

FEBRUARY 2009 PENNSYLVANIA BAR EXAMINATION

Sample Answers



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Performance Test: Sample Answer

February 24, 2009

Barbara Barrister
Barrister & Solicitor
One Law Firm Plaza
Huge City, PA 19999

Dear Ms. Barrister:

We represent Carol Caris, to whom you have recently sent a letter demanding that she resign from her position with Golden Years Nursing Home in Hometown, State X, based upon her previous contract with your client, Megahealth Services, Inc. You have based your demand upon a clause in the contract between Megahealth and our client which purports to bar her from working for any of Megahealth's former clients. However, you seek to bring your claim in the Common Pleas Court of Madison County, Pennsylvania. That is not the proper forum for the suit, since the courts in Pennsylvania lack jurisdiction to hear the claim.

The general Pennsylvania statute granting personal jurisdiction over persons outside the Commonwealth does not apply in this situation. Rule 42 Pa.C.S.A. 5322 (a) states, "that Pennsylvania may exercise personal jurisdiction over a person outside the Commonwealth who acts directly or by an agent to cause the following:

1. Transacting any business in this Commonwealth.
2. Contracting to supply services or things in this Commonwealth.
3. Causing harm or tortious injury by an act or omission in this Commonwealth."

This personal jurisdiction statute does not apply to my client, as the transaction and contract for services were entered in State X and performed in State X. Further, Caris did not perform or refrain from performing any acts within this Commonwealth which resulted in tortious injury.

Although Pennsylvania has enacted a long arm statute (42 Pa. C.S.A 5322 (b)) granting personal jurisdiction on the basis of minimum contacts, it would be unconstitutional to apply this statute to my client in the current situation. According to the due process clause of the Fourteenth Amendment, a state must have minimum contacts between the defendant and the forum state. The contacts must be continuous and substantial, such that a suit against the non-resident would not offend traditional notions of "fair play and substantial justice". The defendant must engage in some act which purposefully avails himself of the privilege of conducting activities in the forum state (Kenny v. Alexson Equipment). In Kenny v. Alexson Equipment, the Pennsylvania Supreme Court held that the state did not have personal jurisdiction over a defendant who is not and has never resided in the Commonwealth, never did business in

Pennsylvania, nor maintained an office in Pennsylvania. The sale referred to in the Kenny case was negotiated, paid, and goods were delivered in Maryland to a company with many offices nationwide, including Maryland. The only contact with the state was that the plaintiff's check was drawn on a Pennsylvania bank and contained the address of the company's Pennsylvania office. This was not sufficient, according to the court, to provide the defendant with notice that he had minimum contacts with the Commonwealth.

Kenny v. Alexson Equipment is similar to this matter, in that it is unreasonable and unfair to require Caris to defend this suit in Pennsylvania. Caris is not and has never been a resident of the Commonwealth of Pennsylvania. At all times relevant to this action, she has been a resident of State X and continues to reside in State X. Caris has never been employed nor entered into a contract as an independent contractor in the state of Pennsylvania. The contract Caris entered into with Megahealth was entered in State X for contract work at a medical facility, Golden Years Nursing home, located only in State X. The only notice she had of any minimum contacts with Pennsylvania was that Megahealth is incorporated in Pennsylvania, and maintains its principal place of business in Pennsylvania, These contacts are not sufficient.

Pennsylvania's authority for jurisdiction in this matter can also be found in 42 Pa. C.S.A. Section 5301. It states the Commonwealth of Pennsylvania will have personal jurisdiction over an individual if:

- (I) they are present in the state when served with process
- (II) they are domiciled in the state
- (III) they consent to personal jurisdiction

Our client was not present in the state of Pennsylvania and she has not been served, only told of possible legal action against her. If our client is going to be served, it will most likely be done through the mail, per the contract, as Hometown is a three hour flight or a 12 hour drive from Madison County. Also, our client resides in Hometown. This is her domicile and she is not domiciled anywhere else. The only possible way to bring her into court in Pennsylvania is to assert that she consented to its jurisdiction.

I suspect that you may try to assert that the forum selection clause included in the contract between Megahealth and Ms. Caris is sufficient proof of Ms. Caris's "consent" to jurisdiction in Pennsylvania, such that jurisdiction would be proper under 42 Pa. C.S.A. § 5301 (a) (i)(iii). Upon research, we disagree, and would argue in response that the forum selection clause is likely unreasonable, and would have no binding effect.

Under Pennsylvania law, courts should uphold the agreement of parties to litigate in a particular forum, unless the agreement is unreasonable at the time of litigation. Churchill v. Third Century (Churchill) at 14. As the court stated in Churchill, "An agreement is unreasonable where its enforcement would, under all circumstances existing at the time of litigation, seriously impair plaintiff's ability to pursue its cause of action". The unreasonableness requires us to consider whether the parties dealt on an equal basis, there is no unfairness in the agreement, and if the parties received consideration for the agreement to litigate in a particular forum. Churchill at 14.

In Ms. Caris's case, there are strong facts to suggest the clause is unreasonable and thus, unenforceable. First, Ms. Caris and Megahealth did not deal on an equal basis. Ms. Caris was a single mother, with only a high school diploma and some limited military training. Ms. Caris was in need of employment in Hometown and was required to sign the contract with Megahealth before commencing her work there. Megahealth is a multi-million dollar corporation, operating in over 44 states. Ms. Caris' business sense and knowledge of contract terms can hardly be considered equal to that of Megahealth.

Additionally, the terms of the agreement itself could be likely found to be plainly unfair. The non-complete clause would limit Ms. Caris to not seek employment with any current or former client in the 44 states in which Megahealth works. Any violation requires Ms. Caris to travel to Pennsylvania to defend such a suit. For Ms. Caris to even get to Pennsylvania she would have to either drive 12 hours, or drive to the nearest airport (approximately 70 miles away) and then take a three hour plane ride. The time and expense associated with such travel is further evidence that the agreement is presently unreasonable. A Pennsylvania court has found similar travel circumstances to be a "serious impairment" for a party attempting to defend a suit. Churchill at 15.

Finally, Ms. Caris received no consideration for the selection clause in the agreement. She concedes that she did not read that provision, and therefore it was not even a matter on which she bargained. See Churchill at 15.

In conclusion, I strongly encourage you to reconsider filing suit in this matter in Pennsylvania in light of the above referenced arguments. If you do not, we will be forced to file a preliminary objection on the ground that the Pennsylvania court lacks jurisdiction, or would seek to enjoin suit. Thank you for your consideration of this matter.

Sincerely,
Steven Sauer

Question No. 1: Sample Answer

1. Gina's 2008 letter will not qualify as a valid and enforceable will or codicil. To make a will one must have the present intent to make the document that is signed their will. Here the document was a letter indicating future intentions that were only contemplated by Gina as evidenced by her precatory language in the letter such as "I'm considering" which will not constitute the necessary present testamentary intent.

Although Gina may have attempted to make the letter valid as a will in form, it will fail for the substantive and intent deficiencies. The intent in the future to make a will is deficient as stated above.

A will needs only to be in writing and signed at the end by the testator. Although, she sent a copy of the signed letter to Ralph this can not be conclusive as to her intent because she may have only wanted Ralph to believe that she was giving him more in her will.

A will must articulate the items to be devised or bequeathed. Here, Gina merely again states precatory language providing vague terms such as "larger share". Moreover the letter does not revoke the previous valid 2006 will and therefore the 2006 will is still valid. To revoke a will the testator must either prepare an additional will or codicil that is valid and that unambiguously revokes all or parts of the previous wills or codicils, or she must engage in some conduct which is recognized as physically revoking a will such as tearing, burning, obliterating, etc., and such conduct must touch the will itself.

The letter is unconforming to the requirements for a valid will and there was no act of revocation of the prior will. Therefore, the 2006 will is valid and the 2008 letter will be inadmissible to probate.

2(a). The sale can continue as scheduled after the death of Gina because of the doctrine of equitable conversion. The law regards the seller under an agreement of sale for real estate to be the holder of only bare legal title, while the buyer is regarded as the true equitable owner of the property. E. National Bank, Gina's executor, will be required to complete the sale of Greenwood on Gina's behalf.

2(b). The common law rule is that if a specific devise is made to someone and that property is no longer in the estate at the time of the testator's death, the devise adeemed or failed. Pennsylvania does not follow the general rule for ademption in all cases. Where the property is sold the devisee is entitled to whatever proceeds are still owing at the time of testator's death.

Here, the real property devised to Jane was sold and a note and a mortgage executed with regard to payments. Under the Pennsylvania rule, Jane would be entitled to the payments, and the remaining estate would be divided between Ralph and Jane.

3. Half of Jane's scholarship will be claimed as gross income and the other half can be excluded from gross income. The general rule is that all income is taxable as gross income no matter how it is derived. An exception is that a qualified scholarship is not taxable. For a qualified scholarship, the scholarship must be for a degree, and must be for tuition or related expenses and not for personal expenses. The scholarship must also not be for any quid pro quo. In other words, the scholarship must not be attached to any conditions that Jane has to perform any kind of services for the scholarship. If the scholarship is a quid pro quo, the income from this scholarship is gross income.

Here, half of the scholarship should be excluded from gross income. It came with no strings attached. Jane also used the scholarship for tuition and tuition related expenses, like books and fees. Jane is in college earning a degree which is considered a qualified degree. Therefore, the money that she received in September 2006 is excluded from gross income. The money that she received in January 2007 is gross income. Here there is a quid pro quo. Jane is required to provide services or work for that money. She is required to do 20 hours per week for research and provide teaching assistance. These conditions that were attached makes the income no longer a qualified scholarship and it is now gross income and taxable. The conditions turned the scholarship into wages which are clearly gross income. Therefore, Jane's 2006 scholarship is not taxable but the money that she received in 2007 is taxable as gross income.

4. Sam's e-mail would not be a violation of the Pennsylvania Rules of Professional Conduct. However, the phone call is likely to be considered a violation of the Pennsylvania Rules of Professional Conduct. Attorney's may advertise their services to prospective clients. However, an attorney may not directly contact a prospective client soliciting business.

The e-mail sent by Sam was a brochure advertising his practice. It did not directly solicit business. The e-mail was used specifically for the purpose of advertising his business which would not be a violation of the Pennsylvania Rules of Professional Conduct. However, the phone call is likely to be considered to be a violation. Based on information given to Sam by his secretary, he directly contacted a prospective client soliciting business and offering advice. He offered his services and any advice which may be helpful to Jane. He also emphasized his experience with wills and estate practice. This action is likely to be considered a violation of the Pennsylvania Rules of Professional Conduct.

Question No. 2: Sample Answer

1. It is likely that the Court will grant the suppression motion.

The 4th amendment of the U.S. Constitution protects individuals from unreasonable searches and seizures, which generally requires a warrant based upon probable cause and issued by a neutral magistrate. There are several exceptions to the warrant requirement, including the two raised here by the district attorney.

A person may be subject to a warrantless search if the search is based on exigent circumstances such as an emergency situation, pursuing a fleeing felon, or entering premises where there is probable cause to believe a serious crime is currently being committed.

Here, the DA will try to argue that the police smelled burnt marijuana, received tips from Al and the hotel manager that marijuana was in the room and that this was enough to amount to the police officer's belief that there was an ongoing crime being committed to justify the search. However, the police were aware that Ed was gone at the time, and so there were no facts to suggest that a crime was currently being committed or that evidence of a crime would be destroyed. Further Ed had a reasonable expectation of privacy in the room, as an overnight guest; therefore the manager giving the officers the key is unlikely to provide valid consent for the search either. Thus, the court should find the search violated Ed's 4th Amendment rights.

Additionally, the drugs should be excluded. The plain view exception allows contraband to be seized if it was in the law enforcements plain view/sight. However, for this exception to apply, the officers must be lawfully present in the place where they seized the item. As noted above, the police were not lawfully in the motel room. Therefore, the plain view exception is inapplicable. The court should thus grant the motion.

2. The District Attorney (DA) should make arguments that the police officers arresting Ed could search the automobile incident to a lawful arrest.

The court will grant the motion to suppress the items with regard to the PA Constitution. The PA Constitution as per the above mentioned rule precludes the search of a person's car when such person has been arrested and is outside the vehicle at the time of the arrest. Here, Ed was stopped and directed to get out of his vehicle. It was only after he was out that Ed was arrested. The police could only search Ed and the area where he was standing after being arrested. Therefore, the search of his car was illegal as pursuant to the PA Constitution.

The U.S. Constitution would have allowed the seized burglary items to be admissible. The U.S. Constitution provides an exception for a warrantless search of an automobile when incident to a lawful arrest. This exception entitles the police to search the entire car and compartments including the glove compartment. Here, the items were found in the back seat and would be admissible under the U.S. Constitution. The PA Constitution can afford more protection than is afforded by the U.S. Constitution. Here, the PA Constitution provides more protection with regard to searches incident to arrest.

3. The Court should rule that Darlene cannot obtain spousal support, but can obtain child support.

Spousal Support

Spousal support is financial support given to a spouse during the marriage. It is available to a spouse who has not engaged in actions constituting grounds for divorce and who cannot support themselves sufficiently through employment. PA is a fault/no fault grounds for divorce state, and one of the fault grounds for divorce is adultery, which is when one spouse voluntarily engages in sexual intercourse with one who is not his/her spouse.

Pursuant to this rule, Darlene is unable to procure spousal support because she has engaged in adultery by having an affair with her boyfriend, which she freely admitted to Ed. By moving out, Ed clearly did not consent to this act or do anything else which could be a defense to any adultery claim against Darlene. Thus, Darlene engaged in an action constituting a ground for divorce, and Ed would not have to pay her spousal support.

Child Support

Generally, pursuant to an agreement, spouses can maintain their own contractual terms regarding support, but cannot contract away the obligation to pay support for their children. Child support is the financial support given to a child. Both parents have a duty to support the child. PA has a calculation based system for determining child support, based primarily on the parties' incomes. Because Ed is a highly paid executive, it is likely that he would be able to pay support and because he cannot contractually waive his duty to support Charles, the court will make him pay support.

Thus, the Court will rule that Darlene cannot obtain spousal support, but can obtain child support.

4. If Ed files for divorce, Darlene should also pursue a claim for Alimony Pendente Lite (APL), because the fact that Darlene had an affair with her former boyfriend does not interfere with APL. APL is alimony received by one spouse from the other during the pendency of a divorce action. APL can only be distributed to the receiving spouse during the pendency of the action and would cease upon the final decree of divorce. APL is given to the receiving spouse in order to allow the receiving spouse to survive while waiting for the divorce to finalize. Acts, such as the adultery committed by Darlene would not prevent her from receiving APL.

Question No. 3: Sample Answer

1. Kelley's attorney should file a preliminary objection to the sufficiency of Herbert's pleading for failure to conform to a court rule. According to the PA Rules of Civil Procedure, any writing upon which the complaint relies must be included with the complaint. The complaint references an agreement between Kelley's and Herbert. The facts show that this agreement was not attached to the complaint. Therefore, the complaint is not complete. According to the PA Rules of Civil Procedure Herbert and his attorney will be given 20 days to amend the complaint and attach the agreement.

Kelley's attorney should also file a preliminary objection based on the agreement for alternate dispute resolution. The agreement from which this litigation arises contains an arbitration clause. When an arbitration clause is a part of the agreement, the parties are bound to settle disputes arising out of the agreement by the method agreed to in the agreement. Here we have an arbitration clause which states that all disputes between Kelley's and Herbert shall be arbitrated in accordance with AAA Arbitration Rules. Since we have no evidence to show the arbitration clause is not enforceable, the Court of Common Pleas of C County should dismiss the complaint and this dispute should be settled by arbitration as stated in the agreement.

2. Able should move for summary judgment, based on the pleadings and discovery, because as a matter of law, Kelley's was not negligent in maintaining its premises because Kelley's did not breach its duty to Mary. While a shopkeeper has a duty to an invitee to keep his shop free from knowable hazards and his duty requires that the shopkeeper take reasonable remedial measures to known hazards, it would be unreasonable to require Kelley's to clean up a spill within 7 minutes of its occurrence.

Summary judgment is appropriate where there is no genuine issue of material fact for the jury to consider and the moving party is entitled to summary judgment as a matter of law. A genuine issue exists where the facts are such that a reasonable jury could find for the non-moving party. A fact is material if it would have an impact on the jury's decision.

In the present circumstance, there are no material facts in dispute. The timings of the various events are agreed—i.e., the area of the fall was inspected at 9:00 a.m., a spill occurred at 9:10 a.m., Mary slipped at 9:17 a.m., the store manager became aware of the spill at 9:22 a.m., and no one else was aware or could have been aware of the spill from the time the spill occurred until Mary fell.

In order for Mary to prevail in a claim of negligence, Mary has to show that (1) Kelley's owed a duty to Mary; (2) Kelley's breached that duty; (3) the breach was both the actual and proximate cause of the accident, and (4) that Mary suffered damages. While it may be that the spill was the actual and proximate cause of Mary's fall and subsequent "serious and permanent" injuries (i.e., damages), the question here is what level of duty did Kelley's owe Mary if any, and did it breach its duty to Mary. The claim turns on the duty owed to Mary.

Insofar as Kelley's is concerned, Mary would be considered an invitee to their premises. An invitee is one who comes to the premises at the invitation of the owner of the premises, for the purposes of conducting business. In such circumstances, the owner of the premises owes a duty to the invitee to prevent or warn the invitee of any hazards which are known or reasonably should be known. In this regard, the owner is supposed to make reasonable inspections to identify such hazards, and take appropriate remedial measures, or at least warn the invitee of those otherwise hidden dangers. The key to the duty is one of reasonableness. A shopkeeper, for example, is not responsible for immediate corrections or warning, so long as the hazards are discovered in a reasonable time and corrections or warnings are made appropriately. Equally, the invitee has some responsibility for looking out for their own well being in preventing accidents.

Here, the time between when the spill occurred and when Mary slipped was only 7 minutes. The store manager only became aware of the spill 12 minutes after the spill occurred. Under standard operating conditions, 12 minutes is not an unreasonable time in which to discover and clean up a spill. While a store manager or his staff might have discovered the spill sooner is not fatal to Kelley's defense. More importantly, the plaintiff in this case was unable to show that anyone else was aware or should have been aware of the spill at the time of Mary's fall. Since the response required to have prevented Mary's fall was not reasonable, Kelley's did not breach its duty to Mary.

Therefore, since Kelley's did not breach its duty to Mary, and the facts of the case are uncontroverted, Able should move for summary judgment and the court should grant this motion.

3. Motions in Limine by Able and likely ruling by the court. (a) Motion in Limine to exclude the liability insurance policy to prove that Kelley's owned the area where the fall occurred. A Motion in Limine by Able to exclude the liability insurance policy for the limited purpose of proving Kelley's ownership should be denied.

As a general rule, evidence of insurance or subsequent remedial actions are inadmissible. There is an exception, however, where that evidence is used not to prove liability or ability to pay, but rather ownership where that ownership is in issue. The classic example of this exception is where the proponent seeks to introduce insurance for the limited purpose of proving ownership in the situation where ownership is at issue.

Here, Kelley's put the issue of ownership of the sidewalk in issue. The fact that the liability policy covers Kelley's for injury on the sidewalk is relevant evidence tending to prove ownership. The evidence should not be excluded as more prejudicial to defendant. Therefore, the Motion in Limine will likely be denied.

(b) Motion in Limine to exclude the fact that the store paid Jody's medical bills to establish liability. Able's Motion in Limine to exclude evidence of payment of Jody's medical bills should be granted.

Evidence of payment of medical bills is not permitted to establish liability. This rule encourages parties (in this case the most likely more wealthy or insured party) to pay for medical bills in situations where fault might be in issue, without admitting or being deemed to admit liability. The store might not be liable, but have chosen to pay for the medical bills nonetheless for positive customer relations. In addition, for this reason, introduction of such evidence is likely extremely prejudicial to Kelley's and outweighs the benefit to the plaintiff for introducing this evidence. Therefore, Able's Motion in Limine will likely be granted.

Question No. 4: Sample Answer

1. Nina has made a prima facie case for age discrimination under the ADEA under the theory of systemic disparate treatment. BUD is subject to the ADEA because it has more than the required 20 workers (60).

Nina is a member of ADEA's protected class (age 40 and over) and she was transferred to a position in which she could no longer earn commissions, which is an adverse employment action. The ADEA prohibits discrimination in the terms/conditions of one's employment because of age.

She has established a prima facie case under the theory of systemic disparate treatment. To prove that an employer intentionally treats a whole protected class differently a plaintiff need only to show a facially discriminatory policy. BUD's policy definitely meets that standard because it flatly states that a sales associate cannot be over the age of 40. So, a prima facie case has been made out based on the above evidence.

2. BUD's defenses will not be successful.

To have a valid bona fide occupational qualification defense to a claim of systemic disparate treatment, the defendant must show that age was a bona fide qualification for the job, meaning it was 1) reasonably necessary to the functioning of the business and 2) age was a proxy for the qualification, meaning that all or substantially all of the members of the class could not perform the job safely and efficiently. While, the ADEA recognizes a defense of reasonable factors other than age, it is not applicable when a plaintiff has made out a claim for direct discrimination based on age.

Here, BUD's mere claim at trial that 25 customers requested younger sales assistants would not rise to the level of reasonably necessary to the functioning of BUD's business to make out a BFOQ defense. While these customers requested younger assistants, evidence was not shown that BUD lost a substantial amount of its business or that the business could not function properly without younger sales assistants. Furthermore, the second part of the BFOQ defense, that age must be a proxy for the qualification is not shown by the evidence, because BUD has not shown that those over 40 could not perform the job safely and efficiently. As to the defense of "reasonable factors other than age," since the policy was directly based on age BUD has not shown that any factor other than age supported its decision to terminate Nina, and thus this defense would fail as well.

Thus, BUD's defenses will not be successful.

3. Alicia can raise a due process claim under the 14th Amendment.

Under the due process clauses of the 14th Amendment, a person shall not be deprived of life, liberty or property without the due process of the laws. This at a minimum requires notice and a hearing before any such interest can be taken away. The timing and order of the "due

process” will be determined by the court. In order to bring a claim however, there must be some governmental “state” action. The mayor of C City is considered a state actor and so a claim under the due process clause can be made by Alicia, a city employee.

The next inquiry is whether Alicia has a valid liberty or property interest. With respect to employment, no property interest exists for at-will employees. There must exist a contract for employment or some other indication that the employer has created such an interest in the employee. Without more, it doesn’t appear that Alicia has such a right. There’s no indication as to how long she’s been employed or what kind of implied contract may be inferred, so it is not likely that she can win a due process claim based on a property right.

She may however, raise a due process claim with a good chance of success for a liberty interest deprivation. A public employee has a liberty interest in having a good reputation when it is connected with an adverse employment decision such as termination. Alicia must prove that the information shared by the Mayor with the City Council was in fact false. In other words, there was no financial misconduct on her part whatsoever, and she must show some damage to her reputation resulted from the information the Mayor divulged in connection with her termination. If she can do so, she will have a valid due process claim and at a minimum be given a chance to be heard to clear her name.

Question No. 5: Sample Answer

1. (a) Gus retained an easement appurtenant when he conveyed Lot 1 to Meg.

An easement appurtenant is an interest in land where one property serves to allow a benefit to another piece of property. Here Meg's property (the servient tenement) allows a benefit to Gus's property (the dominant tenement) to allow Gus and future owners of Lot 2 access to a road for ingress and egress to Blue Lake.

For an easement to be valid, it must be in writing. Here the writing was incorporated into the deed instrument.

1. (b) No, Jim does not have a recognizable interest in Lot 1 that would require Meg to remove the chain because the easement was extinguished when Meg transferred the property to Jim.

Traditionally, an easement appurtenant will run with the land, however, easements can be extinguished in various ways including merger. Generally, if at some point the title of the servient tenement is transferred to the owner of the dominant tenement (or vice versa), the properties are said to "merge," and therefore any easements are thus destroyed.

That is precisely what happened here; Meg conveyed Lot 1 to Jim and at that point Jim held title in both properties. Although Meg and Jim both intended this to be a temporary conveyance to help Jim with his zoning problems, title did in fact transfer, and therefore, at that time the easement was destroyed through merger.

Therefore Meg now no longer needs to remove the chain.

2. Bob can successfully get back his cash deposit because Jim failed to convey marketable title. Marketable title is title that is free from the threat of litigation. It generally means that the title in the land should be free of any encumbrances. It also means that the land was not in violation of any ordinance. Seller generally has until the closing date to clear any defects in the title and present marketable title at the closing. If there is a time of essence clause in the contract, it further strengthens the presumption that the title must be marketable at the closing date. Failure to produce marketable title at the closing date will result in a material breach and a rescission of the land sale contract.

Here, the title is clearly unmarketable. There is a definite threat of constant fines and potential lawsuit because of the zoning ordinance violation. Since time is of essence, Jim undoubtedly has to deliver marketable title by the closing date. It appears that it is very unlikely for Jim to rebuild this house within a week to make it marketable and in fact, Jim did not correct the zoning violation until after the date set for closing. Therefore, this contract can be rescinded by Bob and Bob is entitled to a return of the cash deposit.

3. Jim could rely on the theory of promissory estoppel for failing to obtain fire insurance. Promissory estoppel is a substitute for consideration and is a theory which states that when a person makes a promise and does or should expect another to act or forbear from acting in reliance on that promise and the promise does induce such action or forbearance to the promisee's detriment the promise should be enforceable if it is in the interests of justice.

Here, Jim and the bank entered into a loan contract which expressly required Jim to get fire insurance. After they signed the contract the bank lending officer told Jim not to worry about it; the bank would get the insurance for him.

This could be a contract modification but it would require additional consideration. It is not clear if consideration was present here but promissory estoppel will be applicable here. Bank's employee should have and did expect that Jim would not get insurance because of the promise. It was reasonable for Jim to rely on the promise because a bank would be in good position to procure insurance. Jim relied on that promise to his detriment because his residence burned down and it is uninsured. It would be unjust not to enforce the promise.

4. The insurance company can likely defend the claim on the basis of mistake. Generally when both parties are mistaken about a basic assumption of the contract and neither bears the risk of loss for the mistake, it prevents valid formation of a contract and the contract can be rescinded. This is called mutual mistake.

However, when only one party is mistaken the courts generally do not allow relief, unless the other party was or should have been aware of their ignorance and used it to their advantage, to induce the signing of a contract.

This is called unilateral mistake and a court has discretion to allow a party to avoid such a contract despite the fact that unilateral mistakes do not generally provide a basis for rescission.

Here there has been a unilateral mistake by Deb's insurance company. But Meg learned that the company's employee was unaware that she had rejected an earlier offer and unaware that the court found their insured not liable. Both these facts are essential to the transaction as it means that the company has no further obligation to Meg. Meg took advantage of this mistake and procured herself money by fraudulently withholding the fact that Deb was not likely liable and therefore neither is the company. Under these circumstances the court should allow the company to avoid the contract assuming the court finds that the company doesn't bear the risk of mistake on this issue. However, a plaintiff's negligence such as this is usually not a bar to equitable relief especially when fraud is involved. The 2nd adjuster may have been negligent in failing to investigate Meg's claim further but because of Meg's improper conduct a court will likely allow the contract to be voided.

Question No. 6: Sample Answer

1. Diane should file a shareholder derivative action on behalf of RCI alleging that in granting the bonuses, Art, Ben and Carl breached their fiduciary duties to RCI. Though, Diane is required to make a written demand upon the directors, that they file suit on behalf of the corporation, such a demand would likely be futile in this case.

Diane can file a derivative lawsuit on behalf of the corporation. A derivative lawsuit can only be filed by an individual with standing to file the suit. An individual with standing is an individual that is a stockholder in the corporation and was a stockholder at the time of the improper conduct. Diane is a stockholder in the corporation and was a stockholder when the bonuses were awarded and therefore she has standing to file a derivative suit.

Prior to filing a derivative action, a shareholder must make a written demand upon the corporation that it file the lawsuit on its own behalf. In Pennsylvania, the requirement that a shareholder file a written demand upon the corporation is only waived if she can prove that there would be actual harm to the corporation if such a demand is made.

Here, Diane might be able to forgo making written demand upon the corporation because actual harm might result to the corporation if a written demand is made. The directors would be the ones who would decide whether or not to file a suit, and since the directors have already breached their fiduciary duties as directors, it would be make little sense that they would agree to file a lawsuit against themselves. Moreover, if they receive a demand to file a lawsuit, they may take actions to further defraud the corporation which would satisfy the actual harm requirement in Pennsylvania for excusing the written demand requirement.

2. As a promoter of Newco, Art retains personal liability on the note until RCI, Newco, and Art agree to a novation.

A promoter of a corporation is an individual that seeks contracts on behalf of the corporation prior to the corporation's formation. A promoter is someone who enters contracts on behalf of a soon to be formed corporation. A promoter remains liable on any contracts formed on behalf of the corporation prior to the corporation's formation. Only a novation will alleviate the promoter's liability.

Here, Art will remain liable on the contracts that he entered into on behalf of Newco, until Newco is formed and assumes liability for the contract through a process of novation.

3. Gasco can make a demand that the other party provide adequate assurances prior to continuing to proceed under the contract.

A merchant is entitled to request that a party make adequate assurances of continued performance prior to continuing its performance obligations under the contract. Adequate assurance demands usually come in form of written requests that the individual provide that they will continue to perform their obligations under the contract. A merchant may stop rendering

services under a contract to the extent that their demand for assurance is reasonable based on some information that the party, who is in potential breach, might actually breach the contract. Prior to adequate assurances being received, a merchant may cease his performance provided that his demand for assurances was made in a good faith belief that the other party was going to breach the contract.

Here, Gasco has made a demand for RCI to provide adequate assurances that it would continue to perform under the contract. Gasco was within its rights to make such a demand, because RCI had failed to meet its obligation under the requirements of the contract to make timely payment for the last two months.

4. (a) Casino can argue that they are entitled to Full Faith and Credit under the federal constitution. States are required to honor the decisions of other states when such decisions are on the merits, final, and the state had jurisdiction over the defendant. Full faith and credit means that a final judgment rendered in one state, will be enforced in another state provided that all of the requirements are met.

Here, the Nevada court in which the Nevada judgment was obtained, had subject matter and personal jurisdiction, Casino followed all procedural and notice requirements, which complied with due process, and the judgment is now final.

Though Art would have received greater protection under Pennsylvania procedural and substantive law, the Nevada decision is entitled to full faith and credit and should be enforced in Pennsylvania against Art.