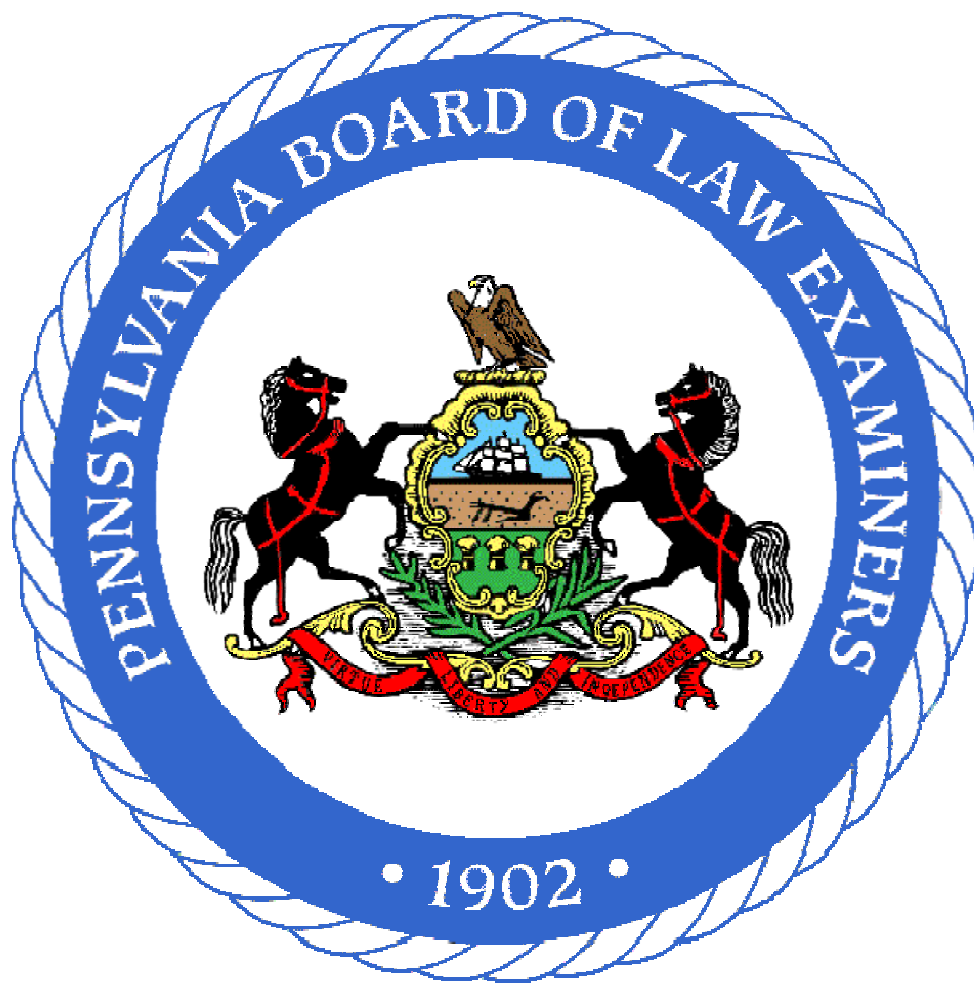


# FEBRUARY 2008 PENNSYLVANIA BAR EXAMINATION

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## Essay Questions and Examiners' Analyses and Performance Test



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Replace with Table of Contents



### **Question No. 5**

1. **Property:** life estate, remainder, executory interest
2. **Property:** equitable conversion
3. **Contracts:** parole evidence rule
4. **Contracts:** offer, conditional acceptance, counter-offer

### **Question No. 6**

1. **Business Organizations:** liability of partnership and partners
2. **Business Organizations:** apparent authority of partner
3. **U.C.C. Art II - Sales:** confirming memo
4. **U.C.C. Art II - Sales:** commercial impracticability

### **Question No. 1: Facts and Interrogatories**

Mario, a widower with two adult children, lived in A County, Pennsylvania. He was a recently retired lawyer, who upon his retirement began to gamble for amusement at a state-licensed casino in A County. There he met a young waitress, Hannah, whom he impressed by representing himself to be much wealthier than he was. After several dates, Mario asked Hannah to marry him, and she agreed. Mario prepared a Prenuptial Agreement. It provided that he would leave Hannah at least 10% of his total estate by Will “so long as she had not divorced him or engaged in conduct which would provide grounds for divorce.” In exchange Hannah would waive any spousal claims or challenges to his Will. In his written disclosure of assets and liabilities attached to the Agreement, he inflated his net worth to triple the true figure, and provided no actual appraisals or account statements for her review. Hannah willingly signed the Agreement, and they were married in January 2006.

Shortly after the wedding, Hannah discovered Mario’s exaggerations of his wealth and left him in late February of 2006, solely because of his financial deceit. She began to discuss her marital problems with a casino patron, Larry, a successful divorce lawyer. Larry quoted his divorce fee, which she could not afford. Unbeknownst to Hannah and Larry, their conversation was overheard by the casino manager, Sam, who was romantically interested in Hannah. Sam later told Larry he would pay any part of the divorce fee which Hannah could not pay, so long as Larry provided him with updates on Hannah’s case and agreed not to inform Hannah of this arrangement unless and until Sam authorized him to do so.

Mario reacted to Hannah’s departure by gambling even more. In July of 2006, he took out a \$50,000 mortgage on his home, which he had owned debt free, primarily to obtain money for existing gambling debts and further betting. He had also prepared his own Last Will and

Testament nine months after Hannah moved out. The Will, which was properly executed and witnessed, named his former law partner Tom as Executor and distributed all his estate in one paragraph as follows: “To my wife, Hannah, I give 10% of my estate, whether or not she is residing with me. The remaining 90% to my children in equal shares.”

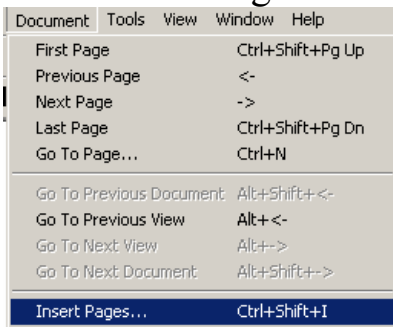
Mario hoped that Hannah would return and called her numerous times throughout the period of separation to tell her that he understood her reason for leaving and to take as much time as she needed to decide whether to come back to him. Hannah did not return and began no-fault divorce proceedings in March of 2007, filed by Larry, who charged her a minimal fee and did not tell her about Sam paying him the difference from his regular fee. Mario suddenly died two weeks after being served with the divorce papers and before he had an opportunity to respond.

During the year 2006, Mario had \$10,000 of gambling winnings but \$40,000 of gambling losses. He paid \$2,500 in mortgage interest. He was a cash-basis taxpayer who typically itemized his deductions. Executor Tom received an extension to file Mario’s 2006 income tax return, given Mario’s death was so close to the filing deadline. The estate had a positive balance after all debts and costs.

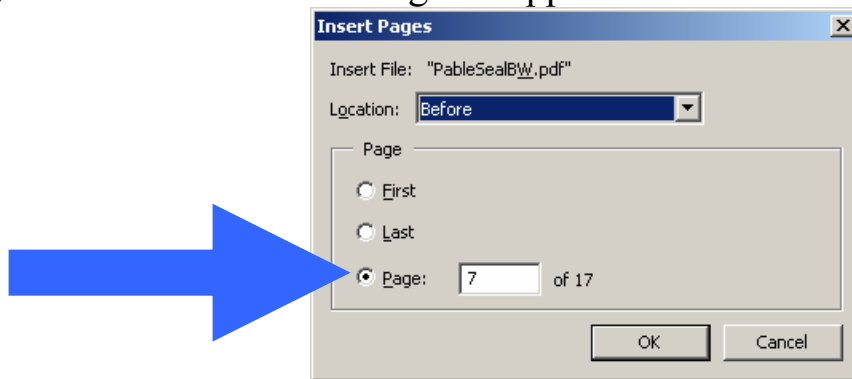
1. What argument(s) should Hannah make to challenge the validity of the Prenuptial Agreement that limited her right to elect against the will, and with what likelihood of success?
2. Assume for purposes of this question only that the Prenuptial Agreement is found invalid and that Hannah attempts to elect against the will. What challenges should be raised by Mario’s children to Hannah’s election against the will, and with what result?
3. Was Larry in violation of any of the Rules of Professional Conduct for his acceptance of Sam’s payment of Hannah’s divorce fees?
4. How should Mario’s 2006 gambling winnings and losses and his \$2,500 payment in mortgage interest be treated by the Executor for Mario’s estate in preparing Mario’s 2006 federal tax return?

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- 2.) On the menu above go to “Document”
- 3.) Select the option to “Insert Pages” shown below:



- 4.) Browse to and Select the document you wish to insert
- 5.) When this dialog box appears:



- 6.) Select “Before” from the dropdown menu.
- 7.) Make sure the page indicated by the blue arrow is the page with these instructions. Click “Ok”
- 8.) Go Back to the Document Menu, and delete this instructions page

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## **Question No. 2: Facts and Interrogatories**

Bill and his friend Al moved to X County, Pennsylvania (PA), from Georgia (GA) on September 15, 2007, two weeks after Bill sustained a disabling work related injury. Bill told his family he wanted to move closer to his estranged wife Mary, but in reality he wanted to relocate his illegal methamphetamine (meth) business to PA. In January 2007 Mary had left Bill after 10 years of marriage and moved to PA to get away from Bill's threatening and aggressive behavior toward her.

A week before Bill's arrival in PA, Mary filed a Divorce Complaint in X County on the grounds of indignities and irretrievable breakdown of the marriage. Bill was properly served with a copy of the Divorce Complaint shortly after his arrival in PA.

Upon moving to PA, Bill resided in a motel located near Mary's home in X County. Based upon Al and Bill's threats of serious harm if Mary did not cooperate, in October 2007 Mary permitted them to put the meth business in her home. She gave Bill a key to her house and both Bill and Al were usually present at her house on a daily basis to operate the meth business. Mary went about her life as normal, including her employment. Mary knew that both Al and Bill routinely carried a gun and had shot uncooperative people in the past.

In December 2007, based upon reliable information that meth was being made in Mary's house, the police obtained a valid search warrant for Mary's house. When the police arrived at Mary's house, they looked through the screen door and did not notice any activity in the house. The police immediately entered the house through the front screen door and discovered Bill and Al in an upstairs room in which they were operating their meth business. The search of Mary's house yielded ingredients for meth production and other items related to drug sales. The X County Police charged Al, Bill, and Mary with criminal offenses, including the illegal production of and possession with intent to deliver meth, and criminal conspiracy.

After the criminal charges were filed, Mary met with her divorce attorney to review several issues as she wanted to finalize the divorce promptly. The first issue discussed was whether Bill's contention that the divorce case was improperly filed in Pennsylvania had merit. Bill was contending he was a GA resident who was just visiting PA. The second issue was whether the following items were marital property subject to equitable division: (1) Bill's anticipated lump sum settlement of his GA workers' compensation claim for the injury he suffered just prior to moving to PA, and (2) the X County home which Mary purchased in February 2007 by using her retirement account from her 2001-2006 employment.

After leaving the attorney's office, Mary drove home where she saw Bill's car in the driveway. She parked behind Bill's car and immediately started honking the car horn and yelling profanities. After hearing Mary's yells for about five minutes, Bill exited the house and walked toward Mary's car in an agitated manner. Mary saw a gun under Bill's coat and immediately got out of her car, removed a handgun from her purse, and critically shot Bill. Bill was hospitalized for the treatment of his gunshot wound, and the X County Police charged Mary with aggravated assault and the attempted murder of Bill.

1. What argument under the Pennsylvania Constitution should Bill's attorney make in a Motion to Suppress the evidence seized in Mary's house and how will the court rule?
2. What arguments should Mary's attorney make to support a defense of duress to the meth and criminal conspiracy charges, what response should the District Attorney make to such arguments, and what will be the likely result?
3. Will Mary be successful in her contention that she was acting in self-defense when she shot Bill?
4. How should Mary's attorney advise her with respect to: (a) whether Mary's divorce was properly filed in Pennsylvania, and (b) whether Bill's workers' compensation settlement, or Mary's X County house are marital property subject to equitable distribution?

## Question No. 2: Examiner's Analysis

- 1. Bill's attorney should argue that the evidence seized should be suppressed by the court because it was obtained as a result of an unreasonable search in violation of the Pennsylvania Constitution due to a violation of the "knock and announce" rule and will likely be successful in having the evidence suppressed.**

Article 1, Section 8 of the Pennsylvania Constitution establishes a right of individuals to be free from unreasonable searches and seizures. Although a criminal defendant has automatic standing under Pennsylvania law to challenge a search when, as a result of evidence seized in the search, he is charged with a possessory offense, the defendant must nevertheless demonstrate that he personally has a reasonable expectation of privacy in the thing improperly searched in order to succeed on a Motion to Suppress. *Commonwealth v. Millner*, 585 Pa. 237, 888 A.2d 680 (2005). "In order to do so, he must demonstrate that he held such a privacy interest which was actual, societally sanctioned as reasonable, and justifiable in the place invaded..." *Id.*

Bill will be able to show that he had a reasonable expectation of privacy in Mary's house. The house was not abandoned and Bill could reasonably argue that his use of the house was with Mary's permission or at least her acquiescence. Bill was given a key by Mary, and for several months Bill conducted his and Al's meth business in Mary's house without her making any attempt to expose the operation.<sup>1</sup>

Bill will also be able to show that the search violated his right under the Pennsylvania Constitution to be free from an unreasonable search. Although the police obtained a valid search warrant for Mary's house, the constitutional prohibition against unreasonable searches and seizures is implicated by the manner of a warrant's execution. See *Commonwealth v. Means*, 531 Pa. 504, 614 A.2d 220 (1992). Pennsylvania has adopted a "knock and announce" rule which is intended to protect individuals from searches and seizures that are unreasonable because of the manner of the execution of a warrant. *Commonwealth v. Douventzidis*, 451 Pa. Super. 280, 679 A.2d 795 (1996). In order to properly execute the search warrant the government must comply with the "knock and announce" rule, which is set forth in Pennsylvania Rule of Criminal Procedure 207 which states as follows:

### **Rule 207. Manner of Entry Into Premises**

(A) A law enforcement officer executing a search warrant shall, before entry, give, or make reasonable effort to give, notice of the officer's identity, authority, and purpose to any occupant of the premises specified in the warrant, unless exigent circumstances require the officer's immediate forcible entry.

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<sup>1</sup> Under the Fourth Amendment to the United States Constitution, the United States Supreme Court in a split decision held that a person did not have a reasonable expectation of privacy in another's home where he was present in the home only for a short period of time (2 ½ hours) solely for the purpose of packaging drugs. *Minnesota v. Carter*, 525 U.S. 83, 119 S.Ct. 469 (1998). Here due to the long standing relationship between Bill and Mary and the length of time Bill had access to the house, ample grounds exist to distinguish this case from *Minnesota v. Carter*, *supra*. Moreover, the *Carter* decision is not controlling here because the reasonableness of the expectation of privacy would be evaluated under an independent analysis of the Pennsylvania Constitution, which may afford greater protection than the federal constitution. See *Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887 (1991).

(B) Such officer shall await a response for a reasonable period of time after this announcement of identity, authority, and purpose, unless exigent circumstances require the officer's immediate forcible entry.

(C) If the officer is not admitted after such reasonable period, the officer may forcibly enter the premises and may use as much physical force to effect entry therein as is necessary to execute the search.

This rule requires the police to make a reasonable effort to knock and announce their identity and purpose. *Commonwealth v. Carlton*, 549 Pa. 174, 701 A.2d 143 (1997). Absent exigent circumstances, forcible entry without announcement of a purpose violates Article 1, Section 8 of the Pennsylvania Constitution which prohibits unreasonable searches and seizures. *Id.* Here the police immediately entered the house without knocking and announcing their purpose. The fact that the police could see into the house through the screen door is not an excuse to violate the knock and announce rule. *Douventzidis, supra.*

There are no facts to support a contention of exigent circumstances such as the potential destruction of evidence or officer safety to support the entry. Nor is there any automatic exception to the knock and announce rule in Pennsylvania for drug cases. See *Commonwealth v. Wagstaff*, 911 A.2d 533 (Pa. Super. 2006). Therefore the evidence seized by the police should be suppressed because it was obtained as a result of an unreasonable search and seizure based on the manner of execution of the search warrant.<sup>2</sup>

**2. Mary's attorney should argue past conduct and current fear of serious harm to support a defense of duress, while the District Attorney would argue that Mary had ample opportunities to get assistance from third parties without participating in these criminal activities. The defense of duress will probably be unsuccessful.**

The facts indicate that Al and Bill had a history of committing crimes of violence, and both were known to carry a gun. Also, Bill had a history of violence toward Mary to a degree that caused her to relocate from GA to PA. Upon Al and Bill's move to PA to engage in illegal drug activities, they threatened to harm Mary if she did not permit them to operate the meth business in her home. Certainly Mary's attorney would argue these facts to support the contention that Mary was coerced into permitting the meth lab to be located at her house and that her actions were such that a person of reasonable firmness would have been unable to resist Al and Bill's demand to locate the meth lab at her house.

The District Attorney would argue that Mary's actions were unreasonable and do not excuse her from criminal conduct. He would note that Bill and Al operated the meth lab in Mary's house for a number of months before the police charged Al, Bill and Mary. The District Attorney would point out that neither Al nor Bill resided with Mary but only used her home as their business location. Mary was free to come and go as she pleased. Also, Mary had access to a gun since she shot Bill. Mary had ample opportunity to go to the authorities, but made the choice not to do so.

Pennsylvania law defines the defense of duress as follows:

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<sup>2</sup> Although the United States Supreme Court in *Hudson v. Michigan*, 547 U.S. 586 126 S.Ct. 2159 (2006) held under the Fourth Amendment that the exclusionary rule did not require the suppression of evidence if there was a knock and announce violation, the Pennsylvania Supreme Court has not as yet adopted the *Hudson* approach under the Pennsylvania Constitution which has been found to provide a greater protection relating to a knock and announce rule violation than was found under the United States Constitution in *Hudson*.

### **18 Pa.C.S.A. 309. Duress**

(a) General rule.--It is a defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.

(b) Exception.--The defense provided by subsection (a) of this section is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged.

While Mary obviously had valid reasons to fear Bill and Al since her safety was in jeopardy, it is likely to be found that she should have been able to resist their threats. Mary had free movement to and from the house. Mary continuously placed herself in jeopardy by returning to the house without telling the authorities about Al and Bill's activities. A person of reasonable firmness should have been able to resist Al and Bill based upon her numerous opportunities to seek help. It is likely that the defense of duress will not be successful although based on the prior history of her spouse Bill's threatening and aggressive behavior Mary might be able to argue that a person of reasonable firmness based upon the facts presented would not have been able to resist Bill's demands. See *Commonwealth v. Baskerville*, 452 Pa. Super. 82, 681 A.2d 195 (1996), *appeal denied*, 547 Pa. 723, 689 A.2d 230 (1997).

### **3. The defense argument that Mary's use of deadly force was necessary to protect herself against serious bodily injury or death due to Bill's history of violence and threats will probably be unsuccessful.**

In support of her claim that she critically shot Bill in self defense, Mary would argue that she was lawfully on her property and based upon Bill having a gun and the past threats of violence made to her by Bill that she reasonably believed that she had no choice but to shoot him to protect herself from death or serious bodily harm. Mary was aware that Bill had carried a gun in the past and used it to shoot people with whom he disagreed, and Mary saw a gun under Bill's coat as he approached her car.

Self defense in Pennsylvania is defined as follows:

### **18 Pa.C.S.A. 505. Use of force in self-protection**

(a) **Use of force justifiable for protection of the person.**--The use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

(b) **Limitations on justifying necessity for use of force.**--

\* \* \*

(2) The use of deadly force is not justifiable under this section unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat; nor is it justifiable if:

(i) the actor, with the intent of causing death or serious bodily injury, provoked the use of force against himself in the same encounter; or

(ii) the actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action which he has no duty to take, except that:

(A) the actor is not obliged to retreat from his dwelling or place of work, unless he was the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be; and

\* \* \*

Mary's use of a gun will be construed to be deadly force since the use of the gun in this case obviously could have caused death or serious bodily injury. 18 Pa.C.S.A. 501. In order for her actions to be justified as self defense, Mary needs to have reasonably believed she was in imminent danger of death or serious bodily injury, must not have provoked the use of force and must not have violated the duty to retreat. *Commonwealth v. McClain*, 402 Pa. Super. 636, 587 A.2d 798 (1991), *appeal denied*, 528 Pa. 636, 598 A.2d 993.

Even though Bill exited the house in an agitated manner and had a gun under his coat, he made no outward display of the weapon and it is questionable whether Mary reasonably believed that she was in danger of death or serious injury at that time.

While it may be successfully argued that Mary was not the aggressor since Bill initially approached her, it is noteworthy that Mary sat outside her house in the car for about five minutes while she honked the horn and yelled profanities until Bill came out.

Finally, Mary was not inside her home and probably could have safely retreated especially since Bill did not outwardly display any weapons, and no facts are presented to support any difficulty in her retreating.

On the day of the shooting, Bill did nothing to justify Mary's use of deadly force and more importantly, Mary could have safely retreated. It is, therefore, likely that Mary would not be acquitted based upon her contention that she was acting in self-defense.

**4. Mary's attorney should advise her that Pennsylvania is the proper forum in which to file the divorce action since Mary has been a Pennsylvania resident for at least six months prior to the filing of the Divorce Complaint, and that although Bill's workers' compensation settlement is not marital property, the Court would equitably divide the Pennsylvania real estate owned by Mary.**

A spouse may commence a divorce action in a Pennsylvania court only if he/she has been a bona fide resident of Pennsylvania for at least six months previous to the commencement of the divorce. 23 Pa.C.S.A. 3104(b). Further, a Pennsylvania Court may entertain a divorce action even if the grounds for

divorce occurred outside Pennsylvania and both parties were residing in that state at the time of the occurrence. 23 Pa.C.S.A. 3104(c).

Mary resided in Pennsylvania from January 2007 until the time in early September 2007 when she filed the Divorce Complaint. During the period from January 2007 to September 2007, Mary bought a home in Pennsylvania where she lived separate and apart from Bill. The fact that Bill was not a Pennsylvania resident at the time the Divorce Complaint was filed is immaterial. *See Zinn v. Zinn*, 327 Pa. Super. 128, 475 A.2d 132 (1984). Mary met the six month bona fide residency requirement. Therefore, an appropriate court in Pennsylvania has jurisdiction to hear this divorce case.

The fact that the grounds for divorce presumably arose while the parties both resided in GA is not of significance. The divorce action can be heard in Pennsylvania. Thus, Bill is not correct in his assertion that Pennsylvania is not a proper place to file the divorce.

The attorney should advise Mary that the settlement proceeds are not marital property subject to equitable division because the cause of action or claim which lead to the settlement proceeds accrued after the date of separation. 23 Pa.C.S.A. 3501(a)(8). The critical element to evaluate in determining whether an award is marital property is when the right to receive the payment arose. *Drake v. Drake*, 555 Pa. 541, 725 A.2d 717 (1999). Both the projected settlement and the underlying injury in the workers' compensation case occurred after the parties separated. Bill and Mary separated at least by January 2007 when Mary moved to PA and there is no evidence, despite Bill's having moved to PA near Mary in September 2007 that there was a reconciliation. Bill resided in a motel and only used Mary's home as the location of his illegal drug business. The attorney should advise Mary that Bill's workers' compensation settlement is not marital property.

The Pennsylvania house owned by Mary is marital property even though Mary purchased it after the separation since she used marital funds for the purchase. See 23 Pa.C.S.A. 3501(4). The Pennsylvania house was acquired in exchange for marital funds. Mary's pension was a marital asset even though it was her pension and not Bill's, since it was acquired after marriage and before separation. This asset can be traced to the Pennsylvania real estate which will be considered marital property subject to equitable division.

Beth, a domiciliary of C County, Pennsylvania, and Kristen, a domiciliary of nearby D County, New Jersey, first met in 2002 at a prestigious university in C County, Pennsylvania, where both women began their undergraduate studies as freshmen. The two women became friends and spent a good deal of time together during their four years of school. Beth was an average student throughout college and was attending college mainly because she was prompted to do so by her wealthy parents. Kristen came from a family of limited means, but due to her outstanding grades in high school, was able to obtain a full academic scholarship to the university.

At the end of their senior year, Beth and Kristen, who were both business majors, returned to their respective homes and discussed opening a computer business together. Beth obtained the money to start the business from her family and set up the business in C County, Pennsylvania, under the name of Beth's Computers, Inc. She hired Kristen as the general manager of Beth's Computers, Inc., and agreed to pay her \$100,000 per year for her services plus a company car for her commute from New Jersey. There was no employment agreement, and Kristen was considered an at will employee.

During 2006 and 2007, Beth's Computers, Inc., did quite well primarily due to Kristen's ideas and hard work. At the end of 2007, Kristen asked Beth to increase her salary to \$150,000 and Beth declined. Because Kristen believed that she was not being fairly compensated for her efforts, she went to ABC Computer, Inc., a nearby competitor located in C County, Pennsylvania, and attempted to secure employment as their general manager. Beth learned of Kristen's attempts to secure this alternate employment through a friend who was acquainted with Fred, the owner of ABC Computer, Inc.

Beth knew that Kristen was the catalyst for the success of Beth's Computers, Inc., and that the business could not survive without Kristen's services. However, she was too greedy to consider acquiescing to Kristen's salary demands. Accordingly, Beth went to the ABC Computer, Inc. office and made a number of false statements to Fred concerning Kristen's job performance with the intention of thwarting Kristen's chances of becoming the general manager for ABC Computer, Inc. Although Fred

had already prepared a contract and was going to offer a three-year contract at \$225,000 per year to Kristen the next day, he declined to extend the offer to Kristen in light of the statements made by Beth in the visit to his office.

Two days after Beth spoke with Fred, Fred telephoned Kristen at the offices of Beth's Computers, Inc., and told her that he could not extend an offer of employment to her. Fred further related the substance of Beth's statements made in her visit to his office. Kristen tried to explain to Fred that the statements were not true, but Fred would not change his hiring decision. When Kristen hung up the phone she was outraged. Kristen immediately went to Beth's adjoining office where she had permission to be. Kristen took a crystal vase from Beth's desk and proceeded to throw it out the window of the office. The vase, which had a present value of \$1,800, was pulverized when it hit the parking lot five stories below.

When Kristen returned to her office she was still furious. She knew that Beth was emotionally fragile due to the pressures of making the business succeed and the rapidly failing health of Beth's mother. In order to complete her revenge, Kristen decided to call Beth, who was attending an industry conference out of town, and tell her that her mother had died although Kristen knew this not to be true. Kristen proceeded to call Beth, and upon hearing the news of her mother's death from Kristen, Beth immediately collapsed and was rushed to a nearby hospital. Beth was required to undergo psychiatric treatment in the hospital for two weeks and is expected to be under the long-term care of a psychiatrist as a result of Kristen's telephone call.

1. Aside from defamation, what civil cause(s) of action should Kristen bring against Beth as a result of her not receiving the general manager position at ABC Computer, Inc., and with what likelihood of success?
2. What civil cause(s) of action should Beth bring against Kristen resulting from Kristen's conduct after her telephone call with Fred, and with what likelihood of success?
3. In what court(s) in Pennsylvania could Kristen bring her cause(s) of action against Beth?

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

**1. Kristen should bring an intentional tort claim for intentional interference with prospective contractual relations against Beth and will likely be successful on this cause of action.**

Kristen should bring a cause of action for intentional interference with prospective contractual relations. In order to sustain a cause of action for intentional interference with a prospective contractual relationship, the Plaintiff must establish the following:

- (1) A prospective contractual relationship;
- (2) The purpose or intent to harm the plaintiff by preventing the relationship from occurring;
- (3) The absence of privilege or justification on the part of the defendant; and
- (4) Actual harm resulting from the defendant's conduct.

*Vintage Homes, Inc. v. Levin*, 382 Pa. Super. 146, 554 A.2d 989 (1989), *appeal denied*, 524 Pa. 622, 571 A.2d 384 (1989); *Jeannette Paper Co. v. Longview Fibre Co.*, 378 Pa. Super. 148, 548 A.2d 319 (1988), *appeal denied*, 522 Pa. 577, 559 A.2d 38 (1989).

The concept of a prospective contractual relationship is something less than a contractual right but something more than a mere hope. *Thompson Coal Company v. Pike Coal Company*, 488 Pa. 198, 412 A.2d 466 (1979). A plaintiff may recover on a claim of intentional interference with a prospective contractual relationship when a fact finder is satisfied that but for the wrongful acts of the defendant it is reasonably probable that a contract would have been entered into. *SHV Coal, Inc. v. Continental Grain Co.*, 376 Pa. Super. 241, 545 A.2d 917 (1988).

As applied here, a prospective contractual relationship existed between Kristen and ABC Computer, Inc. The facts make clear that Fred had prepared a contract and was prepared to extend a three year contract to Kristen at \$225,000 per year. It is clear that Beth carried out a plan to prevent the contract between Kristen and ABC Computer, Inc. from occurring with the purpose and intent to prevent Kristen from getting the job so that Beth could continue to financially benefit from Kristen's services.

There is no indication that Beth was either privileged or justified to act as she did. The privilege that will defeat an action for interference with a contractual relationship has been stated in such general terms as "interferences which are sanctioned by the rules of the game which society has adopted" and "the area of socially acceptable conduct which the law regards as privileged." See *Glenn v. Point Park College*, 441 Pa. 474, 272 A.2d 895 (1971). Beth's actions in intentionally fabricating stories about Kristen's quality of work in order to prevent the contractual relationship from occurring would not likely be considered within the area of socially acceptable conduct.

As a result of Beth's conduct, Kristen has lost a three year contract valued at \$675,000 which the facts indicate was about to be offered to her by Fred. Accordingly, Kristen will likely succeed in her claim for intentional interference with a prospective contractual relationship against Beth.

**2. Beth should bring causes of action against Kristen for conversion and intentional infliction of emotional distress and would likely succeed on both causes of action.**

Initially, Beth should bring a cause of action against Kristen in conversion. Conversion has been defined as a deprivation of another's right of property in, or use or possession of, a chattel, or other interference therewith, without the owner's consent and without lawful justification. *Eisenhauer v.*

*Clock Towers Associates*, 399 Pa. Super. 238, 582 A.2d 33 (1990). Conversion can only result from act intended to affect chattel, and an intent to exercise dominion or control over goods which is in fact inconsistent with owner's rights is sufficient. *Shonberger v. Oswell*, 365 Pa. Super. 481, 530 A.2d 112 (1987). The measure of damages for conversion is the market value of the converted property at the time and place of conversion. *L.B. Foster Company v. Charles Caracciolo Steel & Metal Yard, Inc.*, 777 A. 2d 1090 (Pa. Super. 2001).

As applied here, Kristen took the crystal vase valued at \$1,800 from Beth's office and threw it out the fifth floor office window to the parking lot below. She clearly intended by these actions to destroy the crystal vase thereby permanently affecting Beth's rights to this chattel. As a result of Kristen's actions, Beth was forever deprived of further use and enjoyment of this piece of personal property. Beth obviously did not give consent to Kristen to destroy the vase and despite Beth's tortious conduct Kristen was not legally justified in throwing the vase out the fifth floor window. Since the vase was completely destroyed by Kristen's action, Beth should be able to succeed on a claim against her in conversion and recover the \$1,800 value of the vase.

Beth would also be able to bring a cause of action against Kristen for intentional infliction of emotional distress. Section 46 of the Restatement (Second) of Torts characterizes this tort as the actions of "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress...."*Hooten v. Pennsylvania College of Optometry*, 601 F.Supp. 1151 (1984). To prove a claim of intentional infliction of emotional distress, the following elements must be established:

- (1) The conduct must be extreme and outrageous;
- (2) It must be intentional or reckless;
- (3) It must cause emotional distress; and
- (4) That distress must be severe.

*Hoy v. Angelone*, 456 Pa. Super. 596, 691 A.2d 476 (1997), *affirmed*, 720 A.2d 745; *citing Hooten v. Penna. College of Optometry*, 601 F. Supp. 1151, 1155 (E.D. Pa. 1984); Restatement (Second) of Torts § 46.

Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "outrageous!" *Banyas v. Lower Bucks Hospital*, 293 Pa. Super. 122, 437 A.2d 1236 (1981) *citing* Restatement (Second) of Torts §46, comment d. (1965).

As applied here, it appears that Kristen's conduct was extreme and outrageous under the circumstances. Namely, Kristen knew that Beth was already in an emotionally fragile state due to the pressures of the business and the poor health of Beth's mother. Using this information to her advantage she placed the call to Beth and concocted the story that Beth's mother had died when she knew that this was in fact not true. Regardless of any action that Beth took concerning Kristen's possible employment with ABC Computer Inc. it is likely that an average member of the community would consider this type of action to be outrageous and outside the bounds of ordinary decency.

As to the second element, it is clear that Kristen's actions were intentional in that she placed the call to Beth with full knowledge that the information which she was relating to Beth concerning her mother was not true and that severe emotional distress was likely to result from her conduct. When she

placed this call it was clearly her intention to cause Beth to become emotionally upset in order to exact revenge for Beth's statements to Fred.

As a result of Kristen's call, Beth collapsed and was immediately hospitalized for a period of two weeks. Due to the emotional distress caused by Kristen, Beth is now under the long term treatment of a psychiatrist. Thus, even though Beth was emotionally fragile prior to the incident, Kristen would be responsible for the severe distress which she has now caused to Beth which has necessitated ongoing medical care. Even if it was determined that Beth was under "emotional distress" prior to Kristen's statements there has clearly been an aggravation of that condition for which Kristen would be legally liable. See *Geyer v. Steinbronn*, 351 Pa. Super. 536, 506 A.2d 901 (1986), wherein the court made it clear that one is responsible for the aggravation of a pre-existing condition.

In conclusion, Beth will also likely be successful on her claim against Kristen for intentional infliction of emotional distress.

**3. Kristen could bring her cause of action in Pennsylvania in either the Court of Common Pleas of C County or in the Federal District Court encompassing C County.**

The facts indicate that Beth is a domiciliary of C County, Pennsylvania, and Kristen is a domiciliary of D County, New Jersey. The office of ABC Computer, Inc. is located in C County and it appears that Beth's actions giving rise to the cause of action for interference with prospective contractual relations all occurred within C County, Pennsylvania.

Except in certain limited situations that are not applicable under these facts, the courts of common pleas in Pennsylvania shall have unlimited original jurisdiction of all actions and proceedings. 42 Pa. C. S. A. Section 931(a). Since the cause of action against Beth arose in C County, Pennsylvania, Kristen's lawsuit could be filed in the Court of Common Pleas of C County in accordance with Pennsylvania Rule of Civil Procedure 1006 (a)(1) which provides that an action against an individual may be brought in and only in a county in which the individual may be served or in which the cause of action arose or an occurrence took place out of which the cause of action arose. Although subject matter jurisdiction and venue are distinct they must exist simultaneously in order for the Court to properly exercise its power to resolve the controversy. *Searles v. Estrada*, 856 A.2d 85 (Pa. Super. 2004). In sum, Kristen could bring her cause of action against Beth in the Court of Common Pleas of C County, Pennsylvania since the statements giving rise to the underlying tort were made there, and Beth can be served there because she resides and works in C County.

Kristen could also file suit in the Federal District Court which encompasses C County, Pennsylvania. The Federal District Courts have original jurisdiction over all civil actions where the matter in controversy exceeds the sum or value of Seventy Five Thousand (\$75,000) Dollars, exclusive of interest and costs, and is between citizens of different states. 28 U.S.C.A. Section 1332 (a)(1). A civil action wherein jurisdiction is founded only on diversity of citizenship may be brought in a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred or in which any defendant resides, if all defendants reside in the same state. 28 U.S.C.A. Section 1391 (a).

Citizenship is synonymous with domicile for purposes of diversity jurisdiction. *McCann v. Newman Irrevocable Trust*, 458 F.3d 281 (3d Cir. 2006). As applied, here Beth would be considered a citizen of the state (Commonwealth) of Pennsylvania and Kristen would be considered a citizen of the state of New Jersey. The amount in controversy is \$675,000 which is clearly in excess of the jurisdictional limit of \$75,000. Accordingly, the federal courts would have jurisdiction based upon

diversity of citizenship. As to venue, the statements made by Beth which gave rise to the cause of action were made in C County Pennsylvania and Beth is a resident of C County. Thus, under the federal venue statute cited above the case could be brought in the federal district court encompassing C County, Pennsylvania.

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

Penny was a group manager for a nationwide lobbying and governmental relations company (Company) located in State T, where she has resided for all of her life. She had worked for Company for 5 years, with excellent performance reviews. Penny also is a part-time student in a unique and highly prestigious graduate program leading to a Master's degree in public administration, and she has completed all requirements for her Master's degree except the required thesis. She has been working on her thesis on her assigned topic of waste in State S government for several years, but she still needs some additional data from State S to complete it.

Penny submitted a written request to State S to obtain a copy of its fiscal records under the state's Open Government Records Act ("OGRA"), to which she received the following response from the Secretary of Financial Affairs of State S: "Your request for State S fiscal records is DENIED for the following reason(s): you are not a citizen of State S."

State S's OGRA provides, in pertinent part: "All public records shall be open for inspection and copying by any citizen of the State during regular business hours of the appropriate state agency." The legislative history for this statute states that the purpose of the statute is to strengthen the political process by ensuring transparency and accountability in State S government by making its records available to its citizens who are eligible to vote.

Penny needs the records as soon as possible to assist her in completing a project at work and because her participation in the graduate program will be terminated if she does not complete her thesis within the next three months. A Complaint was filed on Penny's behalf in federal court in State S against appropriate defendants, alleging that the refusal to provide the requested records to Penny violated the Privileges & Immunities Clause of Article IV of the U.S. Constitution. After filing the Complaint, Penny's counsel filed a Motion for Preliminary Injunction, and initial discovery revealed that Penny's request was denied solely because she was not a citizen of State S.

1. What arguments should Penny's counsel make to establish that the denial of State S records violated Penny's rights under the Privileges and Immunities Clause of the federal Constitution, and with what likelihood of success?
2. Assume for purposes of this question only that the court will find that Penny has a strong likelihood of success on the merits of her constitutional claim. What other elements must Penny establish to support her request for a preliminary injunction, and how should the court rule on such request?

While the litigation over access to State S records was pending, Penny received notice by Company that her position as a manager had been eliminated as part of an overall 10% reduction in force ("RIF"). The following facts can be established: prior to the RIF Company had 100 employees, 10 of whom were women; 5 women were terminated by Company as part of the RIF; Penny was Company's only female manager; and male employees with less seniority than Penny were retained as managers by Company. A complex demographic study of governmental relations businesses performed in 2007 showed Company to be in the lowest 1% of similar companies for hiring and promoting women.

As a result of her termination, after complying with the procedural requirements for bringing suit, Penny filed a Complaint against Company in federal court under Title VII of the Civil Rights Act of 1964, alleging discrimination due to disparate treatment on the basis of her sex. Prior to trial, Penny's former boss learned that Penny had not completed her graduate degree. When Penny had applied for her job, she told Company's Director of Personnel that she had completed her Master's degree, which was a requirement for her position, and a ground for which she would have been fired if it was discovered.

3. At trial when Penny's counsel seeks to introduce the demographic study as evidence to support Penny's claim of sex discrimination, Company objects on the grounds of relevance. What arguments should be made in support of the admission of the study, and how should the court rule?
4. Assume that Penny established a prima facie case of discrimination and that Company's reduction in force explanation was found to be a pretext for discrimination. What effect, if any, would the evidence of Penny's misrepresentation of her academic qualifications have on Company's ability to defend against her claim of discrimination, and on any remedy that could be obtained by Penny?

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

- 1. Penny's counsel should argue that State S's denial of access to its records impairs protected rights, and that State S does not have a substantial reason for its denial that bears a substantial relation to the state's goal. Penny will likely be successful in establishing a violation of the Privileges and Immunities Clause.**

The Privileges & Immunities Clause of Article IV, § 2 of the United States Constitution provides: “[t]he citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” It has generally been interpreted as preventing a state from discriminating against citizens of other states in favor of its own. *Hague v. C.I.O.*, 307 U.S. 496, 511, 59 S.Ct. 954 (1939).

The test to determine whether a State's actions or policies violate the Privileges & Immunities Clause of Article IV requires a court to consider whether the policy at issue burdens a right protected by the Privileges & Immunities Clause, and whether the state has a “substantial reason” for the discriminatory practice and whether the degree of discrimination bears a close relation to the reason. *Toomer v. Witsell*, 334 U.S. 385, 68 S.Ct. 1156 (1948), *United Building & Construction Trades v. Mayor and Council of Camden, et. al.*, 465 U.S. 208, 104 S.Ct. 1020(1984), *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284, 105 S.Ct. 1272 (1985). .

Penny should argue that State S has discriminated against her by denying her access to its official records, and that such denial burdened her ability to complete work projects in the field of lobbying and governmental relations on the same basis as residents of State S, and to engage in the political process.

The pursuit of a common calling is one of the most fundamental of those privileges protected by the Privileges & Immunities Clause. *City of Camden, supra*. Penny's inability to perform the functions of her work in the field of lobbying and governmental relations on the same basis as State S residents could be determined to be a right similar to pursuing a common calling. *Toomer, supra.*, at 396, *Lee v. Minner*, 369 F.Supp. 2d 527 (D.Del. 2005), *affirmed*, 458 F.3d 194 (3d Cir. 2006). In the *Lee* case, a non-resident sought Delaware's official records in order to carry out his profession as a consumer advocate and journalist. The District Court found that a citizen-only law violated plaintiff's fundamental right “to practice his common calling...on the same terms and conditions” as residents. *Id.*, 369 F.Supp.2d at 533.

Additionally, it is reasonable to assume that Penny and other residents of State T might be interested in State S' government operations, and that governmental watchdog organizations, like Company, would have an interest in transparency and accountability in State S government. Penny could argue that her inability to investigate and question State S's budget may be determined to be a burden on her ability to participate in political advocacy on matters of common public interest between the states. The court in *Lee v. Minner* found that a citizen's only law violated plaintiff's fundamental right “to engage in the political process with regard to matters of both national political and economic importance.” *Id.*, 369 F.Supp.2d at 533.

If Penny's rights are determined to be protected by the Privileges & Immunities Clause, State S must then establish that it has a “substantial reason” for exclusion of nonresidents from access to its official documents. State S must prove “...that there is an independent, valid reason for the discriminatory treatment of nonresidents, and that nonresidents are a ‘peculiar source of the evil at which the statute is aimed.’” *Id.*, at 535, quoting *Toomer, supra*, 334 U.S. at 399. State S may be expected to argue that it wants to strengthen the political process by ensuring transparency and accountability in State S government for its citizens. .

While ensuring transparency and accountability in government might be found to be a legitimate interest, it is unlikely that the state's goal is substantially related to the means by which it seeks to achieve that goal. See *Lee, supra*, 458 F.3d at 201. Allowing non-citizens access to the same public information available to the citizens of State S does not impede or thwart such interest. *Id.* Moreover, since residents of other states may have a legitimate interest in State S governmental activities, wholesale exclusion of out-of-state residents from access to records is likely to be viewed as an obstacle to such goal. Indeed, Penny's research on waste in State S government would certainly have been of interest to State S residents, thus furthering rather than hindering State S's interest in increasing accountability and transparency in State S government. Accordingly, the court will likely find that OGRA violates Penny's rights under the Privileges & Immunities Clause.

**2. In addition to a likelihood of success on the merits, Penny must establish that irreparable injury will result if the injunctive relief is not granted; that harm to Penny will outweigh harm to State S; and that the public interest will not be harmed if the preliminary injunction is granted. Penny will likely succeed in obtaining a preliminary injunction.**

Preliminary injunctive relief is extraordinary relief, issued at the discretion of the trial court. *JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75, 80 (2d Cir. 1990). Here, Penny is seeking to enjoin the enforcement of OGRA against her. This is considered to be a mandatory injunction that seeks to alter the status quo by commanding a positive act. *Yu Juan Sheng v. City of New York, et al*, 181 Fed. Appx. 38, 2006 U.S. App. LEXIS 11928 (2d Cir. 2006).

The criteria for the entry of a preliminary injunction are: (1) a likelihood of success on the merits; (2) irreparable harm resulting from denial of the relief sought; (3) the harm to the non-moving party if the relief is granted; and (4) the public interest. *United States v. Bell*, 238 F.Supp.2d 696 (M.D. Pa. 2003). Where the preliminary injunction is directed at providing mandatory relief, the burden on the moving party is particularly heavy. *Punnett v. Carter*, 621 F.2d 578 (3d Cir. 1980).

Since success on the merits is assumed, Penny must establish that she will be irreparably injured should the injunctive relief be denied, that the public interest will not be harmed by the preliminary injunction and that the harm to State S (from granting the requested injunction) will not be greater than the harm to Penny (should injunctive relief be denied). In support of these elements, she will allege irreparable injury due to her inability to complete her thesis should she be denied immediate access to State S financial records, which will cause her to be terminated from the unique and prestigious graduate program in which she is enrolled. She should further allege that it is in the public interest for her as a member of the public to gain access to State S fiscal records, and that State S will not be injured by the entry of preliminary injunctive relief.

It is likely that the court will grant a preliminary injunction. It is clear that the public interest will not be harmed by the granting of the injunction, and, in fact, it may further the public interest for such access to be granted so that the public may benefit from Penny's research on waste in State S government. Additionally, State S will not be harmed if the preliminary injunction is granted because access to the records by Penny is currently merely restricted rather than eliminated under the statute. Penny could obtain the records through other means if she were able to identify a State S resident willing to make the request for records on her behalf.

Finally, it is likely that the court will find that Penny will sustain irreparable injury if a preliminary injunction does not issue. An irreparable injury is one that is of a peculiar nature so that money alone cannot compensate for it. *Connors v. Shannopin Mining Co.*, 675 F.Supp. 986 (W.D. Pa. 1987). Most courts hold that when an alleged deprivation of a constitutional right is involved, no further

showing of irreparable injury is necessary to support the grant of a preliminary injunction. *McCormick v. Hirsch*, 460 F. Supp. 1337 (M.D. Pa. 1978). Even if specific proof of irreparable injury were required, it is likely that Penny's dismissal from the unique and prestigious graduate program for her failure to meet the program's deadlines, would be viewed as warranting such extraordinary equitable relief, especially in light of the fact that she has been working on the research project for several years. See *Faulkner v. Jones, et. al.*, 10 F.3d 226 (4<sup>th</sup> Cir. 1993). Penny's Motion for a Preliminary Injunction will likely be granted.

**3. Penny's counsel should argue that the demographic study is relevant to support Penny's *prima facie* case of discrimination, and to support her argument that the reduction in force explanation for her dismissal was a pretext for discrimination. The court will likely admit the study.**

In general, all relevant evidence is admissible. Rule 402, Fed. R. Evidence. Rule 401 of the Federal Rules of Evidence states that relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Here, Penny's position was not filled by another individual; rather, the Company claims that Penny lost her job because of an overall reduction in force. Penny has filed an action based on disparate treatment and will argue that she was singled out for termination because she is female and that the reduction in force is a pretext for discrimination. Statistics can be relevant and important in a case of individual disparate treatment. *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126 (11<sup>th</sup> Cir. 1984). Statistical evidence that relates to an employer's general policy and practice with respect to employment of individuals in the plaintiff's protected class may be relevant to a showing of pretext because such statistics may be helpful to a determination of whether the employer's action with respect to the plaintiff conformed to a general pattern of discrimination against individuals within the plaintiff's protected class. See *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973). Statistical studies, while not ordinarily dispositive, are relevant in establishing that the employer's reason was a pretext for discrimination in an individualized hiring decision. *Id.* at 1826, *Bruno v. W.B. Saunders Co.*, 882 F.2d 760 (3d Cir. 1989), *cert. denied*, 493 U.S. 1062, 110 S.Ct. 880 (1990). However, the probative value of statistical information in a disparate treatment case is limited because overall employment statistics have limited bearing on the specific intentions of the employer in making particular employment decisions. *Bullington v. United Airlines Inc.*, 186 F.3d 1301 (10<sup>th</sup> Cir. 1999). Penny's employer may seek to introduce other statistical evidence to diminish the probative value of the study.

Penny should argue that statistical evidence of the percentage of Company's female employees in comparison to other similarly situated employers in the area is relevant for purposes of establishing that the reduction in force was a pretext for discrimination because the statistical comparison shows that Company appears to have discriminated against women in its hiring and promotion decisions by virtue of its poor performance compared to other similar companies which were able to hire and retain significant percentages of women employees.

Penny could also argue that the statistical information is relevant to establishing a *prima facie* case of discrimination. While statistical information alone may not be sufficient to establish a *prima facie* case of disparate treatment, it can be relevant and important circumstantial evidence of discriminatory treatment. *Smith v Horner*, 839 F.2d 1530 (11<sup>th</sup> Cir. 1998), *Kadas v. MCI Systemhouse Corporation*, 255 F.3d 359 (7<sup>th</sup> Cir. 2001). She would offer the study as circumstantial evidence of Company's discriminatory intent toward her arguing that her termination conformed to a general practice of discrimination against women.

The court would likely overrule the objection and admit the statistical evidence as it supports Penny's claim of discrimination, and it makes the allegation of pretext more probable because of Company's overall hiring and promotion practices with respect to women.

- 4. Since it appears that Company did not learn of Penny's misrepresentation of her academic qualifications until after her dismissal, Company may not avoid liability for discrimination on that basis. However, since the misrepresentation would have justified Company in terminating her for failure to meet the requirements of the job, Penny would not be eligible for reinstatement. She would be eligible for back pay from the date of the discriminatory termination until the date Penny's misrepresentation of her academic qualifications was discovered.**

It was assumed for purposes of this question that a *prima facie* case of sex discrimination had been established by Penny, and that Company's proffered reason of a reduction in force to support Penny's dismissal was found to be a pretext for discrimination. Assuming, as it appears, that Company did not learn of Penny's misrepresentation until after she was discriminatorily terminated, Penny's employer will not be able to use evidence of her misrepresentation of her qualifications as an additional legitimate non-discriminatory reason for termination.

The Supreme Court in *McKennon v. Nashville Banner Publishing Company*, 513 U.S. 352, 115 S.Ct. 879 (1995), recognized that in defending against a claim of discrimination under the ADEA, an employer cannot claim that an employee was terminated for after-discovered misconduct because the employer could not have been motivated to terminate the employee for wrongdoing of which it had no knowledge at the time of the termination. The *McKennon* holding that after-acquired evidence does not provide immunity from liability for a claim of discrimination is applicable to Title VII claims, and to cases where the after-acquired evidence concerned the employee's misrepresentations in a job application rather than misconduct during employment. See *Wallace v. Dunn Construction Company*, 62 F.3d 374 (11<sup>th</sup> Cir. 1995).

The after-acquired evidence of misconduct does bear on the remedy available to the terminated employee, and, as a general rule, neither reinstatement nor front pay is an appropriate remedy in such circumstances. *McKennon, supra., Wallace, supra.* In cases where, as here, the after-acquired evidence was of such severity that it would have led to termination of the employee had the employer known about it, back pay generally will be limited to the period from the date of the unlawful discharge to the date the evidence of misconduct was discovered. *McKennon, supra., Wallace, supra.* The rationale for the rule is that the employer should not be impeded in the exercise of legitimate prerogatives and the employee should not be placed in a better position than she would have occupied absent the discrimination. *Shattuck v. Kinetic Concepts, Inc.*, 49 F.3d 1106 (5<sup>th</sup> Cir. 1995).

The facts establish that a graduate degree was a requirement for Penny's position, and that she would have been terminated if her misrepresentation of her qualifications had been discovered. Penny will prevail in her claim of discriminatory termination since she established a *prima facie* case of discrimination, which was not rebutted by the existence of a legitimate non-discriminatory reason, but she will only be eligible for an award of back pay, and will not be entitled to reinstatement or front pay.

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

Oliver owned a run-down mansion on a parcel of property known as Pennacres located in Big City, Pennsylvania. Tired of living in the city, Oliver signed a valid written sales agreement with Lakeside, a real estate development company, to purchase a newly constructed log cabin home in Rustic County, Pennsylvania, for \$200,000. The sales agreement provided for a \$20,000 cash deposit at the time of the signing of the sales agreement and the remaining amount to be paid at the time of closing. The sales agreement, however, did not contain a provision regarding loss in the event of a fire or similar casualty. Between the time of the signing of the sales agreement and the closing, lightning struck the log cabin home and it was completely destroyed by fire. Lakeside had insured the cabin for \$200,000. Oliver ignored his attorney's advice and did not obtain insurance on the cabin.

After signing the sales agreement, Oliver executed a valid deed stating: "I hereby grant and convey Pennacres to my brother Andy, for his natural life, then to my nephew Bob and his heirs, but if Bob dies without children surviving him, then to my niece Carol and her heirs." Andy immediately took up residence at Pennacres and contacted Carpenter about building a new deck on the back of the mansion. Carpenter asked Andy whether he wanted the deck constructed with more weather-resistant, "super-grade" lumber or with more attractive, but less weather-resistant, "regular" grade lumber. Andy and Carpenter signed a written contract, complete and detailed in all its terms, which specifically provided that the deck would be built with regular grade lumber. The contract also stated: "The parties intend this writing as the final expression of their agreement and as a complete and exclusive statement of its terms." Within several months after its construction, the new deck at the Pennacres mansion started to rot due to exposure to the elements and was in danger of collapsing.

Bob owned a rare, classic automobile. Bob sent an e-mail to Andy stating: "I know that you've always liked my car. If you still want my car, you can buy it; but the price is \$30,000. You can check out the car at my house if you want. You must pay with a cashier's check."

After inspecting the car, Andy replied to Bob by an e-mail that stated: “Yes, I’ll buy your car, but you must have the engine overhauled and replace the two front tires at your own expense. A cashier’s check is not a problem. Let me know what you want to do. Carol is willing to sell her sports car to me, but she said that I have only two weeks to make up my mind about buying it. If I don’t hear from you before then, I am going to buy her car.” When two weeks had elapsed and Bob had still not responded to Andy’s e-mail, Andy agreed to buy Carol’s sports car. The day after Andy picked up the car from Carol, Bob called Andy and told him that they had a deal for the sale of his classic car based on the terms in Andy’s earlier e-mail.

1. What respective interests or estates in Pennacres were created by Oliver’s deed?
2. What right, if any, does Lakeside have to (a) specific performance of the contract to purchase the log cabin, and (b) the proceeds of the insurance policy on the cabin?
3. Andy sued Carpenter for breach of contract, and at the trial Andy attempted to introduce (a) his oral statements made to Carpenter prior to the signing of the agreement that he wanted the deck constructed from super-grade lumber, and (b) evidence of a conversation between Andy and Carpenter that occurred after the contract was signed during which the parties orally agreed that the deck would be constructed with super-grade lumber. If Carpenter objects to this evidence based on the parol evidence rule, how should the court rule?
4. Bob sued Andy for \$30,000 alleging that Andy had breached their contract for the purchase of Bob’s classic car. What arguments should Andy’s attorney make in defending against the action, and how should the court rule?

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

- 1. The interests created in Pennacres by Oliver's deed are a life estate in Andy, a vested remainder in fee simple either subject to complete divestment or subject to an executory limitation in Bob, and a shifting executory interest in fee simple in Carol.**

A life estate arises when a conveyance or will limits the duration of the created estate in terms of the life or lives of one or more persons. S. KURTZ, *MOYNIHAN'S INTRODUCTION TO THE LAW OF REAL PROPERTY*, Chap. 2, § 10, at 64 (4<sup>th</sup> ed.). The use of particular phrases or words of art is not required to create a life estate. *In Re Appeal of Board of Directors of Owen J. Roberts School District*, 500 Pa. 465, 469, 457 A.2d 1264, 1266 (1983). Here, Oliver's deed limited Andy's estate in Pennacres to "his natural life." Based upon use of these words of limitation, Andy's interest in Pennacres is clearly a life estate.

A remainder is a future interest in favor of someone other than a grantor which is capable of becoming possessory upon the natural expiration of a prior estate of lesser duration created at the same time and in the same instrument. R. BOYER, H. HOVENKAMP and S. KURTZ, *THE LAW OF PROPERTY: AN INTRODUCTORY SURVEY*, § 7.5, at 165 (4<sup>th</sup> ed.). The second clause in the deed granted an estate in Pennacres to someone other than Oliver, the grantor. The estate created in Bob followed the grant of an estate of lesser duration (Andy's life estate) and was created at the same time as the estate of lesser duration and in the same deed. Bob's estate in Pennacres thus is a remainder.

Remainders are classified as either vested or contingent. *In Re Houston's Estate*, 414 Pa. 579, 201 A.2d 592 (1964). A remainder is vested if the person to whom the interest is given is born, ascertainable and does not have to satisfy an express condition precedent to obtain possession. R. BOYER, H. HOVENKAMP and S. KURTZ, *supra*, at 167. Bob, the person to whom the remainder interest is given in Oliver's deed, is an ascertainable, identifiable person. Although there is an express condition recited in the deed that qualifies Bob's interest in Pennacres, Bob does not have to satisfy that condition prior to obtaining possession of Pennacres. Therefore, Bob's remainder in Pennacres would be considered to be vested.

The use of "and his heirs" is the classic common law words of limitation used to create a fee simple title. R. BOYER, H. HOVENKAMP and S. KURTZ, *supra*, § 6.1, at 117. Like many other states, Pennsylvania has abolished the need to use these precise words of limitation to create a fee simple interest. The use of the words "grant" or "convey" are sufficient to pass fee simple title. 21 P.S. § 2 (2001). Regardless of whether Oliver used the words "and his heirs" in his deed, Bob's vested remainder would be considered to be a fee simple under Pennsylvania law.

A vested remainder can be subject to complete divestment if the future right to possession or actual possession of the estate can be cut off due to the happening or non-happening of a condition stated in the instrument of conveyance. S. KURTZ, *supra*, Chap. 5, § 5 (C), at 163. In this instance, Oliver's deed subjected Bob's estate to the express condition that Bob have children. If Bob died without children surviving him, his interest in Pennacres would be completely cut off or "divested" and given to another transferee, Carol. If Bob's remainder is cut off because the condition occurs before he gains possession of Pennacres, his future interest would be classified as a vested remainder subject to complete divestment. If Bob's remainder is cut off because the condition occurs after he gains possession of Pennacres, his future interest would be classified as a vested remainder subject to an executory limitation. *Id.*

An executory interest or limitation is a future interest that becomes possessory only upon the occurrence or non-occurrence of an event that divests or defeats the interest of another. *Gohn's Estate*, 324 Pa. 177, 188, 188 A. 144, 146 (1936). It is distinguished from a remainder because it will not come into effect, if at all, due to the natural expiration of the prior estate. R. BOYER, H. HOVENKAMP and S. KURTZ, *supra*, § 7.6, at 170. An executory interest is classified as “shifting” or “springing” depending whether it divests an interest from a transferee or the grantor. S. KURTZ, *supra*, Chap. 8, § 9, at 249-50. In this case, Carol’s interest in Pennacres is a shifting executory interest or limitation because it comes into being only if the condition subsequent of Bob not having any surviving children occurs. If Bob does not satisfy the condition, the interest in Pennacres will shift from the original transferee, Bob, to another transferee, Carol.

Executory interests are not vested and therefore are subject to the Rule Against Perpetuities. *In Re Pruner's Estate*, 400 Pa. 629, 162 A.2d 626 (1960). Carol’s shifting executory interest, however, does not violate the Rule for two reasons. First, Pennsylvania statutorily abolished the Rule Against Perpetuities for interests created after December 31, 2006. *See*, Pa. Cons. Stat. Ann. tit. 20, §6107.1 (b) (1). Thus, if Oliver conveyed Pennacres after December 31, 2006, Carol’s shifting executory interest would not be subject to the Rule. Second, even if Oliver’s conveyance of Pennacres occurred prior to December 31, 2006, Carol’s shifting executory interest would be found valid under Pennsylvania’s “wait and see” approach to the Rule Against Perpetuities. Under the wait and see approach, the validity of interests under the Rule Against Perpetuities is to be determined by actual rather than possible events. *Id.*, § 6104 (b); *In Re Jones' Estate*, 410 Pa. 380, 190 A.2d 120 (1963). Although under the “wait and see” approach there is no need for a prospective analysis, it is clear in this instance that Carol’s shifting executory interest is valid because the event which will lead to the vesting of Carol’s interest in Pennacres (Bob’s death without children surviving him) will actually occur, within the time period covered by the Rule – at the time of the death of Bob, a life in being when the interest was created. Since the express condition determining vesting is specifically tied to a life in being, Carol’s shifting executory interest would have to be valid under the wait and see approach to the Rule.

Oliver’s deed thus created a life estate in Andy, a vested remainder in fee simple absolute in Bob subject to complete divestment by a shifting executory interest or limitation in fee simple absolute in Carol.

**2. Lakeside is entitled to specific performance of the sales agreement because Oliver became the equitable owner of the log cabin under the doctrine of equitable conversion and bears the risk of loss for its destruction prior to the closing. Lakeside is not entitled to keep both the purchase price from Oliver and the insurance proceeds.**

When a buyer and seller enter into a binding agreement for the sale and purchase of real estate, the common law doctrine of equitable conversion considers the buyer as the equitable or beneficial owner of the property. *DiDonato v. Reliance Standard Life Insurance Co.*, 433 Pa. 221, 249 A.2d 327 (1969). The seller retains legal title to the property as trustee for the buyer and as security for the payment of the unpaid purchase money. *Mutual Beneficial Insurance Co. v. Goschenhopp Mutual Insurance Co.*, 392 Pa. Super. 363, 572 A.2d 1275 (1990).

Where an agreement of sale is silent as to which party assumes the risk of loss for injury to the property caused by fire or other casualty which occurs after the execution of the agreement of sale but before delivery of the deed, Pennsylvania law places the risk squarely upon the buyer as equitable owner. *DiDonato v. Reliance Standard Life Insurance Co.*, *supra*, 433 Pa. at 224, 249 A.2d at 329.

Moreover, equitable conversion requires the buyer to pay the full contract price to the seller whatever the condition of the property. *Partrick & Wilkins Co. v. Reliance Insurance Co.*, 500 Pa. 399, 403, 456 A.2d 1348, 1351 (1983).

Where the seller has insured the property, there is an additional issue of who is entitled to recover the insurance proceeds. To prevent the harsh result of a seller recovering both the purchase price and the insurance proceeds for the damage sustained to the property during the period between execution of the contract and final settlement, Pennsylvania case law has long held that the seller's insurance covers both the legal and equitable interests in the property. *Dubin Paper Co. v. Insurance Co. of North America*, 361 Pa. 68, 63 A.2d 85 (1949). The seller's equitable entitlement to the insurance proceeds thus is limited solely to the recovery of the unpaid balance of the purchase price for his ownership of the legal title in the property. *Partrick & Wilkins Co. v. Reliance Insurance Co.*, *supra*. Any amount in excess of the unpaid balance is deemed to be held by the seller in constructive trust for the buyer and must be paid over to the buyer to prevent any unjust enrichment. *Dubin Paper Co. v. Insurance Co. of North America*, *supra*. Based upon these principles, although Oliver would be obligated to pay the remainder of the purchase price, Lakeside too would be obligated to act as a trustee of the insurance proceeds and pay over the proceeds to Oliver, the equitable owner of the property.

In sum, even though the cabin was completely destroyed by fire, Lakeside is still legally entitled to specific performance of the agreement with Oliver for the purchase of the log cabin because Oliver, as the equitable buyer under the doctrine of equitable conversion, bears the risk of loss for injury to the property caused by fire or other casualty which occurs after the execution of the agreement of sale but before delivery of the deed. Equitable principles, however, would prevent Lakeside from recovering both the remaining amount of the purchase price and the entire amount of the proceeds of its insurance policy on the property.

**3. The court should sustain Carpenter's objection on the ground that the parol evidence rule bars the admission of Andy's prior oral statements about building the deck with super grade lumber, but the Court should overrule Carpenter's objection to the subsequent conversation about the type of lumber based on the parol evidence rule.**

Andy's attempt to use his oral statements to Carpenter prior to the signing of their written agreement that he wanted the deck constructed with super grade lumber implicates the parol evidence rule. The parol evidence rule is a substantive rule of law and not a rule of evidence. *Schoch v. First Fidelity Bancorporation*, 912 F.2d 654, 662 (3d Cir. 1990). The purpose of the parol evidence rule is to preserve the integrity of written agreements by refusing to permit contracting parties from attempting to alter the import of their contract through the use of prior or contemporaneous oral declarations. *Rose v. Food Fair Stores, Inc.*, 437 Pa. 117, 262 A.2d 851 (1970). The Pennsylvania Supreme Court has stated the parol evidence rule as follows:

Where the parties, without fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only, evidence of their agreement. All preliminary negotiations, conversations and verbal agreements are merged in and superseded by the subsequent written contract ...[U]nless fraud, accident or mistake be averred, the writing constitutes the agreement between the parties, and its terms and agreements cannot be added to nor subtracted from by parol evidence.

*Yocca v. Pittsburgh Steelers Sports, Inc.*, 578 Pa. 479, 497, 854 A.2d 425, 436 (2004), quoting, *Gianni v. Russell & Co.*, 281 Pa. 320, 323, 126 A. 791, 792 (1924).

In deciding whether parol evidence is admissible to vary the terms of a written agreement, the court first must look at the written document and determine whether the written agreement represents the entire contract between the parties. *Green Valley Dry Cleaners, Inc. v. Westmoreland County Indus. Dev. Corp.*, 832 A.2d 1143, 1154 (Pa. Cmwlth. 2003). If the written document “appears to be a contract complete within itself, couched in such terms as import a complete legal obligation without any uncertainty as to the object or the extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, were reduced to writing.” *Gianni v. Russell & Co.*, *supra*, 281 Pa. at 323, 126 A. at 792. The facts state that the written agreement between Andy and Carpenter was complete and detailed in all its terms. Additionally, the written agreement contained an integration clause. An integration clause in a contract is viewed as a clear and conclusive sign that the writing contains the entire agreement and expresses all of the parties’ negotiations, conversations and agreements made prior to its execution. *McGuire v. Schneider*, 368 Pa. Super. 344, 534 A.2d 115, 117 (1987), *affirmed per curiam*, 519 Pa. 439, 548 A.2d 1223 (1988). Based upon these facts, the written agreement between Andy and Carpenter would have to be considered as the entire contract between the parties.

In addition to examining the writing itself, courts must examine whether the prior oral agreement or statement comes within the field embraced by the subsequent written agreement. This is done by comparing the earlier terms and determining whether the parties, situated as were the ones to the contract, would naturally and normally have included the oral term in the written agreement. If they relate to the same subject matter and are so interrelated that both would be executed at the same time and in the same contract, the scope of the subsidiary agreement must be taken to be covered by the writing. *Gianni v. Russell & Co.*, *supra*, 281 Pa. at 323-24, 126 A. at 792. Here, the type of wood that would be used for the construction of the deck clearly is a subject that would have been discussed by the parties and is one that naturally and normally would have been included within the subsequent written agreement.

Once a writing is determined to be the parties’ entire contract, the parol evidence rule applies and the evidence of any previous oral or written negotiations or agreement involving the same subject matter as the contract are generally inadmissible to vary the terms of the written agreement. *Yocca v. Pittsburgh Steelers Sports, Inc.*, *supra*, 578 Pa. at 497, 854 A.2d at 436-37. In this case, the facts indicate that the agreement between Andy and Carpenter set forth their complete and final understanding. Moreover, the facts do not expressly provide any evidence of fraud, accident or mistake. Since the prior oral statements that Andy seeks to introduce directly contradict the words of their written contract, the court should sustain Carpenter’s objection based on the parol evidence rule.

Furthermore, to the extent that the contract between Carpenter and Andy could be considered to predominantly involve the sale of a good (lumber) rather than the service of installing the deck, the Uniform Commercial Code’s version of the parol evidence rule would produce the same result as the common law version of the rule. Section 2202 of the Uniform Commercial Code in Pennsylvania states:

Terms with respect to which confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein *may not be contradicted by evidence of any prior*

*agreement or of a contemporaneous oral agreement* but may be explained or supplemented:

(1) by course of dealing or usage of trade (section 1205) or by course of performance (section 2208); and

(2) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

Pa. Cons. Stat. Ann. tit. 13, § 2202 (1999). (emphasis added).

The parol evidence rule has no application to oral or written agreements or statements that are made subsequent to the execution of the written agreement. J. E. MURRAY, JR., MURRAY ON CONTRACTS, § 84 (A), at 435 (4<sup>th</sup> ed.). The Pennsylvania Supreme Court colorfully described this limitation on the application of the parol evidence rule as follows: “The most ironclad written contract can always be cut into by the acetylene torch of parol modification supported by adequate proof.” *Wagner v. Graziano Construction Co.*, 390 Pa. 445, 448, 136 A.2d 82, 83 (1957).

In this instance, Andy wants to introduce evidence of a conversation between Andy and Carpenter that occurred after their contract was signed during which the parties orally agreed that the deck would be constructed with super grade lumber. Since these statements concern a subsequent oral agreement or oral modification of the terms of their written agreement, these statements would not be barred by the parol evidence rule. Therefore, absent another proper legal basis for an objection, the court should overrule any objection made by Carpenter based upon the parol evidence rule and should admit the evidence of the subsequent conversation between Andy and Carpenter.

**4. In defense of the breach of contract claim, Andy’s attorney should argue that a contract was not formed because Andy’s reply to Bob’s offer to sell his classic car was not an acceptance, but rather was a counter-offer that lapsed when Bob failed to exercise his power of acceptance within the time period specified in the counter-offer, and this argument will likely succeed.**

To create a contract, there must be an offer on one side and an acceptance of the offer on the other side. *Cohn v. Penn Beverage Co.*, 313 Pa. 349, 169 A.768 (1934). Under common law, an acceptance must be the “mirror image” of an offer. *Flender Corp. v. Tippins International, Inc.*, 830 A.2d 1279 (Pa. Super. 2003). The acceptance of the offer must be absolute and must identically match all of the terms of the offer. *Hedden v. Lupinsky*, 405 Pa. 609, 176 A.2d 406 (1962). If the purported acceptance materially alters the terms of the offer, the acceptance is not unconditional. *Thomas A. Armbruster, Inc. v. Barron*, 341 Pa. Super. 409, 419, 491 A.2d 882, 887 (1963), *citing*, 1 A. Corbin, CORBIN ON CONTRACTS, § 82 (1963). “[A] reply to an offer which purports to accept it, but changes the conditions of the offer, is not an acceptance, but is a counter-offer, having the effect of terminating the original offer.” *First Home Sav. Bank, FSB v. Nernberg*, 436 Pa. Super. 377, 389, 648 A.2d 9, 15 (1994), *allocatur denied*, 540 Pa. 620, 657 A.2d 491 (1995). (citations omitted).

Section 2-207 of the Uniform Commercial Code was intended to remedy the inflexibility of the common law mirror image rule under which the terms of the acceptance were required to be identical to

the terms of the offer. *Flender Corp. v. Tippins International, Inc.*, *supra*. The Pennsylvania version of Section 2-207 of the Uniform Commercial Code states in pertinent part:

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

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

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

Pa. Cons. Stat. Ann. tit. 13, § 2207 (a) and (b) (1999).

In this case, Bob and Andy are not merchants. *Id.*, § 2104. However, Bob's classic car would be considered a good under the Uniform Commercial Code. *Id.*, § 2105 (a) (" 'Goods' means all things . . . which are movable at the time of identification to the contract for sale. . ."). Because a sale of a good is involved, the attempted transaction between Andy and Bob must be examined under the rules for acceptance of an offer set forth in Section 2-207(a) and not under the common law of contracts.

The only terms included in Bob's offer were the price (\$30,000) and the method of payment (cashier's check). Although Andy's reply matched the price and method of payment terms in Bob's offer, it added two new terms: Bob must overhaul the car's engine and replace the two front tires at his own expense. Additionally, Andy invited Bob's assent to these new terms by stating in his reply "Let me know what you want to do." By stating that Bob "must" do these two things regarding the car, Andy's response made his acceptance of Bob's offer expressly conditional upon Bob's assent to the specified additional terms. Based upon the proviso to Section 2-207 (a), Andy's reply would not be considered an acceptance, but would be viewed as a counter-offer to purchase Bob's car under these additional terms and conditions.

When the offeror creates a power of acceptance, as the master of the offer, he may place whatever time limitations upon the exercise of the power that seem desirable to him even though that duration may seem to be unreasonable under the circumstances. J. E. MURRAY, JR., *supra*, § 41 (B), at 110-11. Where a limited time for acceptance is specified, the acceptance must be made within that time. *Van Schoiack v. United States Liability Ins. Co.*, 390 Pa. 27, 133 A.2d 509 (1957). If the power of acceptance is not exercised within the time limitations specified by the offeror, the lapse of time will terminate the offeree's power of acceptance. RESTATEMENT (SECOND) OF CONTRACTS § 41 (1) (1981).

The facts show that Andy's reply to Bob specified the period of time during which Bob had the power to accept Andy's counter-offer to purchase Bob's classic car. Andy's counter-offer indicated that if Bob did not accept Andy's counter-offer within the allotted two week period, then Andy was going to purchase Carol's sports car instead of Bob's classic car. Because the time period specified within Andy's counter-offer had expired, Bob's power of acceptance no longer existed and the counter-offer lapsed. Thus, even though he assented to the terms of Andy's counter-offer, Bob's reply did not create a binding contract between the parties for the sale of his classic car.

Andy's reply was not an acceptance because it was not the mirror image of Bob's offer. It also was not an acceptance under Section 2-207 (a) of the Uniform Commercial Code because Andy's reply was made expressly conditional upon Bob's assent to the additional terms concerning the repair of the classic car's engine and the replacement of the two front tires. Therefore, Andy's reply was a counter-offer. The counter-offer specified a limited period of time in which it could be accepted. Since Bob failed to exercise his power of acceptance within that time period, the counter-offer lapsed. Therefore, the court should rule in favor of Andy because the facts fail to establish a binding contract for the purchase of Bob's classic car.

### **Question No. 6: Facts and Interrogatories**

Steve, Phil, and Chris are the sole partners in Coal Company (“Coalco”), a Pennsylvania general partnership. Coalco is engaged in the surface mining business and the sale of coal and other minerals that it has mined on a wholesale and retail basis.

Coalco has been engaged in a surface mining operation to remove coal on Blackacre, a property owned by Coalco, for about one year. Two months ago, Coalco discovered a very rare and valuable type of fire clay on Blackacre. Steve has contacted Brick Company (“Brickco”) about buying the fire clay once Coalco extracts it. Brickco has analyzed the fire clay and has determined that it could produce a very valuable type of heat-resistant brick with the fire clay which it could sell to its customers. Coalco and Brickco have entered into a written contract that requires Coalco to sell and Brickco to buy 20,000 tons of fire clay from Coalco in 2008, on the condition that the fire clay come only from Blackacre.

Last month, Steve was clearing land for expansion of Coalco’s mining operation on Blackacre. Unaware of the exact boundary line of Blackacre, Steve strayed onto adjoining Whiteacre and knocked down approximately 50 valuable trees. Two weeks ago, the owner of Whiteacre contacted Coalco demanding compensation for the trees destroyed by Steve. After reviewing deeds and maps, Coalco has determined that Steve definitely trespassed on Whiteacre.

At Coalco’s last partners’ meeting, the partners agreed to sell off some equipment no longer used in its operations, and agreed to try to find an equipment broker to assist the partnership in finding buyers. Without the knowledge of the other partners, Steve contacted Ed, an equipment broker he knew. Ed entered into a contract signed by Steve on behalf of Coalco for Ed to find a buyer for two of Coalco’s unused bulldozers. The contract requires that Ed obtain a minimum price of \$500,000 for the bulldozers and further provides that Ed will receive

a \$50,000 commission when a sale occurs. Ed knows Steve is a partner in Coalco but does not know that Coalco's partnership agreement prohibits any partner from entering into a contract that will require a payment of \$20,000 or more by Coalco without the approval of all partners.

Three weeks ago, Chris, who normally orders Coalco's supplies, telephoned Oil Company ("Oil") and ordered 20 cases of lubricant used in Coalco's equipment at a price of \$50 per case. The next day Oil faxed Chris a confirmation accepting the order that also indicated, "any sums outstanding for more than ten (10) days after delivery shall bear interest at a rate of 1.5% per month (18% annually)." Chris received the confirmation but never discussed a finance charge with Oil and did not reply to the confirmation. The lubricant was delivered last week.

Two days ago, a violent storm, the severity of which had not been seen in 100 years, occurred causing unprecedented flooding and destruction in the area of Blackacre. Coalco estimates that its operations on Blackacre will be shut down through the end of July because of the storm. As a result, Coalco believes that by the end of 2008 it will only be able to fulfill one-half of its contract with Brickco, even though Brickco is its only customer for the fire clay.

All transactions and activities involving Coalco and its partners occurred in Pennsylvania.

1. Are Coalco, Phil, and Chris liable for damages as a result of Steve's trespass on Whiteacre?
2. If Ed finds an acceptable buyer for the bulldozers, will Coalco be successful in asserting a defense against Ed's action to enforce his contract with Coalco based on the provision in the partnership agreement requiring the approval of all partners for contracts in excess of \$20,000?
3. Under the Uniform Commercial Code, will Oil be able to enforce the interest provision contained in its confirming memo?
4. Given the fact that the contract for the sale and purchase of the fire clay between Coalco and Brickco is a contract for the sale of goods under the Uniform Commercial Code (the "Code"), under the Code can Coalco avoid liability for its breach of the contract because of its inability to fully perform the contract, and, if so, what steps must Coalco take to avoid liability on the contract?

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

**1. The partnership and all the partners are liable for the damages caused by the wrongful act committed by Steve.**

Under the Pennsylvania Uniform Partnership Act (the "Act"), both the partnership and the partners in the partnership will have liability for the damages caused by Steve's wrongful act. Section 8325 of the Act provides:

Where by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefore to the same extent as the partner so acting or omitting to act.

15 Pa. C.S.A. §8325. The Act further provides:

All partners are liable:

(1) Jointly and severally for everything chargeable to the partnership under sections 8325 (relating to wrongful act of partner) and 8326 (relating to breach of trust by partner).

(2) Jointly for all other debts and obligations of the partnership but any partner may enter into a separate obligation to perform a partnership contract.

15 Pa. C.S.A. §8327.

A partnership is liable for damages caused by the wrongful act of one of its partners if the partner committed the act while acting in the ordinary course of the partnership business. Steve caused damages to the owner of Whiteacre by trespassing onto Whiteacre and felling 50 valuable trees on Whiteacre. When Steve knocked down the trees he was engaged in the act of clearing the land for Coalco's expanding mining operations. Accordingly, Coalco will be liable to the owner of Whiteacre for the value of the trees.

All partners are answerable jointly and severally for everything chargeable to the partnership. Accordingly, the owner of Whiteacre may also look to the individual partners of Coalco jointly and severally to recover.

**2. Coalco will not be successful in raising the provision contained in the partnership agreement as a defense to Ed's action to enforce the contract.**

The Act provides:

Every partner is an agent of the partnership for the purpose of its business and the act of every partner, including the execution in the partnership name of any

instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership unless the partner so acting has in fact no authority to act for the partnership in the particular matter and the person with whom he is dealing has knowledge of the fact that he has no such authority.

15 Pa. C.S.A. §8321(a). The Act further provides, “No act of a partner in contravention of a restriction on his authority shall bind the partnership to persons having knowledge of the restriction.” 15 Pa. C.S.A. §8321(d).

The Act essentially provides that a third person dealing with a partner apparently carrying on the business of the partnership is not affected by restrictions on the partner’s authority contained in the partnership agreement if he or she has no notice or knowledge of the restrictions. Ed knew that Steve was a Coalco partner. Ed did not know of the restriction in the Coalco partnership agreement. Since Steve was acting on partnership business his execution of the contract with Ed would bind Coalco despite the restriction in the partnership agreement and his lack of express authority in the matter.

**3. Oil will be able to charge a finance charge if payment is not made within ten (10) days of delivery if such a provision is reasonable within the industry.**

Coalco and Oil are both merchants under the Pennsylvania Uniform Commercial Code, Article 2, Sales (the “Code”). See 13 Pa. C.S.A. §2104. Oil sells lubricants and Coalco sells coal and other minerals once severed from the ground. Lubricants and minerals severed from the ground are goods under the Code. Between merchants, the confirming memo, not objected to in writing within ten days of receipt, will satisfy the requirements of the statute of frauds under the Code. 13 Pa. C.S.A. §2201(b). Here, the confirming memo by Oil operates as an acceptance of Coalco’s order to purchase the lubricant. See 13 Pa. C.S.A. §2207(a). The issue then becomes one of the applicability of the interest provision, not discussed by the merchants, that was included in the confirming memo sent by Oil.

Section 2207 of the Code addresses this situation. It provides, *inter alia*:

Additional terms in acceptance or confirmation

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

(b) Effect on contract.--The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(1) the offer expressly limits acceptance to the terms of the offer;

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

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

Under the facts, subpart (b)(2) of Section 2207 is relevant. The language adding interest if payment is not made within ten (10) days is an additional term. The inquiry is, does this additional term materially alter the contract? The comments to Section 2207 suggest that an additional term will materially alter the contract if it will result in surprise or hardship if incorporated into the contract. Comment 5 lists as an example of a clause not materially altering a contract a clause providing for interest on overdue invoices if it is within the range of trade practice. 13 Pa. C.S.A. §2207, Comment 5. Arguments could be made both ways regarding the interest provision added by Oil. A thirty (30) day time for interest to attach would be more reasonable. One would need to look at trade practice in the industry to determine if a ten (10) day trigger for the imposition of interest is reasonable. *See White and Summers, Uniform Commercial Code, 4<sup>th</sup> Ed. §1-3.*

**4. Coalco will be able to avoid liability for breach of contract if it promptly notifies Brickco that due to commercial impracticality it will only be able to fulfill one-half of its contract to deliver the fire clay.**

Section 2615 of the Code “excuses a seller from timely delivery of goods contracted for, where his performance has become commercially impracticable because of unforeseen supervening circumstances not within the contemplation of the parties at the time of contracting.” 13 Pa. C.S.A. 2615, Comment 1. Section 2615 provides:

Except so far as a seller may have assumed a greater obligation and subject to section 2614 (relating to substituted performance):

(1) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (2) and (3) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

(2) Where the causes mentioned in paragraph (1) affect only a part of the capacity of the seller to perform, he must allocate production and deliveries among his customers, but may at his option include regular customers not then

## Question No. 2: Grading Guidelines

### 1. Suppression

Comments: The candidate should recognize that under Pennsylvania law there is automatic standing for possessory offenses. The candidate should also recognize that in order to successfully challenge a search, the subject must have an expectation of privacy in the place to be searched. Further, the candidate must discuss the proper procedure required for the execution of a search warrant, the exigent circumstances exception and render a proper conclusion as to the suppression of the evidence.

7 points

### 2. Duress

Comments: The candidate must discuss the elements of the duress defense, and needs to discuss the defense and prosecution's arguments relating to the duress defense that should be made under the facts, and apply the elements of duress to the facts in reaching a well reasoned conclusion.

4 points

### 3. Self-Defense

Comments: The candidate should identify the requirements for establishing self defense and apply these elements to the facts in concluding that this defense will not be successful for Mary since she did not have a reasonable belief she was in danger of death or serious bodily injury and also since she violated her duty to retreat.

4 points

### 4. Divorce

Comments: The candidate must discuss the fact the Pennsylvania Courts have jurisdiction over this divorce action since Mary was a resident of Pennsylvania for over six (6) months even though the grounds for divorce occurred in Georgia. The definition of marital property should be discussed together with a proper conclusion that the workers' compensation settlement arose from a claim that occurred after separation and is not marital property, while Mary's Pennsylvania house is marital property since it was purchased with funds that were marital property.

5 points

### **Question No. 3: Grading Guidelines**

**1. Intentional Interference with Prospective Contractual Relations**

The Candidate is expected to recognize that Kristen would likely have a cause of action against Beth for intentional interference with prospective contractual relations as a result of her not receiving the General Manager position at ABC Computer, Inc. The Candidate should discuss the elements of the tort and apply the relevant facts in reaching a well reasoned conclusion.

6 Points

**2. Conversion and Intentional Infliction of Emotional Distress**

The Candidate is expected to recognize that Beth would have potential claims against Kristen for conversion and intentional infliction of emotional distress. The Candidate is expected to identify the elements of these torts and discuss the relevant facts in reaching a well reasoned conclusion.

8 Points

**3. Civil Procedure**

The Candidate is expected to recognize that Kristen could bring her cause of action in either State or Federal Court and discuss the basis for being able to do so with regard to each Court.

6 Points

## Question No. 4 Grading Guidelines

### 1. Privileges and Immunities

Comments: Candidates should identify the elements necessary to establish a violation of the Privileges & Immunities Clause, and apply the facts to these elements in reaching a well reasoned conclusion.

6 Points

### 2. Preliminary Injunction

Comments: Candidates should identify the requirements for preliminary injunctive relief, and apply the facts to these elements in reaching a well reasoned conclusion.

7 Points

### 3. Relevance

Comments: Candidates should define relevant evidence and analyze the relevance of the statistical report to a claim of discrimination in reaching a well reasoned conclusion as to the admissibility of the report.

4 Points

### 4. Discrimination- After Acquired Evidence

Comments: Candidates should recognize that although the misrepresentation related to a job requirement that would otherwise have served as a basis for termination, it was not known at the time the decision to terminate was made by Company, and that as a result it cannot serve as a legitimate reason for the termination. Applicants should recognize that the misrepresentation as to qualifications for the position may have an impact on the remedies available for the discrimination, notably that Penny will not be eligible for reinstatement.

3 Points

## **Question No. 5: Grading Guidelines**

### **1. Life Estates and Future Interests**

Comments: Candidates should analyze the language of the stated conveyance and apply the appropriate common law and statutory rules to determine the respective present and future interests as a life estate in Andy, a vested remainder in fee simple absolute in Bob subject to complete divestment by a shifting executory interest or limitation in fee simple absolute in Carol.

7 points

### **2. Equitable Conversion and Risk of Loss**

Comments: Candidates should discuss the doctrine of equitable conversion and its application to which party bears the risk of loss for damage to a property during the period between the execution of a sales agreement and the delivery of the deed. Candidates should recognize the principles of unjust enrichment are applied to the doctrine of equitable conversion to prevent the harsh result of a seller recovering both the purchase price of the property and insurance proceeds.

4 points

### **3. Parol Evidence Rule**

Comments: Candidates should discuss the requirements of the parol evidence rule and should apply the requirements of the rule to the stated facts in reaching a well-reasoned conclusion.

5 points

### **4. Contract Formation – Conditional Acceptance, Counter- Offer and Rejection of Offer due to Lapse of Time**

Comments: Candidates should recognize and discuss a conditional acceptance and should apply the facts to determine whether the purported acceptance is unconditional or constitutes a counter-offer. Candidates should recognize that an offeror can place time limitations upon the exercise of a power of acceptance, and should analyze the stated facts and reach a well-reasoned conclusion concerning whether the lapse of time terminated the power to accept the counter-offer.

4 points

## **Question No. 6: Grading Guidelines**

### **1. Partnership's and partner's liability for wrongful act of a partner**

Comments: The candidates should discuss the relationship between the partnership and its partners relative to a wrongful act committed by a partner in the course of conducting partnership business, and recognize that a partnership is liable for the wrongful act of a partner acting in the course of partnership business, and that partners are jointly and severally liable for matters chargeable to the partnership.

5 points

### **2. Effect of restriction on partner's authority in contract with third party**

Comments: Candidates should recognize that partners are agents of the partnership, that they can bind the partnership via apparent authority, and that a third party without knowledge of a restriction on a partner's authority will not be affected by the restriction.

5 points

### **3. UCC-Sales-addition of new term between merchants**

Comments: The candidates should recognize that the parties are merchants, that the confirmation acts as an acceptance and that the new term contained in the confirming memo will become a part of the contract unless it materially alters the contract.

5 points

### **4. UCC-Sales-commercial impracticability**

Comments: The candidates should recognize that the contract required the fire clay to come from Blackacre and that has become at least partially impracticable due to an unforeseen event. Candidates should recognize that performance will be excused if Coalco gives notice of the impracticability and of the delay in delivery or the allocation of the available fire clay.

5 points

# PT

PLACE BAR CODED APPLICANT LABEL HERE



Supreme Court of Pennsylvania  
Pennsylvania Board of Law Examiners

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Pennsylvania Bar Examination  
February 26 and 27, 2008

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PERFORMANCE TEST  
February 26, 2008

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

## TABLE OF CONTENTS

### **File**

Memorandum to applicant outlining task .....	1
Guidelines and format for preparation of internal legal memorandum .....	2
Notes of interview with Janice Taynes .....	3
Residential Lease Agreement .....	4
Diary of Janice Taynes re: move to City, Pennsylvania .....	5
Letter dated 11/15/2007 from Janice Taynes to Amanda Agent .....	9
Report of Building Code Violations dated 12/6/2007 .....	10

### **Library**

<i>Pugh v. Holmes</i> (Supreme Court) .....	11
---	----

**FILE**

**Able, Best, & Candor**  
**1234 Main Street**  
**City, PA 12345**

**MEMORANDUM**

To: Applicant  
From: Attorney Able  
Date: February 26, 2008  
Re: Janice Taynes v. Homes 4 Rent, Inc.

We represent Janice Taynes in the defense of her landlord's action for the recovery of rent owed and for eviction. Ms. Taynes withheld her rent for several months because of the poor condition of the home she was renting, and eventually her family vacated the home. She is temporarily residing with one of her colleagues. She does not want to be liable to her landlord, Homes 4 Rent, Inc. ("Homes"), for the months she withheld rent, and wants to recover some of the rent she has paid. She desires to retain possession of the premises.

I believe that a strong argument can be made that Homes breached the implied warranty of habitability, and that Ms. Taynes should be entitled to some, if not all, of the relief she seeks. In order to assist me in preparing for this matter, please prepare an internal legal memorandum which addresses the following issues:

1. Whether Homes breached the implied warranty of habitability with respect to the premises it leased to Ms. Taynes?
2. Assuming that Homes breached the implied warranty of habitability, to what relief and or remedies is Ms. Taynes entitled?

You should follow our firm's format and guidelines for preparing internal legal memoranda, which are set forth in a memorandum in the File. Since I am familiar with her case, you do not need to prepare a Statement of Facts. In the analysis portion for the first issue, begin with September and address each month that Ms. Taynes possessed the home in chronological order. For each month, you should determine whether a material breach of the implied warranty of habitability occurred, and if so, whether it was a total or partial breach. There is no need to analyze the breach of the implied warranty of habitability for the months after she moved in with a colleague in December since the conditions in the home remained unchanged after she departed.

For the second issue, you should address all of the relief that Ms. Taynes is seeking, and determine whether she will be entitled to such relief. While you should advance all reasonable arguments that support the relief requested by our client, I am looking for an objective assessment of the likelihood of success on the above issues so that I can accurately advise Ms. Taynes on the likelihood of obtaining the requested relief.

The File and Library which are provided contain the only facts and legal principles that you should consider and rely upon in completing this assignment. You should assume that the facts set forth in the documents in the File are true and should rely on them in preparing the legal memorandum.

**Able, Best, & Candor  
Attorneys At Law**

Date: January 4, 1995

To: All Associates

Re: Guidelines and Format for Preparation of Internal Legal Memoranda

Use the following guidelines and format in the order listed for preparing all internal legal memoranda:

**HEADING:** the upper left hand corner of the Memorandum should have:

DATE: (date memo created)

TO: (recipient)

FROM: (associate)

RE: (subject matter)

**STATEMENT OF FACTS:** state all relevant facts needed to resolve the issues presented as well as any background facts helpful to understanding the issues. If a Statement of Facts has been provided, or is deemed to be unnecessary, reference that fact in this section of the memorandum.

**If more than one issue has been assigned, present a separate discussion of each issue using the following headings in the order listed:**

**ISSUE PRESENTED:** state the issue that has been assigned in the form of a question.

**BRIEF CONCLUSION:** state your conclusion as a positive statement that responds to the question(s) raised by the issue presented.

**ANALYSIS:** identify the relevant and controlling legal principles and apply these legal principles to the facts to demonstrate the reasoning that supports your conclusion on the issue presented. Cite legal authorities relied upon, such as cases, statutes, or regulations. If the outcome is uncertain, identify the unresolved question(s) of fact or law which give rise to the uncertainty.

### **Notes of Attorney Able from 2/18/08 Interview with Janice Taynes**

Janice Taynes came to our office to discuss the circumstances leading up to the eviction action filed against her by Homes 4 Rent, Inc. (“Homes”), because of her refusal to pay rent.

Ms. Taynes is a graduate fellow at University located here in City, Pennsylvania. Upon receiving notice of her appointment as a Fellow, she began looking for a home to rent for her family. Ms. Taynes is a single mother of two children, Girl and Boy, ages 10 and 8, respectively. She contacted Amanda Agent of Homes and informed Agent of her need for a three bedroom home near University, and provided Agent with other criteria for finding an acceptable home.

Ms. Taynes and Agent toured several Homes’ properties in late June and July 2007. Eventually Ms. Taynes selected the property at 456 Broad Street in City, Pennsylvania. She executed a 12-month lease for the home at a monthly rent of \$1,500, effective August 1, 2007. In addition to 3 bedrooms, the home has 2.5 baths, a living room, kitchen, and fully finished basement.

When touring the home, Ms. Taynes noticed that some repairs were needed including: a cracked window pane in the kitchen and broken locks on 2 of the bedroom doors. Agent assured her that the repairs would be made, and Ms. Taynes signed the lease and gave a \$3,000 security deposit in addition to \$1,500 as the first month’s rent (August 2007).

Ms. Taynes began experiencing difficulties almost immediately after moving in. She provided me with a diary that she prepared, which documents the problems experienced as they occurred. She paid rent for August through October, but withheld rent from November 2007 until now because of Homes’ failure to make the numerous necessary repairs.

In December, Ms. Taynes packed up sufficient clothing and personal effects, and she and her children moved in with a colleague. Her furnishings remain in the property. On that same date she contacted Agent and notified her that she would not return to the property or pay rent until it “was fit for humans to live in.”

Ms. Taynes wants to retain possession of the premises because of its close proximity to University so that she can re-occupy the property once the required repairs are made. She doesn’t believe any rent should have been due from September 2007 through the present. She wants to recover all or a part of the rent she paid for September and October, and to be relieved from paying any rent until such time as all repairs are completed.

## RESIDENTIAL LEASE AGREEMENT

This Lease is entered into by and between Homes 4 Rent, Incorporated ("Landlord"), and Janice Taynes ("Tenant").

In consideration of the mutual covenants contained herein and other valuable consideration received, and with the intent to be legally bound, Landlord and Tenant agree as follows:

1. PREMISES. Landlord hereby leases to Tenant, and Tenant hereby leases from Landlord, the following premises: home located at 456 Broad Street, City, Pennsylvania. The property is unfurnished.

2. TERM. The term of this Lease will commence on August 1, 2007, and will continue for one year. The lease will be automatically renewed on an annual basis on the same terms and conditions herein, unless either party provides written notice of termination at least 30 days prior to the annual expiration date. This Lease may also terminate sooner according to the provisions hereof.

3. RENT. Tenant agrees to pay to Landlord, without any deduction or set off, rental payments in the amount of \$1,500 per month, payable in advance on the fifth day of each month during the term of this Lease. Landlord acknowledges the receipt from Tenant of the sum of \$1,500 to be applied to the first month's rent.

4. SECURITY DEPOSIT. Upon the execution of this Lease, Tenant shall pay to Landlord a security deposit in the amount of \$3,000 to be held as security for the payment of rent and the faithful performance by Tenant of all of its obligations in this Lease. Landlord may use the security deposit to repair any damage to the Premises caused by Tenant or its guests, and to clean the Premises upon termination of this Lease. If Tenant fully performs its obligations hereunder, the security deposit, or balance, shall promptly be returned to Tenant after the termination of this Lease.

5. MAINTENANCE AND CONDITION. Tenant acknowledges that it has examined the Premises and furnishings, if any, and personal property, and that they are in a good and habitable condition. After examination, Tenant notes the following conditions that Landlord covenants and agrees to repair: cracked window pane in kitchen, replace broken locks on 2<sup>nd</sup> and 3<sup>rd</sup> bedroom doors.

Tenant shall keep the Premises and furnishings and personal property in a clean and sanitary condition and in as good order and repair as they were at the commencement of this Lease, ordinary wear and tear excepted.

6. DEFAULT. Tenant will be in default of this Lease upon the occurrence of any one of the following events:

- (a) failure to pay any installment of rent or any other amount hereunder on the date the same is due; or
- (b) abandonment of the Premises.

7. REMEDIES OF LANDLORD. Upon any default by Tenant, Landlord may, at its option, terminate this Lease and/or commence eviction proceedings in accordance with the laws of the Commonwealth of Pennsylvania.

In WITNESS WHEREOF, and intending to be legally bound thereby, the parties hereto have executed this lease as of the last date signed below.

Larry Landlord  
President, Homes 4 Rent, Inc.

July 23, 2007

Janice Taynes

July 22, 2007

## Janice Taynes Diary of Move to City, Pennsylvania

### June 2007

June 8 - Travel to City, PA, to meet with Homes 4 Rent agent, Amanda Agent, to go over housing needs. Informed her that we need 3-4 bedrooms, and a family room or finished basement so that the kids can play. Told her I am very sensitive to habits of prior tenants because of my kids' allergies and asthma and want to avoid properties where tenants had pets or smoked. Price range is \$1,400-1,600 per month.

6/9-10 Visited 3 Houses  
890 Fairview St. – Ok, distance a little far from University  
385 Richards Road – very nice, too pricey  
762 Domino Lane – former pets (not good for kids' allergies)

6/29 934 Aimsley Ave. - out of price range  
248 Montour St. – no kids play area  
539 Pine Road - too small, no kids play area

### July 2007

7/20-22 Travel to City, PA (gotta find something in this visit!)

7/21 456 Broad Street – ok, close, reasonable  
175 Made Blvd – nice, \$\$\$! (price too high and prior tenants were smokers ☹)

7/22 657 Winding Way – ok, reasonable, too far.

7/22 Signed lease for 456 Broad Street. Before signing lease I commented on cracked window pane in kitchen and broken locks on kids' bedroom doors. Also referenced small moisture stains around basement perimeter. Agent assured me that the stain visible was only visible on rare occasions, after a heavy rain (it rained yesterday). She said staining didn't get much larger and that basement never flooded or experienced an accumulation or pooling of water. Agent assured me that the window and locks would be repaired before I moved in or shortly thereafter.

### August 2007

8/1 Move in day!

8/2 Uh-oh! Discovered window pane not fixed, bedroom door locks still broken. Can't fully close kids' bedroom doors. I called Agent to advise & request repair as per rental agreement.

8/13 Still no answer from agent re: window & locks

8/22 Rained yesterday. Water ran down wall from gaps around window pane and created puddle on kitchen floor. Discovered that window pane's not just cracked, it's broken, and entire window frame needs to be replaced because there are gaps around window at top. Called Agent again! She apologized for failure to respond and assured me someone would be out before the end of the month. Told her if no one comes, I will fix the problems myself and submit a bill.

8/31 No repairs to window or locks.

### September 2007

9/5 Toilet fails to flush and spills over sides...great! (first day of school I don't need this now)

9/7-10 Toilet continues to fail to flush, and leaks over sides at least once/day.

9/10 -11 Called Agent to advise of plumbing problems with toilet. Plumber repairs the next day.

9/15 Heavy rainstorms. Water on kitchen floor again. Toilet backs up and overflows a lot this time. Water spilling over sides, onto the floor and under the walls. I go into basement to check if it is leaking down there and discover that entire basement is flooded. Water's dirty, and smells like sewage. Another call to Agent. She assures me that plumber will come the next day. Me & kids leave house and stay in hotel.

9/16 Plumber comes to fix toilet and drain the water from the basement.

9/17 Homes 4 Rent sends cleaning company to clean basement and bathroom.

9/25 Rains again today. Approximately 1 inch of clear water standing in basement. I call Agent. She says will send plumber.

9/26 Plumber returns to pump out water in basement.

9/27 Homes 4 Rent sends cleaning company again to clean basement.

### October 2007

10/1 Toilet leaks over sides again today, but not as bad. Called Agent.

10/10 No one has come to fix toilet. More rain. Toilet overflows and basement floods AGAIN. Both backup, and sewage is in bathroom and basement. Call Agent to advise her of problem. She's finally apologetic and says "there are real problems with this house...I'll get right on it." I tell her we're going to stay with one of my colleagues, because the smell in the house is too bad to stay.

10/11 Rains heavy again. I return to house to check and see if problems are resolved. They are not. Agent says plumber suggested fixing when rain stops. We stay @ colleague's home for 3 more days.

10/13 Plumber returns for repairs and to pump out basement. I ask him what the underlying problem is and why he has to return so often. He says that the toilet is overflowing because the plumbing stack and lines are made of old cast iron pipe that frequently clogs and needs to be replaced. Until this is done he can only temporarily solve the problem by removing a clog when it occurs. He believes that the underground plumbing for the basement drain is broken and is the reason the basement keeps flooding. Says it's very expensive to repair. Without replacing the system he can only temporarily solve the problem by unclogging the basement drain when flooding occurs. Both problems will occur more frequently and the toilet overflow problem is likely to be more severe when the basement plumbing is backed up due to heavy rains.

10/14 Back in house. Notice mold spots along lower portions of basement walls.

10/21 Agent brings over dehumidifier to remove moisture from basement.

10/26 Kids are sneezing and wheezing when they finish playing in basement.

10/28 More light rain. Finally no flooding, but notice that mold spots are larger and basement smells. Toilet overflows. Called Agent again. No response.

10/30 Unbelievable, the stove is broken. Sometimes it works, sometimes it doesn't. Only right side burners work consistently, left side goes on and off. It's a hazard. Call Agent to advise of stove problem and that toilet still overflows. What's next?

#### November 2007

11/1 The heat went out last night. Can't figure out why. Outside Temp in the 30's. Put extra blankets on me and kids. Advised Agent.

11/2 No heat again. Called Agent - no response. Outside temps still in 30's.

11/4 Left message to advise Agent that problems continue and that I will not pay rent until necessary repairs are made to correct problems.

11/5 Agent tells me to pay rent. Says repairs are scheduled but that's no reason to fail to pay rent. I say rent will get paid as soon as repairs are made.

11/6 No heat again. Third night without heat. House is freezing - off to colleague's again. Called agent and left message that we need heat.

11/7-9 Still no heat. Called Agent - left message. Still at colleague's.

11/8 Heavy downpour today. Checked house. Once again, basement floods and toilet is backed up. Glad we are at colleague's, house stinks. Advised Agent.

11/10 Outside temperatures have increased to the low 50's. Back home, but heat still does not work. The basement has been drained and cleaned but flooring is ruined. Mold is growing rapidly. I tell kids not to play down there. Call Agent to complain about heat and basement. Use some portable heaters when we're awake.

11/13 Repairman finally comes to inspect heat. Identifies problem with heating system. Water meter intake valve to boiler is broken. Plumbing line to boiler also needs repair. Repairman made some adjustments and heat is working again. Defective parts were not replaced.

11/15 No burners on stove are working. I call Agent. Send letter to Agent re: too many problems in this house!

11/16 Agent leaves message that a repair person is scheduled to look at stove.

11/19 Stove repaired but not replaced.

11/22 It's Thanksgiving and the stove burners went out again. Went to dinner at a friend's. Good thing – no heat again and the house is freezing.

11/22-25 Called Agent several times over course of weekend and no one replied.

11/26 Agent returned call and apologized for "inconveniences...especially at Thanksgiving."

#### December 2007

12/1 Agent asks if I plan to pay rent this month. I ask if she expects to have all repairs made and to have this place habitable. The heat is out again and I've been cooking in a crock-pot for more than a week.

12/2 Call City's Department of Licenses and Inspections regarding problems in property. Heat out again. Kids and I sleep together for warmth.

12/3 License and Inspection's Inspector visits and examines entire house. Of course heat works today!

12/5-12 Stayed at colleague's. Heat out again, stove works intermittently and needs replacement. Nighttime temps in the 20's.

12/12 Moved to home of colleague until house becomes habitable.

#### February 2008

2/17 Incredible! Nothing's been fixed but received Homes 4 Rent civil action seeking unpaid rent and eviction.

Janice Taynes  
456 Broad Street  
City, PA 12345

November 15, 2007

Homes 4 Rent, Inc.  
Attn: Amanda Agent  
6789 Main Street  
City, PA 12367

Re: Repairs Required in Rented Home

Dear Ms. Agent:

I write to inform you that I am very dissatisfied with the condition of the property I rented from you in August 2007. Not only have the promised repairs not been made, but there are also several other problems with the condition of this home. I have called you hoping to resolve some of these difficulties, to no avail. When we have spoken you have consistently assured me that “everything will be taken care of” and to date, there are no permanent solutions to the problems I am experiencing.

Although plumbers and an HVAC technician have visited the home when I reported to you that I was experiencing flooding and lack of heat, the problems persist. I find it totally unacceptable to continue to be exposed to, and to expose my children to, leaking sewage from the toilets and flooding in the basement. The basement continues to flood with water after heavy rains and it’s so bad that I have resorted to simply telling the children not to play there. You know that one of the reasons I selected the home was because it had a fully finished basement that I could use as a playroom. Now there is mold growing down there and my children’s asthma and allergies are out of control as a result of living in this mold-infested home.

To add insult to injury, at times the heat doesn’t work. The heater will simply shut down whenever the water supply to the boiler’s intake unit is insufficient. Since the water level meter on the boiler is broken, we never know when that’s going to be and suffer through the increasingly cold days and nights without heat. Because of the flooding, sewage, and heating problems, I have been forced to vacate the premise and stay in a hotel and/or with a friend. To date, you have refused my request to reduce my rent by the number of days I was forced to stay elsewhere. To make matters worse, you haven’t even made the repairs promised at the inception of the lease. As a result it rains in the kitchen window, leaving a puddle on the floor and stains on the wall. Finally, sometimes the stove simply doesn’t work and I have to cook in a crock-pot!

These conditions are totally unacceptable. The repairs to the home must be made immediately. I am also formally requesting reduction of rent for days I had to leave the home. You should know that it is my intention to leave the home whenever the heat is out and the temperature in the house is too cold and also whenever sewage backs up into the home. I expect my rent for those days to be reduced accordingly. I anticipate your expeditious reply.

Sincerely,

*Janice Taynes*

**City Department of License and Inspections  
Report of Building Code Violations**

Address: 456 Broad Street, City, PA 12345  
Report Date: December 6, 2007  
Inspector: Ivan Inglewood (LI 6283)  
Date of Inspection: December 3, 2007

Inspection of this property occurred on December 3, 2007. After a full and complete inspection, this Inspector notes the violations listed below. Non-hazardous violations must be repaired within 90 days. All violations considered hazardous must be remedied within 30 days. All violations considered immediately hazardous must be rectified with 48 hours.

<u>Violation</u>	<u>Type</u>	<u>Description</u>
H289	Hazardous	repair broken window pane in kitchen
H167	Non-hazardous	repair chipping and peeling paint around and beneath kitchen window
H361	Immed. Hazardous	repair or replace defective stove
HP457	Immed. Hazardous	repair or replace clogged plumbing system and sewage leaks in all bathrooms and basement
H250	Hazardous	abate mold in basement
H275	Hazardous	seal basement to abate flooding
**H325	Immed. Hazardous	repair or replace plumbing and/or boiler to restore full functionality to heating system

\*\* The home was heated upon this Inspector's arrival. However, given credible reports and Tenant's and Inspector's observance that at the time of the inspection the water meter intake valve was not functioning, it is this Inspector's opinion that it is more than reasonable to conclude that the heating system malfunctions and shuts down intermittently. Thus, the violation needs correction.

cc: Homes 4 Rent, Inc., Owner  
Janice Taynes, Tenant

**LIBRARY**

Supreme Court of Pennsylvania

J. C. PUGH, Appellant,

v.

Eloise P. HOLMES, Appellee

OPINION

LARSEN, Justice

Eloise Holmes, appellee, had been, pursuant to an oral month-to-month lease, renting a residential dwelling in Chambersburg in Franklin County at the rate of \$60.00 per month from November, 1971 until recently. Her landlord, appellant J. C. Pugh, instituted two separate landlord-tenant actions against appellee before a justice of the peace, the first resulting in a judgment for unpaid rent (for the period from September, 1975 through June, 1976) and the second resulting in a judgment for unpaid rent (for the period from June, 1976 through August, 1976) and for possession of the premises. Following Mrs. Holmes' appeals to the Court of Common Pleas of Franklin County, appellant filed separate complaints, the first seeking unpaid rent and the second seeking both unpaid rent and possession. In both actions, appellee filed answers asserting a defense of the landlord's alleged breach of an implied warranty of habitability. Additionally, in the second action, appellee asserted a setoff due in an amount which she claimed she had spent to repair a broken lock after having given appellant notice and a reasonable opportunity to repair the

lock. Appellee also filed a counterclaim for the cost of repairing other allegedly defective conditions of which she had given appellant notice. Appellant filed preliminary objections to the answer and counterclaim which the Court of Common Pleas sustained finding that appellee's answer failed to set forth a legal defense to the landlord's actions, and that the counterclaim failed to set forth a legal cause of action.

On appeal, the Superior Court, by opinion of President Judge Jacobs, reversed and remanded. The Superior Court abolished the doctrine of Caveat emptor as applied to residential leases and held that a warranty of habitability by the landlord will be implied in all such leases, which implied warranty would be mutually dependent upon the tenant's obligation to pay rent. (citation omitted). By order dated July 20, 1978, this Court granted appellant's petition for allowance of appeal.

I. DOCTRINE OF CAVEAT EMPTOR  
ABOLISHED/IMPLIED WARRANTY OF  
HABITABILITY ADOPTED

The doctrine of Caveat emptor comported with the needs of the society in which it developed. However, we find that the doctrine of Caveat emptor has outlived its usefulness and must be abolished, and that, in order to keep in step with the realities of modern

day leasing, it is appropriate to adopt an implied warranty of habitability in residential leases.

\* \* \*

“Functionally viewed, the modern apartment dweller is a consumer of housing services. The contemporary leasing of residences envisions one person (landlord) exchanging for periodic payments (rent) a bundle of goods and services, rights and obligations. The now classic description of this economic reality appears in *Javins v. First National Realty Corp.*, 138 U.S.App.D.C. 369, 428 F.2d 1071, 1074, *Cert. denied*, 400 U.S. 925, 91 S.Ct. 186, 27 L.Ed.2d 185 (1970) (footnote omitted). When American city dwellers both rich and poor, seek ‘shelter today, they seek a well known package of goods and services a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.’”  
(citation omitted)

\* \* \*

The Superior Court correctly observed that to join the trend toward an implied warranty of habitability would not be a complete and sudden break with the past, but would be the “next step in the law which has been developing in the Commonwealth for a number of years.”  
(citation omitted)

. . . we affirm the Superior Court's holding that a lease is in the nature of a contract

and is to be controlled by principles of contract law. The covenants and warranties in the lease are mutually dependent; the tenant's obligation to pay rent and the landlord's obligation imposed by the implied warranty of habitability to provide and maintain habitable premises are, therefore, dependent and a material breach of one of these obligations will relieve the obligation of the other so long as the breach continues.

\* \* \*

### III. BREACH OF THE IMPLIED WARRANTY OF HABITABILITY

Appellant asserts that the Superior Court erred by failing to establish definite standards by which habitability can be measured and breach of the warranty ascertained. We disagree, the parameters of the warranty were adequately defined by the Superior Court. “The implied warranty is designed to insure that a landlord will provide facilities and services vital to the life, health, and safety of the tenant and to the use of the premises for residential purposes. (citation omitted) This warranty is applicable both at the beginning of the lease and throughout its duration (citation omitted).

In order to constitute a breach of the warranty the defect must be of a nature and kind which will prevent the use of the dwelling for its intended purpose to provide premises fit for habitation by its dwellers. At a minimum, this means the premises must be safe and sanitary of course, there is no obligation on the part of the

landlord to supply a perfect or aesthetically pleasing dwelling. (citation omitted) “Materiality of the breach is a question of fact to be decided by the trier of fact on a case-by-case basis.” (citation omitted) Several factors (not exclusive) are listed by the Superior Court as considerations in determining materiality, including the existence of housing code violations and the nature, seriousness and duration of the defect.

We believe these standards fully capable of guiding the fact finder in his determination of materiality of the breach. Further, these standards are flexible enough to allow the gradual development of the habitability doctrine in the best common law tradition.

\* \* \*

Additionally, we agree with the Superior Court that, to assert a breach of the implied warranty of habitability, a tenant must prove he or she gave notice to the landlord of the defect or condition, that he (the landlord) had a reasonable opportunity to make the necessary repairs, and that he failed to do so. (citations omitted) This reasoning is even more persuasive in Pennsylvania where there is no statewide housing code and where many municipalities have not promulgated local housing regulations. (footnote omitted)

In this case, appellee alleged ten specific defective conditions including a leaky roof, lack of hot water, leaking toilet and pipes, cockroach infestation and hazardous floors and steps. If

proven on remand, these conditions would substantially prevent the use of the premises as a habitable dwelling place and could justify a finding by the trier of fact that a breach of the implied warranty of habitability had occurred.

#### IV. REMEDIES FOR BREACH OF IMPLIED WARRANTY OF HABITABILITY

As the adoption today of the implied warranty of habitability creates new legal rights and obligations, it is essential for this Court to outline and clarify some of the available remedies and the manner in which these remedies are to be implemented. The tenant may vacate the premises where the landlord materially breaches the implied warranty of habitability. We have held analogously where the landlord materially breaches express covenants to repair or to maintain the leasehold in a habitable state. (citation omitted) Surrender of possession by the tenant would terminate his obligation to pay rent under the lease. (citations omitted)

Where the tenant remains in possession, and the landlord sues for possession for unpaid rent, the implied warranty of habitability may be asserted as a defense. . . . If the landlord totally breached the implied warranty of habitability, the tenant's obligation to pay rent would be abated in full, and the action for possession would fail because there would be no unpaid rent. (citation omitted) If the landlord had not breached the warranty at all, no part of the

tenant's obligation to pay rent would be abated and the landlord would be entitled to a judgment for possession and for unpaid rent. (citation omitted). If there had been a partial breach of the warranty, the obligation to pay rent would be abated in part only. In such case, a judgment for possession must be denied if the tenant agrees to pay that portion of the rent not abated; if the tenant refuses to pay the partial rent due, a judgment granting possession would be ordered. (citation omitted)

\* \* \*

Also at issue in this case is the availability of the “repair and deduct” remedy. Appellee, after allegedly giving notice to the landlord and a reasonable opportunity to repair, repaired a broken door lock and deducted \$6.00 from her rent for the month of May, 1975. We have held that, where a landlord fails to perform a lease covenant, the tenant may perform it at his own expense (if reasonable) and deduct the cost of his performance from the amount of rent due and payable. *McDanel v. Mack Realty Co.*, *supra*, 315 Pa. at 177, 172 A. 97 (landlord failed to perform covenant to supply heat, tenant could have provided heat and deducted reasonable costs from rent). Similarly, the repair and deduct remedy is appropriate for breaches of the implied warranty of habitability. This remedy has been approved in other jurisdictions. (citations omitted) If a tenant is entitled to apply his rent to eliminate the landlord's default, the tenant, after proper notice to the landlord,

may deduct from his rent reasonable costs incurred in eliminating the default. “Proper notice” in this instance is one that describes the default and specifies what steps will be taken by the tenant to correct it if the landlord has not eliminated the defective condition within a reasonable time. (citation omitted) The use of the repair and deduct remedy is not, of course, unlimited. Repairs must be reasonably priced and cannot exceed the amount of the rent available to apply against the cost, i. e. the amount of rent owed for the term of the lease. (citations omitted) Further the tenant runs the risk of an adverse court finding on the necessity of the repairs. If the court finds that the repairs were not needed to render the premises habitable, the court must find the rent deduction unreasonable. In such event, the landlord could obtain a judgment for the amount of rent deducted. Or if the repairs were needed but the cost was excessive, the landlord could recover the difference between the actual cost and what would have been the reasonable cost of repairs.

Appellant also asserted a counterclaim for \$25.00 for repairs allegedly made at various times to the heating system, the bathroom floor and to replace a broken window pane. In principle, we see little difference between the counterclaim for repairs and the “repair and deduct” remedy. The counterclaim can be utilized to recover damages from already paid rents based upon expenses incurred in making repairs of defective conditions after failure of

the landlord to repair within a reasonable time following proper notice. (citation omitted) The limitations applicable to the repair and deduct remedy are applicable here as well, the cost of the repairs must be reasonable and the maximum amount which the tenant may expend is the amount of rent owed for the term of the lease. However the counterclaim is not available where the tenant has not paid his rent for the period in which the repairs are made and the cost of the repairs do not exceed the rent owed for that period. In that case, there are no damages as the tenant has already been compensated for the cost of repairs by not paying rent.

\* \* \*

Finally, since the lease is a contract, other traditional contract remedies such as specific performance are available to enforce the implied warranty of habitability. (citations omitted) As with other contracts, however, specific performance is an equitable remedy not available as a matter of course but only in unique situations. (citations omitted)

#### V. MEASURE OF RENT ABATED

The Superior Court held, where the tenant claims the breach of warranty of habitability as a defense or counterclaim “the monthly rent past and future (until the dwelling is returned to a habitable state) may be reduced by the difference between the agreed upon rent and the fair rental value of the apartment in its

present condition.” It is urged that this Court adopt the “percentage reduction of use” method of calculating damages for breach of the implied warranty (This method would reduce the amount of rent owed by a percentage equal to the percentage by which the use of the premises has been decreased by the breach of warranty.) rather than the “fair rental value” approach suggested by the Superior Court. We hold that the “percentage reduction in use” method is the correct manner of determining the amount by which the obligation to pay rent is abated.

\* \* \*

This method of evaluation better achieves the goal of returning the injured party (the tenant) to the position he would have been in if performance had been rendered as warranted. (citation omitted) The tenant bargains for habitable premises and the rental price reflects the value placed on those premises by the parties. Therefore, where the premises are rendered uninhabitable, in whole or in part, the contract price (fixed by the lease) is to be reduced by the percentage which reflects the diminution in use for the intended purpose. Another advantage of the percentage reduction method is that the need for expert testimony is greatly reduced as the determination in “percentage of reduction in use” of a residential dwelling is a matter within the capabilities of the layman.

Finally, there should be no doubt that recovery will not be precluded simply because

there is some uncertainty as to the precise amount of damages incurred. It is well established that mere uncertainty as to the amount of damages will not bar recovery where it is clear that damages were the certain result of the defendant's conduct. (citation omitted) The basis for this rule is that the breaching party should not be allowed to shift the loss to the injured party when damages, even if uncertain in amount, were certainly the responsibility of the party in breach. (citation omitted) .

\* \* \*

For the foregoing reasons, we overrule all cases inconsistent with this opinion, affirm the order of the Superior Court with the aforementioned modifications, and remand to the Court of Common Pleas of Franklin County for proceedings consonant with this opinion.

\* \* \*

## Performance Test: Grading Guidelines

This Performance Test presents a situation in which the Applicant is an associate attorney working for Able, Best and Candor. The firm agreed to defend a tenant against eviction proceedings filed by her landlord. A named partner in the firm has instructed the Applicant to prepare an internal legal memorandum in order to assist him in preparing for the case. The firm's client, Ms. Janice Taynes, rented a 3 bedroom home from Homes 4 Rent, Inc. in August 2007. She experienced numerous problems with conditions in the home almost immediately after taking possession of it. In addition to Homes failing to make repairs as it promised at the inception of the lease, Homes also failed to remediate the following conditions: leaking toilet, sewage in the bathroom and basement, flooding in the basement, mold, a broken stove, and the sporadic loss of heat. Ms. Taynes paid rent for three months and after oral notification to the landlord of the unacceptable condition of the premises, began withholding rent. The landlord subsequently petitioned for her eviction and instituted an action to recover unpaid rent.

The Applicant is required to draft an objective internal legal memorandum to assist the partner in handling the matter. In drafting the memorandum the Applicant is required to analyze the facts of this case and to determine whether and when a material breach of the implied warranty of habitability occurred. Applicants must also analyze the relief requested and determine whether the client is entitled to such relief.

### FORMAT

**1 Point**

Following directions is an important part of the Performance Test. The Applicant should follow the instructions that are provided for preparing an Internal Legal Memorandum. As per the instructions a Statement of Facts should not be included in the memorandum. Instead, the Applicants should reference that the instructions directed that no such statement be included in the memorandum. The Applicants should set forth the issue presented, a brief conclusion and an analysis for both issues that have been assigned. With respect to the analysis for the first issue, beginning with September, and excluding the months of January and February, the applicant should address each month that Ms. Taynes possessed the home in chronological order to determine whether a material breach of the implied warranty of habitability occurred. Finally, as per the instructions the applicant should identify whether any breach was partial or total.

#### 1. Analysis: Breach of the Implied Warranty of Habitability

Ms. Taynes' lease, as are all residential leases in Pennsylvania, is subject to the implied warranty of habitability. The covenants and warranties in the lease are mutually dependent such that the tenant's obligation to pay rent and the landlord's obligation to provide and maintain habitable premises are dependent. *Pugh v. Holmes*

A material breach of either the tenant's obligation to pay rent or of the landlord's obligation to provide habitable premises relieves the other party's obligation as long as the breach continues. *See Pugh*. Therefore, Ms. Taynes was not obligated to pay rent beginning with the onset of any total material breach of the landlord's obligation to provide habitable premises.

In order to constitute a breach of the warranty of habitability the defect must be of a nature and kind which will prevent the use of the dwelling for its intended purpose. *Pugh*. This means the premises must be safe and sanitary, but the landlord is under no obligation to provide a perfect or aesthetically pleasing dwelling.

Materiality of the breach is a question of fact to be decided by the trier of fact, and is determined on a case by case basis. *Pugh*.

### **September 2007**

In order to assert a breach of the implied warranty of habitability Ms. Taynes was required to give notice of the defect to Homes and to provide Homes with a reasonable opportunity to make the required repairs and Homes must have failed to make the repairs. *Pugh*

During the month of September the toilet failed to flush and occasionally overflowed for approximately 5 days. After the 5<sup>th</sup> day that the toilet overflowed, Ms. Taynes notified Agent. Homes sent a plumber to repair the following day. The toilet overflowed again on a later day when there were heavy rains which caused the basement to flood and smell of sewage. Ms. Taynes notified Agent of this problem and Agent sent a plumber who made repairs the following day. During this month Homes made all repairs within a reasonable time after it received notification from Ms. Taynes.

The September 15, 2007 rains resulted in dirty and smelly water standing in the basement of the home, causing Ms. Taynes to stay in a hotel. Applicants may conclude that there was not a breach of the implied warranty of habitability because Homes promptly repaired the defects upon notice. In the alternative, Applicants could argue that a breach occurred due to Homes' failure to remedy the problem permanently and also because the defective conditions recurred repeatedly.

The conditions which Homes covenanted in the lease to repair remained defective throughout the duration of Ms. Taynes' occupancy. However, these conditions do not constitute a breach of the implied warranty of habitability as the warranty is designed to insure that a landlord will provide facilities and services vital to the life, health, and safety of the tenant and to the use of the premises for residential purposes. *Pugh*

Neither broken locks on bedroom doors nor a cracked or broken window pane are vital to safety or habitability. Because neither the broken locks nor window frame prevent the use of the residence for its intended purpose, these conditions, alone, are insufficient to constitute a breach of the implied warranty of habitability.

### **October 2007**

Despite her payment of rent for October, the defective conditions in the home continued. After informing Agent that she would vacate, Ms. Taynes and her family vacated the premises for several days because the toilet overflowed again and heavy rains again caused the basement to back up and flood, resulting in sewage being present in the home. Ms. Taynes notified Agent of these problems but they were not repaired until the rain stopped several days later. By the end of the month mold spots in the basement got larger, the toilet overflowed again, and the stove did not work properly.

The Applicant should recognize that continuing plumbing problems, growth of mold, and problems with stove are serious problems involving health and safety that relate to the use of the home for its intended purpose and support a claim for at least a partial breach of the implied warranty of habitability.

Factors such as the existence of housing code violations and the nature, seriousness and duration of the defect are considered in determining the materiality of the breach. *Pugh*.

The Applicant should argue that because these problems, which relate to the habitability of the premises, continued from the prior month that there was at least a partial material breach of the implied warranty of habitability during this month. In the alternative, Applicants may argue that the seriousness of the defective conditions and their impact on the health and safety of the tenants resulted in a total breach.

### **November 2007**

Early in the month there was no heat in the home, a situation which continued for several days. Applicants should argue that the lack of heat in a home when it is 30 degrees outside is a serious problem relating to the health and safety of the tenants that constitutes a material breach of the implied warranty of habitability. Notice of the problem was given at the beginning of the month but was not responded to for several weeks, and the heating problems continued even after the defect was identified and addressed. Thus, the defect was not corrected by the landlord within a reasonable time after having received notice.

The lack of a properly working heater is considered an immediately hazardous condition. *See Report of Licenses and Inspections*. Although the Report was not issued until December 2007, the severity of the condition is clear and is supported by the subsequent Report. The Applicants should argue that there has been a total and material breach of the implied warranty of habitability due to a lack of heat.

Additionally, plumbing problems continued, and mold began to grow rapidly in the basement. Problems with the unreliable stove worsened. Ms. Taynes provided Homes with notice as required via the letter she sent to Agent informing her of all unacceptable conditions, many of which continued from the prior months. She also advised Agent of her intent to leave the home when house is without heat. None of these problems were corrected by the landlord, and they further support a finding of a total and material breach of the implied warranty of habitability.

### **December 2007**

The month began with the continuing problem of no heat in the home and also the lack of a working stove.

The License and Inspections Report details several immediately hazardous conditions that clearly support an argument for a total breach of the implied warranty of habitability. The landlord received a copy of this report and had been aware of the problems from prior complaints by the tenant.

Three of the defective conditions were rated "Immediately Hazardous" and required attention within 48 hours. The immediately hazardous conditions were not repaired within the requisite time. It is clear that the implied warranty of habitability was breached as a result.

The cumulative effect of the defects was that they prevented the use of the dwelling for the purposed intended habitation. *See Pugh*.

## 2. Analysis: Relief/Remedies

Where a landlord totally breaches the implied warranty of habitability, the tenant's obligation to pay rent is abated in full and an action for possession will fail because there is no unpaid rent. *Pugh*. For any month in which an Applicant concludes that there has been a total breach of the implied warranty of habitability, the Applicant should conclude that the rent for the respective month is fully abated. Where Ms. Taynes has not paid rent for a month in which a total breach occurred, no rent is due. For months in which Ms. Taynes paid rent and an Applicant concludes that a total breach has occurred, the Applicant should conclude that Ms. Taynes is entitled to recover a refund of rent paid due to the breach.

The month of November began with heating failures and outside temperature is in the 30's. Ms. Taynes gave oral notice of the problems on the 1<sup>st</sup> of November and did not pay rent due on November 5, 2007. Applicants should argue that there was a total breach of the implied warranty of habitability on or before November 5, 2007 based on the lack of heat and other continuing problems of which the landlord had previously been given notice. *See Pugh*

Because the conditions in the home likely amount to a total and material breach of the implied warranty of habitability from November until the present, Applicants should argue that no rent is due for the months of November 2007 to the present. Applicants should also argue that Ms. Taynes is entitled to remain in possession of the home because there was no unpaid rent that was overdue.

Where there is a partial breach of the warranty of habitability the obligation to pay rent is partially abated. *Pugh*. There was at least a partial breach of the implied warranty of habitability during the month of October because Ms. Taynes was required to leave the home for four days due to continuing poor conditions, including flooding, the presence of sewage and mold.

Where the premises are rendered uninhabitable, in whole or in part, the contract price is to be reduced by the percentage which reflects the diminution in use for the intended purposes. *Pugh*.

Ms. Taynes paid her rent for September and October 2007 in full. If a partial breach was found in either of those months, Ms. Taynes' rent for those months should be reduced by the percentage which reflects the diminution in use of the premises for their intended purpose, and she should be able to recover a refund for a portion of rent she paid for these months.

Breach of the implied warranty of habitability may be asserted as a defense against a landlord's action for possession and for unpaid rent. There were clearly total breaches of the implied warranty of habitability for each month beginning with November 2007 and continuing at least until Homes filed its action for possession. Due to the total breach no rent was due for that period. Therefore, Homes' action for possession and for unpaid rent should fail.