations of the ADA.

4. The compelled disclosure of personal medical information should be subject to challenge as a violation of the privacy rights deemed protected by the United States Constitution, and would likely be successful.

As noted in *C.N. v. Ridgewood Board of Education*, 430 F.3d 159, 178 (3rd Cir.2005), the Constitution does not contain an explicit right to privacy and the Supreme Court has never “proclaimed that such a generalized right exists.” The Supreme Court has recognized, however, that certain “zones of privacy” are created in the amendments to the Constitution. See *Roe v. Wade*, 410 U.S. 113, 152-153, 93 S. Ct. 705 at 726 (1973). Personal medical information has been deemed within the ambit of this “zone of privacy” by numerous courts. See *Doe v. Attorney General of the United States*, 941 F.2d 780 (9th Cir. 1991), *United States v. Westinghouse Electric Corp.*, 638 F.2d 570 (3rd Cir. 1980).

The right to avoid disclosure of personal medical information is not absolute. Most courts apply some form of balancing test, examining the type of record requested, the information it contains, the potential for harm in any subsequent non-consensual disclosure, the government’s need for access to such information and the adequacy of safeguards to prevent unauthorized disclosure. See *C.N. v. Ridgewood Board of Education*, *supra*, 430 F.3d at 179-80; *Idaho Aids Foundation v. Idaho Housing and Finance Association*, 422 F. Supp.2d 1193 (D. Idaho 2006).

Consideration of these factors in this instance suggests that the compelled disclosure of personal medical information as part of a licensing process for collection of solid waste could not be sustained against the right of employees to protect such personal, confidential information. The information is purportedly sought by C County for the purpose of assuring the health of workers exposed to solid waste. Although this is a noble concern, it seems little related to C County's basis for imposing a licensing requirement in the first instance since an evaluation of the adequacy of the facility, personnel and equipment available to a collector can be accomplished without any reference to personal health information of employees. Thus, there appears to be no real need for access to this information. Moreover, even if there was a need for such disclosure, there are little or no safeguards established by C County to prevent inadvertent, non-consensual disclosure of employees' personal health records, which are stored in unlocked filing cabinets readily accessible by C County employees. The possibility of harm from disclosure of such personal health information to random employees of C County, with the related risk of re-disclosure, is extraordinarily high. The balancing of the competing interests in this case tips easily in favor of the employees, whose personal medical history is potentially exposed out to view by many persons. Accordingly, a challenge based upon the privacy rights created under the Constitution would likely be successful.

Question No. 5: Facts and Interrogatories

George subdivided a tract of land located in Pennsylvania into parcels designated as Lots 1, 2, and 3. The recorded subdivision plan for this tract contained the following restriction: “No intoxicating beverages of any kind shall be sold, kept for sale, or manufactured for sale on any lot in the plan. This restriction shall be binding upon all grantees, their heirs, successors, or assigns.”

Angie was engaged to marry Bob. George sold Lot 1, which had a house constructed on it, to Angie and Bob. George’s deed conveyed Lot 1 to Angie and Bob as tenants by the entirety. Bob moved into the house on Lot 1 in anticipation of the marriage. Angie had a fight with Bob, broke their engagement, and eloped to Las Vegas where she married John.

George conveyed Lots 2 and 3 to other grantees by valid deeds that expressly referred to the restriction in the subdivision plan. Within a short period of time, George’s original grantees properly conveyed Lots 2 and 3 to new grantees. Lot 2 was conveyed to Connie by a deed which stated that the transfer of the lot was “under and subject to all restrictions of record.” Lot 3 was conveyed to Dave. Dave, who declined his attorney’s advice to have a title search performed, received a deed that contained no mention of any restriction on the use of Lot 3.

1. Angie died shortly after her marriage to John. As the Executor and sole heir under Angie’s Will, John filed an appropriate action in court to determine the ownership of Lot 1. How should the Court rule on John’s action?
2. Dave started construction of a micro-brewery on Lot 3. Connie is opposed to the construction of a micro-brewery. What relief should Connie seek to stop Dave’s construction and what legal theory, if any, supports her right to relief?

Dave later purchased an old warehouse in nearby Big City, Pennsylvania, in order to convert the property into “Happy Harry’s,” a nationally franchised eating/family entertainment complex. The Happy Harry’s franchise was a completely new and untried concept in the Big City market. Dave, who had extensive experience in the restaurant and entertainment industries, examined earnings reports for other Happy Harry’s franchises in comparable locations and estimated that a franchise in Big City would earn an average of \$1,000/day in profits. Dave entered into a written contract with Ed, a local contractor, to convert the warehouse into a Happy Harry’s. The contract provided that the work was to be completed by October 1, 2006, the date of Happy Harry’s grand opening. The agreement between Dave and Ed expressly provided that Ed would pay \$1,000/day if the renovation of the warehouse was not completed in time for Happy Harry’s grand opening.

Dave entered into a separate written contract with Tony to perform special electrical work needed for the electronic games that would be part of the Happy Harry’s complex. As the October 1st opening date rapidly approached, Tony told Dave that he would not be able to complete his work on time because his supplier (Supplier) refused to provide him with necessary parts and supplies until Tony paid a long overdue bill. Dave called Supplier and said, “If you don’t give Tony the parts and supplies, my Happy Harry’s will not open on schedule. If you give Tony the parts and he still does not pay his bill, I will pay you.” Supplier gave Tony the parts and supplies and Tony finished the electric work before the scheduled opening.

Happy Harry's opened ten days late due to Ed's failure to finish the renovations to the warehouse. When Happy Harry's finally opened for business, it proved to be more successful than anticipated and has earned an average of \$1,500/day in profits.

3. When Tony's bills for parts and supplies remained unpaid, Supplier sued Dave for breach of contract. Can Dave successfully defend Supplier's suit based upon the Statute of Frauds?
4. Dave sues Ed for his actual damages suffered when Happy Harry's did not open on time. If Ed is found liable, what is the proper measure of damages?

Question No. 5 – Examiner's Analysis

1. **Because Angie and Bob were not married, the deed conveying Lot 1 did not create a tenancy by the entirety. The deed will be construed to create a joint tenancy with right of survivorship between Angie and Bob. Since Bob survived Angie, the court will declare that Bob is owner of the entire interest in Lot 1.**

“Under Pennsylvania law, it is not possible for two persons who are not married to one another to hold title to land as tenants by the entirety.” *Estate of Reigle*, 438 Pa. Super. 361, 652 A.2d 853, 854 (1995), *appeal denied*, 542 Pa. 672, 668 A.2d 1135. Marriage, in addition to the unities of time, title, interest and possession, is a necessary element in order for an estate to be held as tenants by the entirety. *Masgai v. Masgai*, 460 Pa. 453, 333 A.2d 861 (1975). Since Angie and Bob were not married at the time that George conveyed Lot 1 to them, they could not own the property as tenants by the entirety.

Although a deed to two unmarried persons as tenants by the entirety is legally ineffective in creating such an interest, the deed itself is not wholly invalid. *Thornton v. Pierce*, 328 Pa. 11, 16, 194 A. 897, 899 (1937). Since the transfer is nevertheless valid, the Pennsylvania Supreme Court has declared that there is “no reason why the grantees, like any other two persons, cannot take title in some form of dual ownership appropriate under the circumstances.” *Maxwell v. Saylor*, 359 Pa. 94, 96, 58 A.2d 355, 356 (1948).

In determining what is the appropriate form of dual ownership when an attempt to create a tenancy by the entirety fails because of the absence of the marriage element, Pennsylvania courts look to the intention of the parties, the traditional guideline by which all deeds are to be interpreted. *Riccelli v. Forcinito*, 407 Pa. Super. 629, 634, 595 A.2d 1322, 1325 (1991), *appeal denied*, 529 Pa. 651, 602 A.2d 861 (1992). Where the language of the deed is clear and unambiguous, the intent of the parties must be gleaned solely from an examination of the language of the deed. *Teacher v. Kijurina*, 365 Pa. 480, 486, 76 A.2d 197, 200 (1950).

In numerous cases, the Pennsylvania courts have held that where a deed to two unmarried individuals uses the words “tenants by the entirety,” the use of such language shows an intent to establish a right of survivorship. Accordingly, the deed should be construed to create the form of joint ownership that most closely approximates a tenancy by the entirety: a joint tenancy with right of survivorship. *See, e.g., Estate of Reigle, supra.; Riccelli v. Forcinito, supra.; Maxwell v. Saylor, supra.*

In *Maxwell v. Saylor*, an unmarried couple purchased a parcel of property. The deed to the property designated them as husband and wife and stated that the grant was as “tenants by the entirety.” While it concluded that the deed was ineffective in creating a tenancy by the entirety, the Supreme Court of Pennsylvania declared that the use of term “tenancy by the entirety” in the deed was significant in determining the appropriate form of joint ownership that should be given effect. The Court in *Maxwell* declared:

Their declared intention was to own the property as tenants by the entirety which ... was equivalent to stating in so many words that they desired to establish a right of survivorship. Therefore, joint tenancy with right of survivorship ... best effectuates their intention to the extent legally permissible, that being the form of tenancy for unmarried persons most nearly resembling the tenancy by the entirety enjoyed by husband and wife, since in both instances the survivor takes the whole.

Maxwell v. Saylor, supra., 58 A.2d at 356. (citations omitted).

In some jurisdictions, an attempted conveyance as a tenancy by the entirety which fails due to the absence of the marriage element would be construed to create a tenancy in common based on the strong presumption against forms of joint ownership of property with rights of survivorship. Although Pennsylvania also has a presumption against rights of survivorship (*See* 68 P.S. § 110), the Pennsylvania Superior Court in *Estate of Reigle*, declared that this statutory presumption against survivorship was overcome when a deed conveying title to unmarried grantees contained tenancy by the entirety language. The court in *Estate of Reigle* observed:

If the deed ... had been silent as to the estate to be acquired by the grantees, the [statutory presumption] would have required that they hold as tenants in common. When the deed recited that they were to hold as tenants by the entirety, however, the issue became whether by this language they intended a joint tenancy with right of survivorship. The words ‘tenants by the entirety’ cannot be disregarded and, when construed, must entail some element of survivorship. Therefore, the language of the conveying clause can best be given effect by holding that the grantees were to hold title as joint tenants with right of survivorship.

Estate of Reigle, supra., 652 A.2d at 855.

Therefore, a Pennsylvania court examining the facts in this case and the applicable precedents would probably conclude that the use of the tenants by the entirety language in George’s deed should be construed as creating a joint tenancy with right of survivorship between Angie and Bob and not a tenancy in common.

Although the deed conveying Lot 1 did not create a tenancy by the entireties between Angie and Bob because they were not married, the transfer of the property is still valid. Instead, the language of the deed will be construed to create a joint tenancy with right of survivorship between Angie and Bob. Since Bob is the survivor, the court will declare that he is the sole owner of the entire interest in Lot 1.

2. Connie should seek injunctive relief on the basis that Dave was violating the restrictive covenant that prohibits intoxicating beverages from being sold, kept or manufactured on any lot in their subdivision.

Restrictive covenants affecting real property are mainly of two kinds. A restriction which is binding only upon the covenantor and which is not intended to be a continuing charge on the realty is classified as a personal covenant. Those restrictions that are so closely connected with the realty that their benefits and burdens pass to subsequent purchasers and assignees of the realty are classified as real covenants or covenants running with the land. *DeSanno v. Earle*, 273 Pa. 265, 117 A. 200 (1922).

As a general matter, restrictive covenants that run with the land are not favored in the law because they constitute an interference with an owner's free use and enjoyment of real property. Although the law disfavors such restrictions on an owner's free use and enjoyment of real property, restrictive covenants running with the land are nevertheless legally enforceable. *Vernon Volunteer Fire Department v. Connor*, 579 Pa. 364, 374, 855 A.2d 873, 879 (2004).

Under Pennsylvania law, an action in equity seeking injunctive relief is available to enforce a covenant in a deed or recorded plan. *Peter v. Davis*, 426 Pa. 231, 238, 231 A.2d 748, 752 (1967). When equitable enforcement of the covenant is sought, a court will examine several factors in determining if the restrictive covenant (equitable servitude) is binding on successive owners.

First, the restriction, which must be in writing, must touch and concern the land. This requirement generally involves the imposition of some benefit or burden upon the land by some restriction of its use. *Goldberg v. Nicola*, 319 Pa. 183, 178 A. 809 (1935); William B. Stoebuck & Dale A. Whitman, *The Law of Property*, § 8.15 (3d. 2000). In this case, the restriction included in the subdivision plan clearly touches and concerns the land because it imposes a benefit or a burden on the lots by prohibiting the sale and manufacture of intoxicating beverages.

Another factor used in determining whether the equitable servitude is binding upon successive owners is the intention of the parties. *DeSanno v. Earle, supra.*, 273 Pa. at 270, 117 A. at 202. To determine intent, a court must examine the language of the covenant in light of the subject matter thereof, the apparent purpose of the parties and the conditions surrounding execution of the covenant. *Gey v. Beck*, 390 Pa. Super. 317, 568 A.2d 672 (1990). Applying these criteria to the stated facts, it is evident that George's intention was to have the restriction contained in the subdivision plan bind subsequent owners of the lots.

The language of the covenant included by George in his subdivision plan is clear and unambiguous. George plainly expressed his desire that none of the lots in the subdivision should have any connection with the sale, storage, distribution or manufacture of intoxicating beverages.

Additionally, while the facts do not provide any specific reason why George wanted the restriction, it can be reasonably assumed that George's purpose in creating the restriction was to protect the health, peace and welfare of present and future owners from the nuisances and vices inherent in the sale, manufacture and consumption of alcoholic beverages. On several occasions, the Pennsylvania courts have held that a covenant that restricts land from use in connection with the sale or consumption of alcoholic beverages is a valid and enforceable covenant running with the land. *See, e.g., Vernon Volunteer Fire Department v. Connor, supra.; Logston v. Penndale, Inc.*, 394 Pa. Super. 393, 576 A.2d 59 (1990); *Appeal of J.C. Grille, Inc.*, 181 Pa. Super. 456, 124 A.2d 659 (1956).

Furthermore, language stating that a particular restriction is binding upon the grantees' heirs and assigns is considered to be "generally decisive of the question" whether a covenant is intended to run with the land. *Leh v. Burke*, 231 Pa. Super. 98, 107, 331 A.2d 755, 760 (1974). Here, the restriction in the covenant states that it is "binding upon all grantees, their heirs, successors and assigns." Thus, language of the restriction is another indication that George wanted the restriction to be binding upon all subsequent owners of the lots in the subdivision.

In this case, Dave did not have actual notice of the restriction prohibiting use of Lot 3 for the making of intoxicating beverages. Further, no reference to the restriction was included in his deed to the lot. Dave, however, cannot use either the absence of actual notice of the restriction or the lack of any reference to the restriction in his deed to avoid compliance with the restriction on his use of the property. In *Finley v. Glenn*, 303 Pa. 131, 138, 154 A. 299, 301 (1931), the Pennsylvania Supreme Court held not only that a property owner had the duty to become aware of the recorded restrictions in his chain of title but also that the property owner would be bound by such restrictions even in the absence of actual notice. Consistent with *Finley v. Glenn*, other Pennsylvania courts have held that the lack of a specific reference to a restriction contained in a prior recorded deed or subdivision plan did not excuse compliance with the restriction. *Doylestown Township v. Teeling*, 160 Pa. Cmwlth. 397, 635 A.2d 657 (1993); *Leh v. Burke, supra.* Because the restriction here was in the recorded subdivision plan and Dave could have learned about the restriction if he had performed a title search, he will be deemed to have constructive notice of the restriction and the restriction can be enforced against him.

The restriction prohibiting the sale, storage or manufacture of intoxicating beverages on the lots was intended by George to be a covenant running with the land and to be binding upon and enforceable by successive owners of the lots within the subdivision based upon its particular wording of the covenant and its purposes. The inclusion of the restriction in the recorded subdivision plan provided constructive notice to all successive owners of the lots within the subdivision of the existence of a limitation on the use of their property. Connie should file an action in equity seeking an injunction to stop Dave's construction of the micro-brewery on Lot 3 by alleging a violation of an equitable servitude that prohibits intoxicating beverages from being sold, kept or manufactured on any lot in their subdivision.

3. Dave will not be able to successfully defend Supplier's suit because Supplier can enforce Dave's oral promise to pay Tony's debt under the leading object or main purpose exception to the Statute of Frauds.

The Pennsylvania Statute of Frauds requires that a promise to answer for the debts of another must be in writing to be enforceable. Pa. Stat. Ann. tit. 33, §3. The Pennsylvania Superior Court has set forth several reasons why promises to answer for the debt of another must be in writing:

Promises to pay the debt of another must be in writing for two reasons. The first is evidentiary. The second, cautionary. . . . [T]he circumstance that the promisor has received no benefit from the transaction ... may make perjury more likely because while in the case of one who has received something the circumstances themselves which are capable of proof show probable liability, in the case of a guaranty nothing but the promise is of evidentiary value. Furthermore, though in many instances the surety is paid by the principal for his undertaking, in others the surety's motivation is purely gratuitous and, as the lack of any benefit received by the guarantor increases the hardship of his being called upon to pay, it also increases the importance of being very sure that he is justly charged.

In addition to serving an evidentiary role, the provision serves a cautionary function. By bringing home to the prospective surety the significance of his act, it guards against ill-considered action.

Thomas A. Armbruster, Inc. v. Barron, 341 Pa. Super. 409, 412, 491 A.2d 882, 883-84 (1985), quoting, E.A. Farnsworth, *Contracts* § 6.3 (1982).

The Statute of Frauds rule that a promise to answer for debt of another must be in writing does not apply, however, if the main object of the promisor is to serve his own pecuniary or business purpose. *Webb Manufacturing Company v. Sinoff*, 449 Pa. Super. 534, 674 A.2d 723 (1996). This specific exception to the suretyship provision of the Statute of Frauds is known as the "leading object" or "main purpose" rule. This exception "applies whenever a promisor, in order to advance some pecuniary or business purpose of his own, purports to enter into an oral agreement even though that agreement may be in the form of a provision to pay the debt of another." *Biller v. Ziegler*, 406 Pa. Super. 1, 8, 593 A.2d 436, 440 (1991). The Restatement (Second) of Contracts provides this rationale for the leading object or main purpose exception:

Where the surety-promisor's main purpose is his own primary or business advantage, the gratuitous or sentimental element often present in suretyship is eliminated, the likelihood of disproportion in the values exchanged between promisor and promisee is reduced, and the commercial context commonly provides evidentiary safeguards. Thus there is less need for cautionary or evidentiary formality than in other cases of suretyship.

Restatement (Second) of Contracts § 116, comment a; *Thomas A. Armbruster, Inc. v. Barron*, *supra.*, 491 A.2d at 884.

Case law provides no bright line test for determining when a promisor has made an oral promise to benefit himself and his own interests rather than to benefit and accommodate another.

The trier of fact must determine the purpose, motive or object of the promisor in agreeing to pay the debt of another “by analyzing the complex of objective manifestations surrounding the making of the promises.” *Webb Manufacturing Company v. Sinoff, supra.*, 674 A.2d at 726, quoting J. Murray, *Murray on Contracts* §316 (2d ed. 1974).

In this case, Dave clearly made an oral promise to Supplier to pay the overdue bill owed by Tony if Supplier gave Tony the parts and supplies needed to complete the electrical work at Happy Harry’s. Dave’s oral promise to Supplier to pay Tony’s bill was made to prevent any delay in the planned opening of Dave’s new Happy Harry’s complex. Dave’s statements strongly suggest that he made this promise not out of concern for Tony but to advance his own pecuniary or business interests.

Given these circumstances, Supplier still can enforce Dave’s promise to pay Tony’s bill, even though it is not in writing, under the leading object or main purpose exception to the Statute of Frauds.

4. Dave should be precluded from receiving actual damages because the contract with Ed contains a valid liquidated damages clause.

Contracting parties may include as part of their agreement a clause specifying in advance the amount of damages that a party shall receive in the event that a breach occurs. Such a clause is known by the term of art phrase as “liquidated damages.” *Pantuso Motors, Inc. v. Corestates Bank, N.A.*, 568 Pa. 601, 608, 798 A.2d 1277, 1282 (2002).

A liquidated damages clause is a valid contractual provision if it comports with the general and overarching principle of contract damages - compensation for damages sustained. *Holt’s Cigar Co. v. 222 Liberty Associates*, 404 Pa. Super. 578, 587, 591 A.2d 743, 747 (1991). Consistent with this principle, a liquidated damages clause only will be enforced by a court if two requirements are met. First, the computation of actual damages for contractual breach is speculative or otherwise difficult to estimate or ascertain in advance or to prove after a breach occurs. Second, the amount agreed to as damages is a reasonable forecast or approximation of the expected loss. *Carlos R. Leffler, Inc. v. Hutter*, 696 A.2d 157, 162 (Pa. Super. 1997).

When a liquidated damages provision is intended as a form of punishment, the threat of which is designed to secure contractual compliance, the overarching principle of contract damages recognizing recovery only for the actual loss sustained by a party is subverted and such a provision must fail as a penalty. *Hanrahan v. Audubon Builders, Inc.*, 418 Pa. Super. 497, 502, 614 A.2d 748,750 (1992). Where the amount fixed in advance as damages is highly disproportionate to the amount of probable loss in the event of a breach, it is considered a penalty and not compensation. *Holt’s Cigar Co. v. 222 Liberty Associates, supra.*, 591 A.2d at 748.

To assist in distinguishing a valid liquidated damages clause from an unenforceable penalty provision, the courts have employed certain rules of construction that are commonly thought to provide the best indication of the parties’ intent.

The question [of whether stipulation is a penalty or a valid liquidated damages provision] is to be determined by the intention of the parties, drawn from the words of the whole contract, examined in the light of its subject matter and its surroundings; and that in this examination we must consider the relation which the sum stipulated bears to the extent of the injury which may be caused by the several breaches provided against, the ease or difficulty of measuring a breach in damages, and such other matters as are legally or necessarily inherent in the transaction.

Commonwealth v. Musser Forests, Inc., 394 Pa. 205, 212, 146 A.2d 714, 717 (1959), quoting *March v. Allabough*, 103 Pa. 335, 341 (1883).

Further, parties who agree to include a liquidated damages clause in their contract cannot later claim entitlement to actual damages if the clause is found to be valid. Rather, the parties are bound to their bargain and any evidence as to the existence and extent of injury received by the court in determining the character of the provision is no longer relevant once the court has concluded that the provision is a true liquidation clause and not a penalty. This is true regardless of whether the claim is that the amount of liquidated damages is insufficient to fully compensate the aggrieved party or excessive in light of the actual damages caused. *Calabro v. Department of Aging*, 689 A.2d 347, 351-52 (Pa. Cmwlth. 1997), *appeal denied*, 548 Pa. 674, 698 A.2d 596 (1997).

In this case, the facts state that Happy Harry's was a completely new and untried concept in the Big City market. What Dave's earnings would be for this new and untried restaurant/family entertainment franchise is less than certain and would appear to be difficult to ascertain at the time that Dave entered into his contract with Ed for the renovations to the warehouse.

The facts here also state that Dave had extensive experience in the restaurant and entertainment industries. He used his experience to conduct an examination of what other Happy Harry's franchises earned in locations comparable to Big City. The figure of an average of \$1,000/day in lost profits that was agreed to by the parties was not some made up, spur-of-the moment figure, but rather appears to be a well thought out attempt by the parties to reasonably forecast the expected loss that Dave would suffer if Ed breached the contract. *See, e.g., Holt's Cigar Co. v. 222 Liberty Associates, supra.* (\$500 per diem payment not a good faith pre-estimate of damages anticipated from delayed repairs). Furthermore, although the actual damages suffered by Dave are greater than the stipulated loss amount in the contract with Ed, the difference between the two amounts does not seem to be so grossly disproportionate as to afford any party a windfall.

In short, Dave and Ed's agreement contained a damages provision that satisfies the legal requirements for enforcing a claim for liquidated and not actual damages. Since the parties agreed to include a liquidated damages clause in their contract, the court will enforce their bargain. Therefore, Dave will be precluded from receiving his actual damages suffered as a result of Ed's breach of the agreement.

Question No. 6: Facts and Interrogatories

Retail, Inc. ("Retail"), a Pennsylvania corporation, operates a retail appliance store in Pennsylvania. Pete owns 10% of Retail's stock and has served on its board of directors and as its President for ten years. Bill, the founder of Retail, owns the remaining stock and serves on Retail's board. Bill had originally hired Pete as president and sold Pete stock in Retail because Bill wanted to retire. Bill told Pete that, over time, he would transfer additional Retail stock to Pete; however, Bill is comfortable with his income from his Retail stock and has not done so.

Retail's board has been discussing opening an outlet store to move some of its less expensive merchandise. The board feels an outlet would enhance Retail's profits. Recently, while meeting with one of Retail's suppliers, Pete learned that Outlet, Inc. ("Outlet"), an outlet based appliance store, is trying to sell out. The Outlet location would be perfect for Retail.

Due to his dissatisfaction with Bill, Pete plans to form a new corporation, which he alone would own, to purchase Outlet. Pete does not intend to make Retail's board aware of the Outlet opportunity.

Six months ago, Retail began to use a new sales agreement that Pete developed to allow its customers to purchase goods by making installment payments. The sales agreement is six pages long with small print. It includes a complicated cross-default/cross-collateralization clause that gives Retail the right if a customer defaults on one agreement to declare a default on all of that customer's agreements and repossess all collateral under that customer's agreements even if the customer is current on the other agreements. Retail's counsel has advised Pete that this clause may be subject to attack under Pennsylvania law. Pete stated, "Most of our customers are not that smart," and has left the clause in the agreement.

Joe, a high school dropout, has lived with his mother just outside of Pennsylvania in State X his entire life. Four months ago, Joe learned of a part-time janitor position with the government offices of C City, Pennsylvania. C City requires all of its employees to be residents of C City. Joe found a one-room apartment in C City and entered into a month-to-month lease. Joe listed the apartment as his residence on his C City job application. Joe does not like C City and spends nearly every evening and weekends at his mother's State X home, sleeping and eating nearly all meals there. Joe has maintained his checking account, driver's license, and voter registration at his mother's address.

Three months ago, Joe had visited Retail to buy a refrigerator for his apartment and a new stove for his mother. Each had a cost of less than \$500. Pete prepared two sales agreements providing for installment payments; one for Joe's refrigerator and one for the stove. Pete did not explain the agreements to Joe prior to Joe signing them. Joe asked Retail to hold the stove in its warehouse for a few months because it is a surprise birthday gift for his mother. Joe is behind in payments on the refrigerator but is current on the stove having paid 80% of the total contract amount. Retail has declared a default under both sales agreements and has filed suit to recover the refrigerator and stove.

Because of Joe's minimal income, he is eligible for food stamps. He visited the Welfare office in C City and explained his circumstances. The caseworker correctly advised Joe that he can get food stamps but, under Pennsylvania law, the amount he will receive will be the amount

payable under the law of the state of his domicile. Pennsylvania provides a higher amount of food stamps than State X, so Joe would like Pennsylvania law to be determinative.

1. Under corporate law, what substantive argument, if any, could Retail assert to challenge Pete's actions if he forms a new corporation and buys Outlet?
2. In such a challenge, what remedy(s) might Retail seek?
3. Under the Pennsylvania Uniform Commercial Code, what defense can Joe assert in court to challenge the cross-default/cross-collateralization clause as it would apply to the stove and with what likely result?
4. Which state's food stamp amount will Joe be entitled to receive?

Question No. 6 - Examiner's Analysis

1. Retail could assert that Pete has breached his duty of loyalty to Retail and has taken advantage of a corporate opportunity to the detriment of the corporation.

The Pennsylvania Business Corporation Law of 1988, as amended (the "BCL"), states, "[a] director of a business corporation shall stand in a fiduciary relation to the corporation and shall perform his duties as a director . . . in good faith, in a manner he reasonably believes to be in the best interest of the corporation . . ." 15 Pa. C.S.A. §1712(a). This is commonly known as the duty of loyalty. Section 1712(c) of the BCL similarly imposes a duty of loyalty upon corporate officers. Directors of a corporation have been analogized to trustees of a trust with the shareholders of the corporation being the beneficiaries of the trust. *See, Sell, Pennsylvania Business Corporations, Rev. 2d Ed. §1712.2*. As such, a director "acting in good faith will not put herself in a position where her personal interests conflict with her duty to the corporation . . ." *Id. at §1712.4*.

Pete's action presents a classic "corporate opportunity" situation. "The law has long recognized the doctrine of corporate opportunity which prohibits one who occupies a fiduciary relationship to a corporation from acquiring, in opposition to the corporation, property in which the corporation has an interest or tangible expectancy or which is essential to its existence." *Fletcher Cyc. Corp., (Perm. Ed.) §861.10*. A corporate opportunity is said to exist "when a proposed activity is reasonably incident to the corporation's present or prospective business and is one in which the corporation has the capacity to engage." *Id.* Directors "must devote themselves to the corporate affairs with a view to promote the common interests and not their own, and they cannot, either directly or indirectly, utilize their position to obtain any personal profit or advantage other than that enjoyed also by their fellow shareholders." *Seaboard Industries, Inc. v. Monaco*, 442 Pa. 256, 261, 276 A.2d 305, 309 (1971). The *Seaboard* court further stated:

In short, there is demanded of the officer or director of a corporation that he furnish to it his undivided loyalty; if there is presented to him a business opportunity which is within the scope of its own activities and of present or

potential advantage to it, the law will not permit him to seize the opportunity for himself; if he does so, the corporation may elect to claim all of the benefits of the transaction.

Id. at 262, 309. Pete had a duty to disclose to the corporation his knowledge of the opportunity. This duty includes “the obligation of a director to reveal an opportunity of interest to him personally which is also available to the corporation.” *Sell, Pennsylvania Business Corporations, Rev. 2d Ed. §1712.6*. If, after full and fair disclosure of the opportunity to the corporation, it chooses not to avail itself of the opportunity then the director may, assuming no other conflict exists, pursue the opportunity. “Thus, the appropriate method to determine whether or not a corporate opportunity exists is to let the corporation decide at the time the opportunity is presented.” *Fletcher Cyc. Corp., (Perm. Ed.) §861.10*.

The facts are clear that obtaining Outlet would enhance Retail’s operations and increase its profits. Retail has been considering an outlet location. Pete appears to be acting out of spite to Bill and his usurpation of the Outlet opportunity flies directly in the face of his duty of loyalty to Retail and its shareholders. Pete should not have taken advantage of the opportunity until he first fully disclosed it to Retail’s board and the board rejected the opportunity. Pete has breached his duty of loyalty to Retail by taking the opportunity.

2. Retail most likely will seek the imposition of a constructive trust and an accounting from Pete.

“The corporate opportunity doctrine rests upon the broad foundation of public policy that, for the purpose of removing all temptation, it extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relations.” *Fletcher Cyc. Corp., (Perm. Ed.) §861.50*. Accordingly, a director who breaches his duty of loyalty to a corporation by usurping an opportunity will not be allowed to benefit from his breach.

The remedies for usurpation of a corporate opportunity will generally lie in equity. *See, Sell, Pennsylvania Business Corporations, Rev. Ed. §1712.3*. The remedy most often applicable to a misappropriation of corporate opportunity is the imposition of a constructive trust for the benefit of the corporation against the property or opportunity. *See, Fletcher Cyc. Corp., (Perm. Ed.) §861.50*. On occasion courts have also required the party who has usurped the corporate opportunity to account for all profits derived because of the usurpation of opportunity and to pay over those profits for the benefit of the corporation. *See Seaboard Industries, Inc. v. Monaco*, 442 Pa. 256, 276 A.2d 305 (1971).

Retail could seek the imposition of a constructive trust upon the outlet opportunity taken by Pete. Retail could also ask the court to compel Pete to account for any profits derived as a result of his usurpation of the outlet opportunity. Under the facts Retail has a high likelihood of success on both counts.

3. Joe should argue that the clause is unconscionable and ask the court to, at a minimum, enforce the contract without recognition of the unconscionable clause.

Long before the adoption of the Uniform Commercial Code courts of equity “have refused to grant specific enforcement of, or have rescinded, contracts so unconscionable ‘as no

man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.” *White and Summers, Uniform Commercial Code, (4th Ed.) §4-2*. The doctrine of unconscionability now appears in the Pennsylvania Uniform Commercial Code (the “Code”) and the codes adopted by most other states. The Code provides:

(a) Finding and authority of court.--If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may:

(1) refuse to enforce the contract;

(2) enforce the remainder of the contract without the unconscionable clause; or

(3) so limit the application of any unconscionable clause as to avoid any unconscionable result.

(b) Evidence by parties.--When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

13 Pa. C.S.A. §2302. This section assigns the issue of unconscionability to the judge to determine. Comment 1 to Section 2302 states, “[t]he basic test is whether, in light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of making of the contract.”

It is impossible to provide a black and white definition of unconscionability. Words such as “oppressive,” “unfair” and “one-sided” often appear in cases where the issue is discussed. *White and Summers* discuss concepts of both procedural and substantive unconscionability. The former concept addresses bargaining unfairness, e.g., small print, complex terms, failure to allow a buyer to read the contract. The later focuses on the one-sided nature of the terms of the clause in question itself. *See, White and Summers, Uniform Commercial Code (4th Ed.) §4-3*. In a case parallel to the case at hand the court stated, “[u]nconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.” *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 2 U.C.C. 955 (D.C. Cir 1965).

Here, arguments can be made that the clause in question raises issues of both procedural and substantive unconscionability. Procedurally, the cross-default/cross-collateralization clause is suspect because it is part of the six-page agreement with small print. Additionally, Pete never explained the clause to Joe despite its complexity. These procedural defects are relevant to establishing the absence of meaningful choice on the part of Joe. *Id. at 449*. Substantively, the clause is one sided in favor of Retail and results in an unfair result, i.e., the stove could be taken even though 80% paid for. On the contrary, one might argue that a clause such as this is justified because the seller is taking a substantial risk in extending credit to one who is less than credit worthy.

If the court finds unconscionability, the court “in its discretion, may refuse to enforce the contract as a whole if it is permeated by the unconscionability, or it may strike any single clause or group of clauses which are so tainted or which are contrary to the essential purpose of the agreement, or it may simply limit unconscionable clauses so as to avoid unconscionable results.” *13 Pa. C.S.A. §2302, Comment 2*. The facts do not describe other contract terms so it is difficult to determine if the court would refuse to enforce the contract in its entirety. Despite arguments that the clause is substantively acceptable, there is basis for the court to strike the cross-default/cross-collateralization clause as unacceptable on a substantive basis as well as on a procedural basis.

4. Joe likely will receive the lower amount of food stamps as the law of State X will most likely be applicable.

Pennsylvania law provides that the amount of food stamps to be received is governed by the law of the person’s domicile. The question of domicile is to be determined by the law of the forum. *Greenwood v. Hildebrand*, 357 Pa. Super. 253, 515 A.2d 963 (1986). Therefore, Pennsylvania law will be applied in determining the state of Joe’s domicile because he has applied for food stamps in Pennsylvania.

A determination of a person’s domicile is governed by the facts in each case. *Civil Service Com’n of the City of Pittsburgh v. Parks*, 80 Pa. Cmwlth. 134, 471 A.2d 154 (1984).

A domicile is the place at which an individual has fixed his family home and principal establishment for an indefinite period of time. *Citation omitted*. A domicile once acquired is presumed to continue until it is shown to have been changed and where a change is alleged the burden of proving it rests upon whoever makes the allegation. *Citation omitted*. A new domicile can be acquired only by physical presence at a new residence plus intent to make that new residence the principal home. *Citation omitted*. Intent is the actual state of facts, not what one declares them to be.

In Re Pendergast, 543 Pa. 498, 506, 673 A.2d 324, 327 (1996). Although one may have multiple residences, one can have only one domicile. *See Greenwood, supra.; Restatement, Second, Conflict of Laws §11(2)*. Domicile, then, is a matter of intention, unlike residence, which is a physical fact. *See Greenwood, supra.*

Joe has established a residence in C City, Pennsylvania. Joe has also declared, via his job application, C City, Pennsylvania, to be his residence. The courts, however, have made it clear that a declaration is not conclusive. Instead, one must look to the intent indicated or revealed by the acts and conduct of the person. *Civil Service Com’n of the City of Pittsburgh v. Parks*, 80 Pa. Cmwlth. 134, 471 A.2d 154 (1984). Although, Joe has an apartment in C City, he neither sleeps nor eats at this apartment. He has not changed his checkbook, driver’s license or voting addresses to C City. Clearly, Joe has not exhibited behavior consistent with demonstrating an intent to have C City become his permanent home. His actions, rather, demonstrate an intention to have State X continue to be his domicile. Accordingly, Pennsylvania will apply the law of State X in determining the amount of food stamps for which Joe will be eligible.

Grading Guidelines

Question No. 1

1. **Pennsylvania Rules of Professional Conduct: Confidentiality of Information**

- Subject to certain exceptions, a lawyer shall not reveal to third parties information relating to representation of a client unless the client consents or the disclosure is impliedly authorized by the representation.
- An exception to the general rule of confidentiality is if the lawyer reasonably believes that a disclosure of confidential information is necessary to prevent a reasonably certain death.

5 points

Comments: Candidates should recognize that Able without Sam's permission and without an implied authorization to do so, broke Able's confidence with Sam about Sam's plan to assist Frank with a drug overdose by telling Frank's doctor (who was prescribing the prescriptions to be used for the overdose). Candidates should also recognize that the "prevent future harms" exception to this rule of confidentiality may reasonably apply.

2. **Estates: Intestacy, Advancement and Slayer's Act**

- The intestate estate of a decedent who does not leave a surviving spouse but does leave two surviving children (and no deceased children) passes in equal shares to the decedent's two children.
- A payment by an intestate decedent to his beneficiary accompanied by a writing that the payment is an advancement will be considered as partial payment of that beneficiary's inheritance.
- A person who willfully and intentionally participates in the unlawful killing of another person shall not in any way acquire any property or receive any benefit as a result of the death of that person, and instead shall be deemed to have predeceased the person.

10 points

Comments: Candidates should recognize that the estate of a decedent without a will who does not leave a surviving spouse but does leave two surviving children (and no deceased children) passes in equal shares to the decedent's two children. Candidates should also recognize that an intestate decedent who makes a pre-death payment to an intestate beneficiary and declares same in writing to be an advancement toward the inheritance shall be deemed to have made an advancement to the beneficiary which will be deemed to be on account of his inheritance. Furthermore, candidates should recognize that the decedent's son under the facts is a slayer who is ineligible to receive his inheritance. Sam will be treated as if he had predeceased Frank, and his inheritance will thus pass to his son.

3. Federal Income Tax: Exclusion of Advancement from Gross Income and Inclusion of Fees for Services in Gross Income

- An advancement of an inheritance under intestate laws is not includable in gross income because an inheritance is not includable in gross income. It is fundamentally an inter vivos gift which is not includable in gross income.
- A payment which is designated as an advancement on an inheritance but also is a fee for services to be rendered is arguably includable in gross income as compensation for services.

5 points

Comments: Candidates should recognize that an advancement of an intestate inheritance is not includable in gross income for federal income tax purposes because whether considered an inheritance or a gift, it is not gross income. Candidates should also recognize that a payment which is both an advancement toward an intestate inheritance and also made in return for an agreement to provide services is arguably includable in gross income for federal income tax purposes as compensation for services.

Question No. 2

1. Crimes

- Kidnapping - identify and discuss the elements including the removal of Amy for a substantial distance from a place of relative safety to facilitate the commission of the robbery.
- Second degree murder - identify and discuss the elements including death occurring in the course of committing one of the enumerated felonies (robbery/kidnapping); no intent to kill is required.
- First degree murder - identify and discuss the elements including that it is an intentional killing (willful, deliberate or premeditated).

11 Points

Comments: The candidate must discuss the elements of each crime in relation to the facts provided and reach the proper conclusion as to whether each crime is supported by the facts.

2. Suppression

- Constitution applies to governmental action;
- Constitutional protections (Miranda) not applicable to acts of private citizens (Chief).

3 Points

Comments: The candidate must discuss that Constitutional protections apply to the acts of governmental officials and not private citizens and also reach the proper conclusion that the statement is admissible evidence.

3. Protection From Abuse

- Identify a Petition under the Protection From Abuse Act as the proper civil action Sue should file;
- Applicability to a former or current family member;
- Requires current or former abuse or threats of abuse.

3 Points

Comments: The candidate must identify a Petition under the Protection From Abuse Act as the proper civil action Sue should file together with discussing whether there are past or current acts of violence or threats thereof between former family members.

4. Dying Declaration

- Carl's death was imminent;
- Personal knowledge/describe circumstances surrounding declarant's death.

3 Points

Comments: The candidate must discuss the elements of a dying declaration and come to the proper conclusion that this statement would be inadmissible since Carl's statement did not relate to the circumstances surrounding his death.

Question No. 3

1. Products Liability

- Candidate is expected to recognize that both Whirlwind, Inc. and Bike, Inc. would likely be found liable on theory of strict products liability for Sandy's injuries.
- Candidate should identify and discuss the elements of design defect and failure to warn theories of strict products liability.

10 Points

Comments: Candidates should identify the elements required to prove a design defect and an inadequate warning for purposes of strict products liability and apply the facts to these elements in reaching a well reasoned conclusion that both Whirlwind and Bike, Inc., will be liable.

2. Preliminary Objections

- Candidate is expected to recognize that Preliminary Objections could be raised due to the improper service of the Complaint and the inclusion of scandalous and impertinent matter in the complaint.
- Candidate should recognize that under the facts, service was required to be made by the sheriff.
- Candidate should recognize that the comments in the Complaint about Whirlwind executives were immaterial and inappropriate to the claim of negligence.

6 Points

Comments: Candidate should recognize that Preliminary Objections should be filed raising improper service and inclusion of scandalous and impertinent matter, and that the objections would be successful.

3. Evidence

- Candidate is expected to define hearsay and recognize that the statement constituted hearsay.
- Candidate is expected to identify and define the present sense impression exception to the hearsay rule.

4 Points

Comments: Candidate is expected to analyze the facts under the present sense impression exception to the hearsay rule and conclude that the objection will likely be overruled.

Question No. 4

1. Article I, Section 8 - Commerce Clause

- The dormant Commerce Clause restricts states from imposing differential treatment of in-state and out-of-state economic interests.
- A local regulation which discriminates on its face is invalid unless it advances a legitimate local purpose that cannot be served by reasonable non-discriminatory alternatives.
- A local purpose will not be legitimate if the intention is to intentionally discriminate.

5 points

Comments: Candidates should recognize the applicability of the Commerce Clause to the facts presented. The terms of the ordinance should be examined to determine whether it is discriminatory as to out-of-state interests, and adversely impacts those interests. The local interest asserted in support of the interest should be examined to determine whether it is indeed legitimate, and even if deemed legitimate, whether the purpose could be adequately served by reasonable non-discriminatory alternatives.

2. Article III - Standing to Pursue a Claim in Federal Court

- Article III of the Constitution requires that a plaintiff meet certain minimal requirements for standing to assert a claim.
- A plaintiff must show an injury in fact that is fairly traceable to the actions of the defendant that will likely be redressed by a favorable decision.
- In addition, judicial precedent has established a prudential standing requirement for determining whether a plaintiff is a proper party.
- Prudential standing requires that the plaintiff's injury is arguably within the zone of interest to be protected by the asserted constitutional guarantee.
- A plaintiff must satisfy both the Article III and prudential standing requirements.

5 points

Comments: A candidate should analyze the essential standing requirements imposed by Article III of the Constitution and should focus on the impact of the increased fee as an injury to WCI. In addition, the candidate should recognize the prudential standing requirement and analyze whether WCI is within the zone of interest protected by the Commerce Clause, the constitutional guarantee in question, in the absence of any out of state disposal at WCI's landfill facility.

3. The Americans With Disabilities Act

- The ADA prohibits discrimination against qualified individuals with a disability.
- No covered employer may discriminate against a qualified individual with a disability because of the disability with respect to discharge or other terms and conditions of employment.
- The ADA also requires that an employer consider an accommodation which would allow a disabled employee to perform the essential functions of a job.
- Accommodation may also require a transfer to another position which could be performed by the disabled employee.

5 points

Comments: A candidate should recognize the applicability of the ADA to the facts presented. Eli's physical condition should be evaluated to ascertain whether he is disabled within the meaning of the ADA, and Eli's ability to perform the essential functions of his present position, with or without accommodation, should be considered. A candidate should recognize the duty to consider transfer to another position as a form of accommodation, and consider whether such a transfer is required in this instance given that the only alternative position is presently filled by another employee.

4. Privacy Rights Under the United States Constitution

- The Supreme Court has recognized certain zones of privacy are created by the Constitution.
- Personal medical information has been deemed within the ambit of the zone of privacy by judicial decision.
- A balancing test is applied to determine whether a particular disclosure would violate this constitutional right to privacy.

5 points

Comments: A candidate should recognize that the Supreme Court has determined that certain "zones of privacy" are created by the Constitution, and that personal medical information has been deemed within the ambit of this zone of privacy. A balancing test should be applied to the C County requirement of disclosure of personal medical information, examining the type of information required to be disclosed, the potential for harm from any subsequent nonconsensual disclosure, the Government's need for access to such information and the adequacy of safeguards to prevent unauthorized disclosure. Through application of this balancing process, the validity of C County's requirement of disclosure of personal medical information of each employee should be evaluated.

Question No. 5

1. Creation of a Tenancy by the Entireties

- Tenancy by the entireties is limited to married people.
- Although a conveyance to two unmarried persons will not create a tenancy by the entireties, the conveyance is still valid.
- The appropriate form of joint ownership is based upon the intent gleaned from the language of the deed.
- Use of term "tenancy by entireties" has been construed to create the form of joint ownership that most closely approximates a tenancy by the entireties - a joint tenancy with right of survivorship.

- Under a joint tenancy with right of survivorship, the surviving joint tenant succeeds to sole ownership of the property upon the death of the other joint tenant.

5 Points

Comments: Candidates should recognize that marriage is an essential element to create a tenancy by the entireties and that a conveyance to two unmarried persons, while valid, will not create a tenancy by the entireties. Candidates should discuss what is the appropriate form of joint ownership based upon the intention of the parties as determined by the language of the deed, conclude that the conveyance should be construed as a joint tenancy with right of survivorship and that Bob as the sole survivor will be the owner of lot 1.

2. Enforcement of a Restrictive Covenant

- Recognition of restrictive covenant issue based upon restriction contained in the subdivision plan.
- Elements for determining whether a restriction is a restrictive covenant running with the land that can be enforced by and against successive owners: touches and concerns the land and intent to bind based upon the language, purposes and conditions surrounding the execution of the covenant.
- Actual notice to the successive owner of the existence of the covenant is not needed if the covenant was intended to run with the land.
- Appropriate remedy to prevent violation of a restrictive covenant is an action in equity seeking injunctive relief.

5 Points

Comments: Candidates should recognize that the restriction contained in the subdivision plan is a restrictive covenant. Candidates shall determine whether this particular covenant runs with the land by stating the legal elements necessary for a covenant to be binding upon successive owners and applying these elements to the stated facts. Candidates should conclude their analysis by discussing the specific relief to stop a violation of a restrictive covenant running with the land.

3. Enforcement of Oral Agreements to Answer for the Debt of Another and the Statute of Frauds

- Statute of Frauds requires that agreements to pay the debt of another must be in writing.
- Specific Exception to this rule under the Statute of Frauds - agreements to pay the debt of another can be enforced under the main purpose or leading object exception.

5 Points

Comments: Candidates should recognize that the enforcement of the particular oral agreement raises an issue under a specific provision of the Statute of Frauds dealing with agreements to pay the debt of another. Candidates should then discuss the main purpose or leading object exception to the Statute of Frauds and apply this exception to the stated facts in reaching a well-reasoned conclusion.

4. Liquidated Damages for Breach of Contract

- Elements for a valid liquidated damages clause: computation of actual damages is speculative or difficult to estimate or ascertain and amount of damages is a reasonable forecast of expected loss.
- Liquidated damages are an unenforceable penalty if the damages fixed in advance are highly disproportionate to the amount of the actual loss.
- If a liquidated damages clause is valid, the parties cannot subsequently claim entitlement to actual damages.

5 Points

Comments: Candidates should recognize that the question concerns the validity of a liquidated damages clause. The candidates should recognize not only the particular elements needed for a valid liquidated damages clause but also that an aggrieved party cannot claim entitlement to actual damages if a contractual provision is determined to be a valid liquidated damages clause. The candidates should discuss the elements needed for a valid liquidated damages clause in light of the stated facts and come to well reasoned conclusion concerning whether the party suffering the loss due to the breach of contract is limited to the stated damages.

Question No. 6

1. Corporations--Corporate Opportunity

- Directors owe a duty of loyalty that prohibits the usurpation of corporate opportunities.
- Corporation must pass on opportunity before director can take advantage of it.

5 points

Comments: Candidates should recognize that usurpation of a corporate opportunity violates a director's duty of loyalty to the corporation and that to comply with the duty the director should have recognized that the opportunity would benefit the corporation and should have disclosed the opportunity to the corporation.

2. Corporations--Remedies for Usurpation of Corporate Opportunity

- Equity allows for the impression of a constructive trust and an accounting.

5 points

Comments: Candidates should discuss the equitable remedies of a constructive trust and an accounting to allow the corporation to receive the benefit of the opportunity and any profits.

3. UCC--Sales--Unconscionable Contract Provision

- One-sided, oppressive provisions are unconscionable.
- Court can refuse to enforce contract, the clause or limit the clause.

5 points

Comments: Candidates should raise the unconscionability of the clause on both a procedural and substantive basis and discuss the enforceability of the clause.

4. Conflict of laws--Domicile

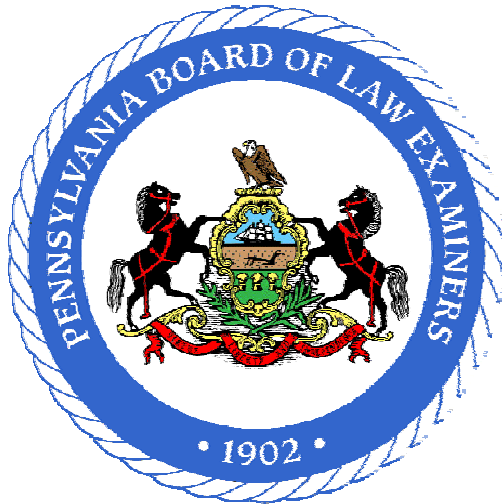
- Domicile is fact driven.
- Domicile requires presence plus an intent to establish.

5 points

Comments: Candidates should indicate that domicile requires physical presence together with an intent to make the location one's domicile and should discuss the facts as they relate to these points.

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FILE

MEMORANDUM

To: Applicant/Law Clerk

From: Judge John D. Smith
United States Judge for the Eastern District of Pennsylvania

Date: February 27, 2007

Subject: Plaintiff v. Paco, Newco and Delco

Presently pending in the above referenced matter is a Motion to Remand filed by Plaintiff. Plaintiff originally filed a Complaint against Defendants Paco, Newco, and Delco in the Court of Common Pleas of Philadelphia County on December 15, 2006. Plaintiff's Complaint contains causes of action against Defendants for negligence.

Defendants Paco, Newco, and Delco filed a Notice of Removal in this court on January 22, 2007. This court is the appropriate federal court to which actions brought in the Court of Common Pleas of Philadelphia County should be removed. On February 1, 2007, Plaintiff filed a Motion to Remand. Your assignment is to draft a bench memorandum to me. In the memorandum you should identify and analyze all of the issues raised in Plaintiff's Motion to Remand and advise me as to whether Plaintiff's Motion to Remand should be granted. In preparing your memorandum, you should follow the format for bench memoranda as set forth in the attached memorandum.

The File and Library provided contain the only facts and legal principles you should consider and rely upon in completing this assignment. Assume for the purposes of your memorandum that the rules for service of process in New Jersey and Delaware are the same as in Pennsylvania, and that the purely factual averments set forth in the documents in the File are true.

CHAMBERS OF THE HONORABLE JOHN D. SMITH
UNITED STATES JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA
MEMORANDUM

To: Incoming Law Clerks
From: Judge John D. Smith
Date: August 25, 2000
Subject: Preparing Bench Memoranda

Law clerks should use the following guidelines when drafting bench memoranda for my review.

1. Use the “To/From” format above. Be sure to identify the case name, civil action number, and pleading or motion title in the “Subject” line.
2. The first section of each memorandum should be titled “Statement of the Facts” and should set forth a concise yet thorough statement of those facts that are relevant to the disposition of the pending motion.
3. Next, in a section entitled “Issue(s) and Brief Conclusion,” identify the issue(s) raised in the pending motion(s). Immediately after identifying an issue, provide a one-sentence answer to the issue identified. If more than one issue has been raised, number the issues.
4. Title the following section of the memorandum “Analysis.” In this section provide a numbered heading that restates your conclusion for the issue raised, followed by an analysis of the issue identified. In the analysis, demonstrate how the relevant authorities should be applied to the facts of the case in reaching your conclusion. Provide citations to the legal authorities relied upon. If more than one issue has been raised, provide the analysis for the first issue before providing the conclusion and analysis for the next issue(s).
5. In the final section “Conclusion and Recommendation,” finalize the memorandum by determining how the motion should be decided and provide a brief summary of the basis for your determination.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

Plaintiff

v.

Paco, Newco, and Delco,
Defendants

:
:
:
:
:
:

No. 06-CV-7890

MOTION TO REMAND

Plaintiff, through her undersigned attorney, hereby submits this Motion to Remand Civil Action to State Court for Lack of Subject Matter Jurisdiction and avers the following:

1. Plaintiff originally filed this civil action on December 15, 2006, in the Court of Common Pleas of Philadelphia County, December Term 2006, No. 1234.
2. On January 22, 2007, Defendants filed a Notice of Removal in this Court.
3. Defendants' Notice of Removal was not timely filed in this court and therefore this matter must be remanded back to the Court of Common Pleas of Philadelphia County.
4. All Defendants were sent a copy of the Complaint via certified mail on December 18, 2006.
5. Because Defendants were sent the Complaint on December 18, 2006, a Notice of Removal was required to be filed within 30 days, on or before January 17, 2007.
6. The Notice of Removal asserts that there is complete diversity of citizenship between the parties. Defendants Newco and Delco also assert that Paco was fraudulently joined as a defendant solely to defeat federal diversity jurisdiction.
7. Defendant Paco is not a fraudulent defendant. Plaintiff, based on the averments in the Complaint and the facts set forth in Exhibit A which is attached hereto, has stated colorable claims against Defendant Paco. Therefore, the parties are not diverse and this matter should be remanded back to the Court of Common Pleas of Philadelphia County.
8. Plaintiff respectfully requests that this Court remand this matter to the Court of Common Pleas of Philadelphia County because the Notice of Removal was not timely filed and this Court lacks subject matter jurisdiction over the claims asserted in the complaint.

Dated: February 1, 2007

AI Attorney

Attorney for Plaintiff

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

Plaintiff	:	
	:	
	:	
	:	
v.	:	No. 06-CV-7890
	:	
	:	
Paco, Newco, and Delco,	:	
Defendants.	:	

**EXHIBIT A TO PLAINTIFF'S MOTION TO REMAND
EXCERPT'S FROM DEFENDANT PACO'S ANNUAL 10-K FORM**

Plaintiff hereby submits for the court's consideration the following statements taken from the 2005 10-K (Annual Report Pursuant to Section 13 of the Securities Exchange Act of 1934) filed with the Securities and Exchange Commission ("SEC") by Defendant Paco. The full text of Defendant Paco's 2005 10-K is located on the SEC's website at www.sec.gov, a website accessible by members of the public. Plaintiff submits the following excerpts of Defendant Paco's 2005 10-K in support of Plaintiff's assertion that Defendant Paco is liable for the negligent acts of Marco. All references to "Company" refer to the filer, Defendant Paco.

Paco, Inc. 2005 Annual Report Pursuant to Section 13 of the Securities Exchange Act of 1934

ITEM 1. BUSINESS

GENERAL. The Company and its subsidiaries collectively are one of the leading suppliers of electric components for major and small household appliances in the United States. The Company, through its subsidiaries, manufactures and distributes a wide range of electric and electronic components. As of January 2005, the Company has three subsidiaries. The subsidiaries manufacture and distribute a variety of components and are diversified by end product to be manufactured, i.e., major appliances, kitchen appliances, personal electronics, etc.. The Company operates through its subsidiaries which are principally located in suburban or rural areas in the Eastern and Mid-Atlantic regions of the United States.

The Company conducts its business through the following three manufacturing subsidiaries: Marco, Virco, and Massco.

The Company provides credit, electronic data processing, and other support functions to its subsidiaries on an integrated, Company-wide basis. The Company's and its subsidiaries' financial and credit services are consolidated and centralized on a Company-wide basis. The Company's data processing division provides operational electronic data processing and management information services to each of the Company's subsidiaries. In addition, a specialized staff maintained in the Company's corporate offices in Bethlehem, provides services for all subsidiaries in such areas as facility design and construction, real estate acquisition and disposal, insurance, preparing and making federal and local tax payments, supply purchasing and transportation, as well as various other corporate office functions. The Company utilizes centralized accounting, merchandise, and accounts payable functions for its subsidiaries.

EXHIBIT A TO PLAINTIFF'S MOTION TO REMAND
EXCERPT'S FROM DEFENDANT PACO'S ANNUAL 10-K FORM (Continued)

EMPLOYEES. As of January 2005, the Company and its subsidiaries had approximately 7,300 regular full-time and part-time employees. Each of the subsidiaries is responsible for its staffing; however, due to the Company's centralized and integrated form of operating, approximately 1,200 employees perform work for both the Company and the subsidiaries. Those employees provide accounting, data processing, and other services for all of the subsidiaries. Approximately 41% of the Company's employees as of January 2005 were represented by unions. Management considers its relations with employees to be satisfactory.

ITEM 1A. EXECUTIVE OFFICERS OF THE REGISTRANT

The following table sets forth certain information regarding the executive officers of the Company:

<u>Name</u>	<u>Age</u>	<u>Position with the Company/Subsidiary</u>
Quinn Allen	54	Paco Chairman of the Board and Chief Executive Officer, Director
James Baylson	58	Paco President and Chief Operating Officer, Director
Regina Carlson	62	Paco Vice Chairman and Chief Financial Officer/Marco Chairman of the Board
Thomas Dobson	47	Paco Executive Vice President /Virco Chairman of the Board
Dennis English	55	Paco Senior Vice President/Massco Chairman of the Board
Karen Fitzgerald	60	Paco Senior Vice President and Treasurer/Marco, Virco and Massco Treasurer

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

Plaintiff	:	
v.	:	No. 06-CV-7890
	:	
Paco, Newco, and Delco,	:	
Defendants	:	

JOINT NOTICE OF REMOVAL

Defendants, Paco, Newco and Delco (hereinafter the “Removing Defendants”), by and through their undersigned counsel, hereby notice the removal of this action from the Court of Common Pleas of Philadelphia County, where it is now pending, December 2006 Term, No. 1234, to the United States District Court for the Eastern District of Pennsylvania, pursuant to 28 U.S.C. § 1441 et. seq.. In support of this removal, Removing Defendants aver as follows:

1. Plaintiff filed a Complaint in the Philadelphia Court of Common Pleas on or about December 15, 2006.
2. On December 26, 2006, the Removing Defendants received their copies of Plaintiff’s Complaint at their respective principal places of business by certified mail. On that same date the Removing Defendants signed receipts for the certified mail.
3. In her Complaint, Plaintiff avers that she is a resident of Philadelphia, Pennsylvania.
4. Plaintiff alleges that only one Defendant is a citizen of Pennsylvania. Specifically, Plaintiff alleges that Defendant Paco is a Pennsylvania corporation with its principal place of business in Bethlehem, Pennsylvania.
5. Paco is an improper Defendant joined in this action only for the purposes of defeating diversity. The citizenship of Paco is, therefore, immaterial. Thus, none of the Defendants that can be considered material for the purpose of removal are citizens of Pennsylvania and the parties are diverse.
6. Paco was fraudulently joined in this matter and the fraudulent joinder of a non-diverse defendant cannot defeat the right of removal.
7. In her Complaint, Plaintiff alleges that Paco is the parent holding company of Marco and that as such Paco is responsible for the negligence of Marco in manufacturing and distributing the heating element.
8. As Plaintiff complains, Marco, not Paco, manufactured and distributed the heating element for the subject electric oven.
9. Paco is not responsible for the negligent manufacture and distribution of the subject heating element simply because it is the parent company of Marco.
10. Plaintiff’s Complaint does not allege that Defendant Paco manufactured, designed, or sold the subject heating element.

11. As the parent company of Marco, Defendant Paco cannot be held liable for damages resulting from the alleged negligently manufactured heating element. Therefore, Defendant Paco is a fraudulent defendant.

12. Marco is a Maryland Corporation with its principal place of business in Baltimore, Maryland. Thus, even if joined in this action, Marco is diverse for purposes of removal.

13. Because Paco did not manufacture or distribute the heating element for the electric oven, it is not a proper defendant in this action. Plaintiff cannot assert a colorable claim against a parent company not responsible for supplying, distributing, manufacturing, designing, or distributing any component part alleged to have been defective and causative of the alleged fire and resulting damages.

14. Since there is no reasonable basis for Plaintiff's claim against Paco, its citizenship is immaterial for purposes of establishing diversity jurisdiction.

15. Thus, complete diversity of citizenship existed at the time of the incident giving rise to this litigation and continues to exist.

16. In her Complaint, Plaintiff demands judgment in an amount in excess of \$250,000.00.

17 Accordingly, the United States District Courts have original jurisdiction over this action and this matter is removable to this Court.

WHEREFORE, Removing Defendants hereby remove this action presently pending in the Court of Common Pleas of Philadelphia County to the United States District Court for the Eastern District of Pennsylvania.

Dated: 1/22/2007

Alice Attorney

Attorney for Newco

Able Attorney

Attorney for Delco

Paul Attorney

Attorney for Paco

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
CIVIL ACTION - LAW**

Plaintiff

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:
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v.

Docket No. 1234

Paco, Newco, and Delco,
Defendants

December Term 2006

COMPLAINT

Plaintiff, by and through her counsel, files this Complaint in negligence against Defendants and alleges as follows:

1. Plaintiff is an adult individual who has lived and resided in Philadelphia, Pennsylvania, for her entire life.
2. Defendant Newco (“Newco”) is now, and at all times mentioned in this complaint was, a corporation organized and existing under the laws of the State of New Jersey, with its principal place of business in Trenton, New Jersey.
3. Defendant Delco (“Delco”) is now, and at all times mentioned in this complaint was, a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Wilmington, Delaware.
4. Defendant Paco (“Paco”) is now, and at all times mentioned in this complaint was, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with its principal place of business in Bethlehem, Pennsylvania.
5. Paco is the parent holding company of Marco. Marco is now, and at all times mentioned in this complaint was, a corporation organized and existing under the laws of the State of Maryland with its principal place of business in Baltimore, Maryland.
6. Marco is a subsidiary of Paco. Marco is now, at and all times mentioned in this complaint was, in the business of manufacturing and distributing heating elements for electric ovens.
7. Marco manufactured the heating element installed in the electric oven Newco manufactured and Delco sold to Plaintiff.
8. Newco is now, and at all times mentioned in this complaint was, in the business of designing, manufacturing, constructing, assembling, inspecting, and selling various types of household appliances, including ovens and ranges.
9. Delco is now, and at all times mentioned in this complaint was, in the business of inspecting, maintaining, installing, and selling at retail to members of the public various types of household appliances, including electric ovens designed and manufactured by Newco.
10. On November 24, 2005, Plaintiff purchased from Delco, and on December 1, 2005, Delco installed in the kitchen of Plaintiff’s home, an electric oven that was manufactured, constructed, assembled, inspected, and sold by Newco.

11. On December 3, 2005, Plaintiff attempted to use the oven, at which time it overheated and malfunctioned causing the injuries and damages described below.

12. At all times mentioned in this Complaint, Marco so negligently and carelessly manufactured and distributed the heating element in the oven purchased by Plaintiff such that it was dangerous and unsafe for its intended use.

13. At all times mentioned in this Complaint, Newco so negligently and carelessly manufactured, constructed, assembled, inspected, and sold the oven such that it was dangerous and unsafe for its intended uses.

14. At all times mentioned in this Complaint, Delco so negligently and carelessly inspected, maintained, installed, and sold the oven such that it was dangerous and unsafe for its intended uses.

15. At all times mentioned in this Complaint, Paco, as the parent company of Marco, was responsible for the negligence of Marco in manufacturing the heating element.

16. As a direct and proximate result of the negligence and carelessness of Defendants as described above, the heating element in the electric oven did not turn off when programmed, and overheated and malfunctioned such that the contents in the oven burned and ignited.

17. As a direct and proximate result of the negligence and carelessness of Defendants as described above, the electric oven and Plaintiff's kitchen were destroyed by fire. Plaintiff's home, personal belongings, furnishings, and clothing were damaged by fire, smoke, and the water used to extinguish the fire.

18. As a further direct and proximate result of the negligence and carelessness of Defendants as described above, Plaintiff sustained the following personal injuries: severe burns to her hands, arms, face, and neck.

19. As a further direct and proximate result of the negligence and carelessness of Defendants as described above, Plaintiff lost wages, experienced pain and suffering, is permanently disfigured, and incurred medical expenses.

WHEREFORE, Plaintiff demands judgment against defendants, and each of them, in excess of \$250,000.00.

DATED: 12/15/2006

AI Attorney
Attorney for Plaintiff

LIBRARY

Title 28. Judiciary and Judicial Procedure.

28 U.S.C. § 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between-

(1) citizens of different States;

* * *

(c) For the purposes of this section and section 1441 of this title--

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business....

28 U.S.C. § 1441. Actions removable generally

(a) . . . any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. . . .

* * *

28 U.S.C. § 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal . . . containing a short and plain statement of the grounds for removal,

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service . . . , of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based

* * *

28 U.S.C. § 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

* * *

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

28 U.S.C. § 1448. Process After Removal

In all cases removed from any State court to any district court of the United States in which any one or more of the defendants has not been served with process or in which the service has not been perfected prior to removal, or in which process served proves to be defective, such process or service may be completed or new process issued in the same manner as in cases originally filed in such district court.

This section shall not deprive any defendant upon whom process is served after removal of his right to move to remand the case.

Pennsylvania Rules of Civil Procedure

Pa.R.C.P. No. 402. Manner of Service. Acceptance of Service

(a) Original process may be served

- (1) by handing a copy to the defendant; or
- (2) by handing a copy

* * *

(iii) at any office or usual place of business of the defendant to his agent or to the person for the time being in charge thereof.

* * *

Pa.R.C.P. No. 403. Service by Mail

If a rule of civil procedure authorizes original process to be served by mail, a copy of the process shall be mailed to the defendant by any form of mail requiring a receipt signed by the defendant or his authorized agent. Service is complete upon delivery of the mail.

(1) If the mail is returned with notation by the postal authorities that the defendant refused to accept the mail, the plaintiff shall have the right of service by mailing a copy to the defendant at the same address by ordinary mail with the return address of the sender appearing thereon. Service by ordinary mail is complete if the mail is not returned to the sender within fifteen days after mailing.

* * *

Pa.R.C.P. No. 404. Service Outside the Commonwealth

Original process shall be served outside the Commonwealth within ninety days of the issuance of the writ or the filing of the complaint ...:

- (1) by a competent adult in the manner provided by Rule 402(a);
- (2) by mail in the manner provided by Rule 403;
- (3) in the manner provided by the law of the jurisdiction in which the service is made for service in an action in any of its courts of general jurisdiction;

* * *

**United States Court of Appeals, Third
Circuit.**
James F. BOYER and Mary R. Boyer,
v.
SNAP-ON TOOLS CORPORATION,
Kenneth Baldwin and Keith A. Kaiser.

OPINION OF THE COURT

This is an appeal by a former dealer of Snap-on Tools Corporation of the district court's grant of summary judgment for defendants Snap-on and two of its employees. We must consider at the outset whether there was subject matter jurisdiction on the basis of diversity of citizenship and whether the district court erred in denying the plaintiffs' motion to remand.

I. Procedural Background and Facts

Appellant James Boyer and Snap-on Tools Corporation, a corporation which sells automotive hand tools to a nationwide network of dealers for resale to auto mechanics, entered into a Dealership Agreement (Agreement) in July, 1985. In meetings leading to the signing of the agreement, Boyer met with appellee Kenneth Baldwin, a branch manager at Snap-on, and Keith Kaiser, a Snap-on field manager. . . . By late 1987 and early 1988, the dealership proved unprofitable for Boyer and Snap-on, and Boyer was orally advised by Snap-on personnel at a January 14, 1988 meeting that he would be terminated.

The Snap-on Agreement provided that on termination of a dealership "with the consent of the Company, the Dealer may sell to the Company at the price paid by the Dealer any of the Products which have been purchased by the Dealer and which remain in its possession in new, saleable condition." In accordance with this provision, Boyer participated in a two-day inventory and turn-in of his tools at the Snap-on branch office in Harrisburg on February 11 and 12, 1988.

On the first day, Baldwin presented Boyer with a Termination Agreement that included a release clause which specified, *inter alia*, that "both parties to this Agreement freely waive any and all claims they may have against each other arising out of the Dealership terminated by this Agreement." Boyer averred in an affidavit and testified on deposition that he was told by a Snap-on employee, Michael Brown, on the first day of the inventory turn-in that if he did not sign the termination agreement (which contained the above release), Snap-on would not pay Boyer for the turned-in tools or other funds allegedly owed by Snap-on to Boyer, that Brown repeated this the second day of the tool turn-in, and that Boyer signed the Agreement later that day based on Brown's representations, because he believed that he would otherwise lose his home and car.

* * *

The Boyers, residents of Pennsylvania, filed this complaint on December 13, 1988 in the Court of Common Pleas of Lebanon County, Pennsylvania, against Snap-on, a Delaware Corporation with its principal place of business in Wisconsin, and Baldwin and Kaiser, both residents of Pennsylvania. The complaint alleged fraud and deceit, fraudulent conspiracy, interference with contract, wrongful termination of dealership, violation of Pennsylvania Unfair Trade Practices and Consumer Protection Law, and intentional infliction of emotional distress.

* * *

The defendants filed a removal petition on January 9, 1989. Although on the face of the complaint there was no federal question or complete diversity of citizenship because the Boyers and the individual defendants were Pennsylvania citizens, the removal petition alleged that Baldwin and Kaiser

were “fraudulently and improperly joined” because the complaint does not state a cause of action against the individual defendants, because these defendants were alleged to have acted only in the interests of Snap-on and were therefore privileged under Pennsylvania law, and because Boyer signed a release against the individual defendants.

The Boyers filed a motion to remand under 28 U.S.C. § 1447(c). The district court, without expressly holding that Baldwin and Kaiser were sham defendants, denied the motion to remand on the ground that the “in-state defendants would prevail in a motion for summary judgment for failure to state a cause of action by reason of the release in the termination agreement.”

The defendants thereafter moved for summary judgment, primarily relying on the release clause in the Termination Agreement. The Boyers opposed the motion, arguing that the release was procured through fraud, economic duress, or in violation of Snap-on's fiduciary duty; that the release covered claims of which the Boyers were unaware; that at the time the Boyers signed the release they were unaware of the alleged fraudulent practices, which they first learned of in July 1988,

The district court granted the motion for summary judgment. The court rejected Boyer's claim of economic duress and fraud in the procurement of the release, and held that the release was broad enough to cover undiscovered fraud. The Boyers filed a timely appeal.

II. Discussion

A fortiori, we do not reach the propriety of the district court's grant of summary judgment unless we are satisfied that the district court had subject matter jurisdiction. That, in turn, is dependent upon its decision

to disregard the presence of the two individual defendants whose citizenship would destroy diversity.

As a general proposition, plaintiffs have the option of naming those parties whom they choose to sue, subject only to the rules of joinder of necessary parties. While the plaintiffs' decision in this regard may have repercussions for purposes of diversity jurisdiction, there is no reason for a court to interfere with this inevitable consequence of a plaintiff's election unless the plaintiff had impermissibly manufactured diversity or used an unacceptable device to defeat diversity.

* * *

Defendants removed Boyer's action from state court pursuant to 28 U.S.C. § 1441. Plaintiffs' motion to remand was filed pursuant to 28 U.S.C. § 1447(c) which provides, in relevant part, that “[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.” 28 U.S.C. § 1447(c) (1988). The removal statutes “are to be strictly construed against removal and all doubts should be resolved in favor of remand.” (citation omitted) Because a party who urges jurisdiction on a federal court bears the burden of proving that jurisdiction exists, a removing party who charges that a plaintiff has fraudulently joined a party to destroy diversity of jurisdiction has a “heavy burden of persuasion.” (citation omitted)

This court has recently stated that joinder is fraudulent “where there is no reasonable basis in fact or colorable ground supporting the claim against the joined defendant, or no real intention in good faith to prosecute the action against the defendant or seek a joint judgment.” (citations omitted). A district court must resolve all contested issues of substantive fact in favor of the plaintiff and

must resolve any uncertainties as to the current state of controlling substantive law in favor of the plaintiff. (citation omitted) “If there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that joinder was proper and remand the case to state court.” (citation omitted)

Turning to this case, we note first that there is no suggestion by defendants that plaintiffs have falsely alleged their Pennsylvania citizenship or that of Baldwin and Kaiser. In other words, this is not a situation where “there has been outright fraud in the plaintiff’s pleadings of jurisdictional facts.” (citation omitted).

Second, this is not a case where the action against the individual defendants is defective as a matter of law. Under Pennsylvania law there is a cause of action against employees whose fraud and misrepresentations contributed to plaintiff’s damages, even if these actions were taken in the course of their employment. (citations omitted)

* * *

Defendants argue that the court may pierce the pleadings to determine whether there has been a fraudulent joinder. Assuming some piercing is appropriate to decide whether plaintiffs have asserted a “colorable” ground supporting the claim against the joined defendant, that inquiry is far different from the summary judgment type inquiry made by the district court here. The limited piercing of the allegations to discover fraudulent joinder is illustrated by *Smoot v. Chicago, Rock Island & Pac. R.R. Co.*, 378 F.2d 879 (10th Cir.1967), where the non-diverse employee of defendant railroad had uncontestedly discontinued his employment

with the railroad 15 months before the accident in question.

* * *

In this case, we need not decide the extent of permissible inquiry into the validity of the release of Boyer’s claims against Baldwin and Kaiser, the non-diverse defendants, because that issue, which the district court stated “is likely to be dispositive of plaintiffs’ claims against Baldwin and Kaiser,” is equally applicable to Snap-on. In fact, ultimately, that is what the district court decided when it granted summary judgment. Thus, the district court, in the guise of deciding whether the joinder was fraudulent, stepped from the threshold jurisdictional issue into a decision on the merits. As the Supreme Court held in *Chesapeake & Ohio Ry. v. Cockrell*, 232 U.S. 146, 34 S.Ct. 278, 58 L.Ed. 544 (1914), this it may not do.

Because *Cockrell* is directly applicable, the underlying facts and the procedural posture are significant. The administrator of an estate, who was a Kentucky citizen, sued a Virginia railroad company and its engineer and fireman, who were citizens of Kentucky, for negligently causing the death of the intestate. The defendants removed the case to federal court on the ground that the charges of negligence against the employees were fraudulently made, thereby vesting the federal court with jurisdiction over the diverse parties, the railroad and administrator. The Supreme Court, after noting first that under Kentucky law employees were jointly liable with the employer for negligent acts committed by the employees, held that removal was improper.

The railroad had sought removal on the ground that the charges of negligence against the employees were false and untrue

and made for the sole and fraudulent purpose of affording a basis for the fraudulent joinder. The Court stated that while this contention “may have disclosed an absence of good faith on the part of the plaintiff in bringing the action at all . . . it did not show a fraudulent joinder of the engineer and fireman.” *Id.* at 153, 34 S.Ct. at 280. The Court continued:

As no negligent act or omission *personal to the railway company* was charged, and its liability, like that of the two employees, was, in effect, predicated upon the alleged negligence of the latter, the showing manifestly went to the merits of the action as an entirety and not to the joinder; that is to say, it indicated that the plaintiff's case was ill founded as to all the defendants. . . . As [the two employees] admittedly were in charge of the movement of the train and their negligence was apparently the principal matter in dispute, the plaintiff had the same right, under the laws of Kentucky, to insist upon their presence as real defendants as upon that of the railway company.

Id. (emphasis added).

Although Snap-on seeks to distinguish *Cockrell* on the ground that the Boyers asserted certain allegations against Snap-on which were not asserted against the non-diverse employees, we find *Cockrell* indistinguishable because the dispositive defense, that based on the release, was raised by all three defendants. Similarly, the Boyers' arguments that the release was invalid involve identical legal and factual issues applicable to the individual defendants and Snap-on. Informed by *Cockrell*, we hold that where there are colorable claims or defenses asserted against or by diverse and non-diverse defendants alike, the court may not find that the non-diverse parties were fraudulently joined

based on its view of the merits of those claims or defenses. Instead, that is a merits determination which must be made by the state court.

III. *Conclusion*

For the reasons set forth above, we will vacate the entry of summary judgment entered against the plaintiffs because the district court was without jurisdiction; we will reverse the district court's order denying the plaintiffs' motion to remand; and we will remand to that court with directions to remand this case to the state court.

**United States District Court, W.D.
Pennsylvania.
James W. STINSON, et. al.
v.
GAF CORPORATION, et. al.**

MEMORANDUM OPINION

The plaintiffs have filed the above action against a number of defendants, including defendant Flintkote Company, alleging that during the course of his employment the plaintiff-husband used and/or was exposed to asbestos substance and asbestos-containing products of the various defendants. As a result of this use and/or exposure, plaintiff-husband has allegedly developed an asbestos-related medical condition.

The Flintkote Company (Flintkote) has filed for summary judgment claiming that there has been no evidence that plaintiff used or was exposed to asbestos-containing products manufactured, sold or distributed by Flintkote. Plaintiffs . . . now contend that the husband's injuries were caused by raw asbestos fibers produced by Flintkote Mines Limited (FML), a wholly owned subsidiary of Flintkote.

The plaintiffs contend that Flintkote controlled FML such that FML was a “mere instrumentality” of Flintkote, and therefore, Flintkote is liable for the acts of its subsidiary. In order to recover from a parent corporation under the “mere instrumentality” test, plaintiffs must prove:

1. That the parent controlled the subsidiary to such a degree that the subsidiary is a mere instrumentality;
2. That the parent is perpetrating a fraud or wrong through its subsidiary (e.g., torts, violation of a statute, or stripping a subsidiary of its assets); . . . (citation

omitted).

Some of the factors considered to determine whether two corporations were truly separate are: adequacy of capitalization; overlapping of officers and directors; separate recordkeeping; maintenance of separate banking accounts; payment of taxes; and authority over day-to-day operations.

Flintkote has demonstrated through the affidavit of Christine Hamilton, the Assistant Secretary of Flintkote Company, that FML was a subsidiary independent of the parent. FML mined and sold asbestos to a number of customers, including Flintkote. Flintkote was invoiced for asbestos purchased from FML and made payments to FML as would any other customer. FML produced its own monthly and yearly financial reports of its asbestos production and sales by grade, subgrade and customer. Expenses incurred by FML as a result of day-to-day operations were paid in full by FML. There was no commingling of funds, and FML has at all times relevant remained solvent.

In order to hold that a subsidiary is the “mere instrumentality” or “alter ego” of the parent corporation, Pennsylvania law requires that the plaintiff bear the burden of establishing that the “controlling corporation wholly ignored the separate status of the controlled corporation and so dominated and controlled its affairs that its separate existence was a mere sham.” (citation omitted)

The Court further stated that in order to find a parent corporation liable for the acts of its subsidiaries, Pennsylvania requires a “threshold showing that the controlled corporation acted robot-or puppet-like in mechanical response to the controller's

strings or pressure on its buttons.” (citation omitted)

In an effort to meet its burden, plaintiffs have produced seventy (70) pages containing nine separate advertisements which mention both FML and Flintkote. Such advertisements appear in the trade magazine known as “Asbestos” and merely confirm that FML is a subsidiary of Flintkote and that FML supplied asbestos fibers, some of which Flintkote used in its own operations. Such advertisements do not support plaintiffs' claim that FML was a mere instrumentality of Flintkote.

Plaintiffs have also made references suggesting that Flintkote played an active role in FML's operations. These mere assertions by plaintiff that Flintkote was involved in the business decisions of FML are not supported by any evidence. There

appears to be no evidence in the current record that would demonstrate that FML was a “mere instrumentality” of Flintkote such that would make Flintkote liable for the actions of FML.

In order to withstand Motions for Summary Judgment, plaintiffs are required to come forward with specific facts showing that there is a genuine issue of fact. (citation omitted) The non-moving party must go beyond the pleadings and introduce evidence setting forth specific facts demonstrating the existence of genuine issues for trial. Plaintiffs have been unable to meet their burden.

* * *

For the above reasons, Flintkote's Motion for Summary Judgment shall be granted.

Performance Test – Grading Guidelines

OVERVIEW

This Performance Test presents a situation in which the Applicant is a law clerk to a United States District Court Judge. The Judge has instructed the Applicant to prepare a bench memorandum advising him of the proper disposition of a Motion to Remand. Plaintiff originally filed a Complaint for negligence in the Court of Common Pleas of Philadelphia, Pennsylvania. There are three corporate defendants who are residents of Pennsylvania, New Jersey and Delaware, respectively. In her Complaint Plaintiff complains that she suffered personal injuries and damages to her real and personal property as a result of a fire that allegedly originated in an electric oven she purchased. The New Jersey and Delaware defendants are the manufacturer and retail sellers of the oven, respectively. The Pennsylvania defendant is the parent company of Marco - the Maryland manufacturer and distributor of the allegedly negligently manufactured and faulty heating element used in the oven.

The defendants filed a joint Notice of Removal in the United States District Court for the Eastern District of Pennsylvania. In the Notice of Removal, the defendants assert that the district court has subject matter jurisdiction, based on diversity of citizenship, over Plaintiff's claims. The Removing Defendants maintain that the district court has subject matter jurisdiction despite the presence of a non-diverse defendant because the Pennsylvania defendant has been fraudulently joined. Plaintiff filed a Motion to Remand the matter to the Court of Common Pleas of Philadelphia County. In the motion Plaintiff claims that remand is warranted because the Notice of Removal: (1) was not timely filed, and (2) the federal court lacks subject matter jurisdiction because the Pennsylvania defendant was not fraudulently joined, thereby destroying diversity.

The assignment requires the Applicant to determine whether Plaintiff's Motion to Remand should be granted. In doing so, the Applicant must state the facts relevant to deciding the motion, and identify and analyze all issues raised in Plaintiff's Motion to Remand. The Applicant is finally required to make a recommendation to the Judge regarding whether Plaintiff's motion should be granted. The Applicant must first determine whether the Removing Defendants' Joint Notice of Removal was timely filed. The Applicant must also objectively analyze the law to determine whether the Pennsylvania defendant was fraudulently or properly joined in order to determine whether subject matter jurisdiction exists in federal court based on diversity of citizenship.

FORMAT

2 Points

Following directions is an important part of the Performance Test. The Applicant should follow the instructions that are provided for preparing a bench memorandum to a Judge. The Statement of Facts should include only the information necessary to determine the disposition of the motion. Each question raised in Plaintiff's Motion to Remand should be separately identified and answered, followed by an analysis that begins with a heading that restates the conclusion, and includes an objective analysis of the relevant legal authority and facts applicable thereto. The memorandum should conclude with a recommendation regarding disposition of the motion.

CONTENT

Statement of Facts

4 Points

Plaintiff purchased from Defendant Delco, an electric oven manufactured by Defendant Newco. The heating element in the oven was manufactured by Marco. Defendant Paco is the parent company of Marco. Paco and Marco share administrative services and have overlapping officers.

Newco, Delco and Paco are incorporated in and have their headquarters in New Jersey, Delaware, and Pennsylvania respectively. Plaintiff is a resident of Pennsylvania.

Plaintiff alleges that the oven was negligently designed, manufactured, sold and installed and that due to a defective heating element, the stove malfunctioned causing personal injuries, and damages to real and personal property in excess of \$250,000.

Plaintiff filed a Complaint on December 15th in state court, and Defendants received their respective copies of the Complaint at their headquarters by certified mail on December 26, 2006. Newco, Delco and Paco filed a Notice of Removal on January 22, 2007. Plaintiff filed a Motion to Remand on February 1, 2007.

Issues and Brief Conclusion

1. Was the Joint Notice of Removal timely filed?

The Joint Notice of Removal was timely filed.

2. Does this court have subject matter jurisdiction over Plaintiff's claims based on diversity of citizenship?

This court does not have subject matter jurisdiction over Plaintiff's claims based on diversity of citizenship.

Analysis

1. The Joint Notice of Removal was timely filed.

4 Points

Defendants have 30 days from receipt of a complaint through proper service to file a notice of removal in federal district court of a matter originally filed in State court over which the federal district court has original subject matter jurisdiction. 28 U.S.C. §§ 1441 and 1446(b).

Pa.R.C.P. No. 403 and 404 permit service on Defendants outside the Commonwealth via certified mail. Therefore, service of the Complaint on Newco and Delco at their out-of-state headquarters via certified mail was proper.

Although Plaintiff filed the Complaint on December 15, 2006, Plaintiff did not effect service on Defendants Newco and Delco until they received the certified mail on December 26, 2006 since service is complete upon delivery of the mail, not the date of mailing. Pa.R.C.P No. 403.

The Removing Defendants timely filed their Notice of Removal because although Plaintiff sent the Complaint via certified mail on December 18, 2006, the Removing Defendants did not receive it until December 26, 2006. Since proper service on Defendant Paco was never properly effected, and service on Defendants Newco and Delco was effected on December 26, 2006, Defendants had 30 days, or until January 25, 2007, to file their Notice of removal. The removing Defendants filed their Notice of Removal on January 22, 2007, therefore it was timely.

2. The United States District Court does not have original subject matter jurisdiction over Plaintiff's claims based on diversity of citizenship.

9 points

Federal district courts have original jurisdiction of matters in which the amount in controversy exceeds \$75,000 and the parties are diverse. 28 U.S.C. 1332

A corporation is a citizen of the state of incorporation and is also a citizen of the state in which it maintains its principal place of business. 28 U.S.C.A. §1332. On the face of Plaintiff's Complaint the parties are not diverse because both Paco and Plaintiff are citizens of Pennsylvania.

Therefore in order to determine if complete diversity exists, it must be determined whether Paco was fraudulently joined as a defendant. In order to determine whether Paco is a fraudulent defendant, it must first be determined whether Plaintiff has a colorable claim against Paco.

The Removing Defendants must demonstrate that Paco was fraudulently joined because a party who urges jurisdiction on a federal court bears the burden of proving that jurisdiction exists. *Boyer v. Snap-On Tools*. A removing party who charges that a plaintiff has been fraudulently joined to destroy diversity of jurisdiction has a "heavy burden of persuasion." *Boyer*.

In order to prove that Paco was fraudulently joined the Removing Defendants must demonstrate that there is no reasonable basis in fact or colorable ground supporting the claim against Paco or no real intention in good faith to prosecute the action against the defendant or seek a joint judgment against Paco. *Boyer*

To determine whether Plaintiff has a colorable ground supporting her claim against Paco the district court may pierce the pleadings to determine whether there has been a fraudulent joinder *Boyer*. However, in piercing the Complaint, the court cannot decide the merits of the underlying claim. *Boyer*

If Plaintiff has asserted a colorable claim against Paco, the court may not find that Paco was fraudulently joined. *Boyer*. However, if Plaintiff has not asserted colorable claims against Paco, the court should rule that Paco was fraudulently joined. *Boyer*

In order to determine whether Plaintiff has a colorable claim against Paco, the court must analyze whether Marco is a mere instrumentality or alter ego of Paco and whether Paco can be liable for the negligent acts of its subsidiary Marco. *Stinson v. GAF*.

Unlike in *Boyer*, the district court must perform a limited piercing of Plaintiff's Complaint, not a summary judgment type piercing of pleadings to determine this. If Plaintiff's claim cannot stand against Paco, Paco was fraudulently joined.

In order for Paco to be liable for Marco's alleged negligence, Pennsylvania law requires that Plaintiff demonstrate that either Marco acted robot-or puppet-like in mechanical response to Paco's strings or pressure, or that Paco ignored Marco's separate status and so dominated and controlled Marco's affairs that its separate existence was a mere sham. *Stinson*

Plaintiff must demonstrate that:

1. That the parent controlled the subsidiary to such a degree that the subsidiary is a mere instrumentality;
2. That the parent is perpetrating a fraud or wrong through its subsidiary (e.g., torts, violation of a statute, or stripping a subsidiary of its assets). *Stinson*

Some factors to consider in determining whether a subsidiary is a mere instrumentality are: adequacy of capitalization, overlapping of officers and directors, separate record keeping, maintenance of separate banking accounts, payment of taxes and authority over day to day operations. *Stinson*

Plaintiff has provided excerpts from Paco's 2005 10-K demonstrating that Paco and its subsidiaries, including Marco, share some corporate officers, that Paco prepares and pays Marco's corporate taxes and that Paco performs Marco's record keeping functions. The excerpts also demonstrate that Paco and its subsidiaries share some of the members of Paco's workforce who perform services for the consolidated company, further providing some evidence that Marco is a mere instrumentality of Paco.

A court must resolve all contested issues of substantive fact in favor of Plaintiff. *Boyer*. If there is a possibility that a state court would find that the Complaint states a cause of action against a resident defendant, the federal court must find that joinder was proper and remand the case to state court. *Boyer*.

Since Plaintiff has provided some evidence that Marco is a mere instrumentality of Paco, the issue of whether Plaintiff has asserted a colorable claim against Paco must be decided in Plaintiff's favor. *Boyer*. Because the court can perform only a limited piercing of the pleadings and cannot make a summary judgment type of determination the court should conclude that there is a possibility that a state court would find that Plaintiff's Complaint states a cause of action against Paco. *Stinson*.

Because there is a possibility that a state court would find that Plaintiff's Complaint states a cause of action against Paco, Paco cannot be considered a fraudulent defendant. Based upon the limited evidence provided by Plaintiff which demonstrates some corporate control of Marco by Paco, under Pennsylvania law there is a possibility that Paco may be held liable for Marco's acts of negligence. Therefore, the court should conclude that Plaintiff may have a colorable claim against Paco.

Conclusion and Recommendation**1 Point**

Since the court should conclude that Plaintiff may have a colorable claim against Paco, the court should also determine that Paco is not a fraudulent defendant and was not fraudulently joined. As Paco was not fraudulently joined, the Removing Defendants Notice of Removal was not proper. Because Paco is not a fraudulent defendant the parties are not completely diverse. As the parties are not completely diverse, the United States Court for the Eastern District of Pennsylvania does not have subject matter jurisdiction over Plaintiff's claims. Therefore, Plaintiff's Motion to Remand should be granted.