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1. U.C.C. Article II – sales: nonconforming goods – rejection/cure
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Frank operated a landscaping business in E County, Pennsylvania. He was married to Peg for over 30 years, but they began having marital difficulties in 2009. Frank had his attorney, Wanda, a sole practitioner licensed in Pennsylvania, write a will which left “my wife, Peg” 50% of his estate, with the remaining half to his adult daughter Kelly. It also named Peg as executrix of the will “under any and all circumstances so long as she survives me and is willing to serve.” The will also contained a provision which stated that “should any beneficiary contest this will or attempt to vacate, alter or change any provision thereof, he or she shall forfeit any interest given hereunder.” The will was properly signed before two witnesses by Frank in Wanda’s office.

Frank and Peg separated later in 2009, and Frank retained Wanda for an amicable divorce proceeding which concluded in March of 2010. Frank and Peg informally divided their marital assets and debts equally, except for the landscaping business which Frank started during the marriage in his name alone, because they disagreed about its value. They both wanted the divorce before they could agree on an appraisal of the business, and they agreed orally to deal with it later. They had no formal written marital property settlement agreement, and Peg explicitly acknowledged to Wanda that she chose not to retain her own lawyer.

Shortly after the divorce was final, Frank advised Wanda that he wanted to make a new will, to eliminate Peg as a beneficiary of his estate. Frank did not make a new will and died suddenly in May of 2010, leaving a substantial estate approximately half of which was the value of the landscaping business as appraised by an accountant Frank and Peg had chosen just before their divorce decree was final, and who provided his report shortly after Frank’s death.

Frank and Wanda made an arrangement at the beginning of 2009 under which Wanda would do legal work for Frank in exchange for Frank providing landscaping services including
regular lawn mowing and leaf removal at Wanda’s legal office. Wanda had previously paid for such landscaping services as an expense of her law practice. In the calendar year 2009, Wanda received landscaping services with a value of $2,000 in exchange for her legal work for Frank that year, which consisted of representing Frank in his divorce and drafting his will. Frank and Wanda both had acknowledged late in 2009 that this was a fair exchange of the value of their services. Both Frank and Wanda are cash basis taxpayers and report business as well as personal income as individuals.

When the 2009 will was located among Frank’s possessions after his death, Peg went to Wanda’s office to hire her as the Estate’s lawyer. Peg thought that she should be the executrix of the will and receive 50% of the estate, citing the “under any and all circumstances” language of the will’s executrix provision. Peg also asked Wanda to represent her interests with respect to a separate claim against the estate for a share of the landscaping business as she and Frank had preliminarily discussed while their divorce was pending.

Kelly was unhappy with the provisions for Peg, including her appointment as executrix. She sought legal advice from another attorney about her options to contest the will.

1. On what basis should Kelly’s lawyer file an objection on behalf of Kelly to the probate of Frank’s will contesting Peg’s interest in Frank’s estate and her appointment as executrix, and what would be the likely outcome of the will contest regarding Peg’s 50% share and her executrix appointment?

2. Under the Pennsylvania Rules of Professional Conduct, may Wanda represent Peg in her effort to claim a share of the landscape business?

3. What effect, if any, would Kelly’s objections to Peg’s taking pursuant to Frank’s will, have on her interest in Frank’s estate in light of the will’s forfeiture provision?

4. How should the exchange of landscaping work for legal services between Frank and Wanda during 2009 be treated for federal income purposes by each of them?
1. Peg would not be entitled to the 50% bequest in Frank’s will because the divorce negated the bequest, and the will’s “under any and all circumstances” language applied only to her appointment as Executrix. Peg will continue to be able to serve as Executrix.

Wanda wrote a will for Frank while his marriage to Peg was under distress; inserting the phrase in the Executrix appointment which Peg now interprets as preserving her bequest despite the divorce. Kelly’s objection to the Will should be based on the effect of the divorce on the provisions in Frank’s will.

Under the Probate, Estates and Fiduciaries Code at 20 Pa. C.S.A. 2507 (2), a divorce subsequent to the execution of a will generally extinguishes “any provision in the will in favor of or relating to his spouse so divorced...unless it appears from the will that the provision was intended to survive the divorce.” This would include the right to serve as Executor of the will of a divorced spouse. Bloom v. Selfon, 520 Pa. 519, 555 A.2d 75 (1989). The phrase used, “under any and all circumstances” makes no reference to marital status or the prospect of a divorce, but, on its face, appears to insulate Peg’s appointment as Executrix against such a marital dissolution. However, the phrase would not have any effect on the statutory modification of Peg’s 50% share of the estate resulting from the divorce because there is no language in the will to provide that this bequest was intended to survive the divorce.

The statutory extinguishment of will provisions in favor of a divorced spouse should result in a determination that Peg’s 50% bequest fails, and falls to the residue, to be distributed to Kelly as set forth in the will.

2. Wanda would have a conflict of interest in representing Peg regarding the claim for a share of the landscape business while she is representing the estate in the distribution of Frank’s estate.

Wanda should realize from the time that Peg asserted her claim to a share of the landscaping business that she would be unable to represent her because of a conflict of interest caused by Wanda’s representation of Frank’s estate, as well as her prior representation of Frank in the divorce. Rule of Professional Conduct 1.7 Conflict of Interest: Current Clients states:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or
(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a) a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent.

Wanda’s primary loyalty must be to the proper administration of Frank’s estate, not to the Executrix, despite the fact that Peg selected her as the estate’s attorney. Having been appointed by Peg as the attorney for the estate, Wanda would have the obligation to assist Peg only in that capacity, and to assist her with the fiduciary obligation to “preserve and protect the property for distribution to the proper persons within a reasonable time.” *In Re Estate of Campbell*, 692 A. 2d 1098 (Pa. Super. 1997). An estate attorney who fails to abide by this obligation can be surcharged by the Orphans’ Court along with the Executor. *Estate of Westin*, 874 A.2d 139 (Pa. Super. 2005).

Wanda’s representation of Peg in her effort to secure a share of the landscape business is directly adverse to the estate and Wanda’s responsibilities to the estate will be materially limited by Wanda’s responsibilities to Peg. Even if Peg could give informed consent on behalf of the estate to facilitate her disputed personal claim without violating her fiduciary duties, Wanda would be precluded from representing her because Peg is asserting a claim against the estate and Wanda could not reasonably believe that she would be able to provide competent and diligent representation to each client. Additionally, the prospect that Peg’s claim would have to be litigated against the estate implicates subsection (b)(3), as Wanda would be the lawyer for both adversaries, Peg and the estate of Frank.

Additionally, in order for Wanda to pursue a claim by Peg against the estate for a share of the landscaping business she would have to act adversely to the interests of her former client, Frank, whom she had represented during the divorce. The proposed representation by Wanda would, therefore, also implicate Rule 1.9, Duties to Former Clients, which states, in part:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client gives informed consent.

Part 3 of the Explanatory Comment to this Rule defines “substantially related” matters as those which “involve the same transaction or legal dispute, or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person’s spouse in seeking a divorce.”
Wanda represented Frank in the divorce, and Peg declined to hire her own lawyer. The divorce concluded without a written agreement dividing the landscaping business which was in Frank’s sole name, and thus Peg forfeited any claim she could have made to a distribution of the business as marital property, and it remained Frank’s sole property to be distributed according to the terms of his will. See 23 Pa.C.S.A. 3503, 3504. While the estate of a decedent can be responsible to complete the terms of a marital settlement agreement reached before the spouse’s death, In Re Estate of Bullotta, 838 A.2d 594 (2003), Frank and Peg had no actual agreement or order of equitable distribution as part of their divorce. Wanda’s representation of Peg would involve a substantially related matter to the divorce in which Wanda represented Frank, and Wanda’s representation of Peg would be materially adverse to the interests of Frank. Since Frank cannot give informed consent, the representation is precluded by Rule 1.9.

Wanda could not now assist Peg in making a claim for a share of Frank’s solely owned property which was not divided in the divorce action without violating Rules 1.7 and 1.9.

3. **Kelly would not forfeit her share of the estate because her challenge to Peg’s bequest had probable cause.**

Frank’s will contained a provision intended to discourage a challenge to his will by anyone by imposing a forfeiture for making such a challenge. Such a provision is known as an “in terrorem” or “no contest” clause; which are generally regarded as valid. In Re Friend’s Estate, 209 Pa. 442, 58 A. 853 (1904). Such clauses are favored by public policy so long as they do not violate a rule of law or other public policy, and because a no-contest clause protects an estate from costly, time-consuming and vexatious litigation. See In Re Estate of Simpson, 407 Pa. Super. 1, 595 A.2d 94 (1991), appeal denied, 529 Pa. 622, 600 A.2d 538 (1991). Nevertheless, a provision of the Probate, Estates and Fiduciaries Code added in 1994 at 20 Pa.C.S.A. 2521, states that such a provision “is unenforceable if probable cause exists for instituting proceedings.” This legislative enactment is consistent with previous case law which determined that a forfeiture clause in a will would not be enforced if the challenger had probable cause to litigate the issue. Estate of Keller, 427 Pa. Super 616, 629 A.2d 1040 (1993), citing Estate of Simpson.

Kelly objected to Peg’s interest in Frank’s estate. Given that Frank and Peg were divorced after the will was written, and that the language of the will did not clearly overcome the statutory negation of her bequest caused by the divorce, and was at most sufficient to maintain Peg’s appointment as Executrix, Kelly’s challenge was based on probable cause. For the probate court to determine that Peg still retained a claim for a share of Frank’s estate required it to find that the disinheritance presumed by law was overcome by Frank’s intent as expressed by the language in his will. There is no evidence to support such a finding. Kelly, therefore, had the necessary probable cause to challenge the will, and the forfeiture provision would not be applied to Kelly.
4. The $2,000 value of Frank and Wanda’s exchange of services should be treated as income to both Frank and Wanda, but only Wanda could deduct this amount as a business expense.

Within the definition of “income” as “all income from whatever source derived” in Section 61(a) of the Internal Revenue Code is the concept of an exchange of goods and services for which no cash is paid; traditionally known as “bartering.” These may also be known as “payments in kind.” The applicable regulations at 26 CFR Section 1.61-2(d)(1) provide that if services are paid for other than in money, the fair market value of the property or services taken in payment must be included in income. Revenue Ruling 79-24 held that the fair market value of goods or services received in exchange for services are income to the recipient.

The facts state that Frank and Wanda agreed that the value of Wanda’s legal services equaled the $2,000 value of the landscaping services provided by Frank. We have no reason to conclude that the “fair market value” was anything other than this amount. Both of them therefore received $2,000 of income in the form of services.

The facts also note that Wanda had previously been paying for landscaping services at her office before she entered into the bartering arrangement with Frank. The Internal Revenue Code at 26 U.S.C. 162 permits taxpayers to deduct the “ordinary and necessary expenses” of “carrying on any trade or business.” Nothing in the facts indicates that the landscaping done by Frank for Wanda’s office property was extraordinary or personal in nature, and certainly the property would need regular lawn mowing and leaf care. Wanda could therefore deduct the same $2,000 as a business expense on Schedule C of her return and thus negate the effect of the income on her federal income tax return for the year 2009.

Frank’s final personal income tax return, however, would have no offsetting business expense deduction, because the legal services he received were for his divorce and estate planning, which were personal in nature, and not deductible.
Question No. 1: Grading Guidelines

1. **Effect of divorce on bequest to spouse**

Comments: Candidates should recognize that a divorce extinguishes provisions of a will in favor of a spouse unless the language of the will provides otherwise. The appointment of the spouse as Executor/Executrix would be included, but the particular language of the will preserved the appointment. However, due to the divorce Peg would not be entitled to the 50% bequest in Frank’s will.

4 points

2. **Conflict of Interest**

Comments: Candidates should recognize that Wanda as the estate attorney is obliged to assist the proper, lawful distribution of the estate, and not a disputed claim made by the Executrix herself. Candidates should recognize the existence of a conflict of interest that would preclude the representation of both parties. There should also be a recognition that the claim being made is adverse to the interest of the lawyer’s former client in his divorce from the Executrix, and is not a conflict which can be waived.

6 points

3. **“In terrorem” clauses**

Comments: Candidates should recognize that “in terrorem” or “no contest” clauses in a will punishing beneficiaries with forfeiture are generally valid, unless a challenge is made with probable cause. The challenge here should be successful as to the bequest to the spouse, although the Executrix appointment should survive, so there should be no forfeiture of the challenger’s bequest.

5 points

4. **Non-cash transactions**

Comments: Candidates should recognize the federal income tax recognition of bartered goods and services, and that the fair market value is income to each participant. The service income is deductible by Wanda to the extent it replaced previous expenditures of ordinary and necessary business expenses for the maintenance of her business office property. Frank could not deduct the value of the legal services because they were personal in nature.

5 points
Question No. 2

Ray operated a car that struck and severely injured Karl, a pedestrian. Ray was killed after his car left the roadway and struck a tree. There was one witness to the accident who gave a statement to the police as to how the accident occurred. The witness stated that Karl ran into the crosswalk quickly without looking as Ray’s car was approaching at a high rate of speed. The accident occurred in C City, Pennsylvania. Sue, who was Ray's named executrix, was appointed as executrix by the Orphans' Court of C County, Pennsylvania.

Emily, Karl’s wife, took two months off from work to care for Karl due to the nature and severity of his injuries. Karl was confined to bed for over a month and he could not perform his normal household chores such as yard work. Karl and Emily retained Attorney Able to represent them in a claim to recover damages as a result of the accident. A traffic safety report compiled as part of Attorney Able’s investigation revealed that numerous accidents had occurred at the location of Karl’s accident and concluded that C City should have erected an electronic stop signal at the location of the accident. Able filed a lawsuit in the Court of Common Pleas of C County, Pennsylvania, on Karl’s behalf bringing a cause of action for negligence against Sue as the executrix of Ray’s estate, and C City.

Attorney Wiley, who represented Sue, took the deposition of Karl and Emily. Karl testified at the deposition that Ray was solely at fault for the accident since Ray struck him in the middle of a clearly marked pedestrian crosswalk. Karl further testified that Ray was traveling at a high rate of speed at the time of the accident. At her deposition, Emily testified about her lost wages while rendering care and services to assist her husband while he was recovering.

Attorney Wiley also properly scheduled the deposition of Fred, who is Emily’s current employer, in accord with the applicable rules and served Fred with a subpoena to attend the
deposition. The purpose of this deposition was to inquire into Emily's work and income record while in Fred’s employ. Fred does not want to attend the deposition, and he further plans to remain silent if questioned at the deposition since he feared giving testimony about his employment practices, which included paying employees, including Emily, in cash with no taxes withheld in violation of law. Fred consulted his attorney for advice on his obligation to attend the deposition and further to give testimony at the deposition.

Able sent interrogatories to Sue seeking information on applicable insurance coverage in effect for Ray at the time of the accident. Attorney Wiley filed an objection to the disclosure of insurance information which he claimed was irrelevant to liability and highly prejudicial to his client. After receipt of the expert report prepared by Able’s traffic consultant expert, C City installed an electronic traffic signal at the intersection where the accident occurred.

1. At trial, Karl attempted to testify in his case in chief about the circumstances surrounding the accident, and Attorney Wiley objected based on the Dead Man’s Act. How should the court rule on the objection?

2. (a) How should the Court rule on Attorney Wiley’s objection to the interrogatories seeking insurance information from Ray’s estate?

   (b) How should Fred’s attorney advise him as to his obligation to attend and give testimony at the deposition?

3. At trial, Attorney Able attempts to introduce evidence to show that C City installed the electronic traffic signal at the scene of the accident after it received the traffic consultant’s report in order to support a claim of negligence. How should the Court rule on C City’s objection to the admission of such testimony?

4. (a) Based upon the statement of the eyewitness, what affirmative defense to the personal injury lawsuit should the estate assert, and if successful, what effect would the defense have on Karl’s ability to recover?

   (b) Would Emily have a cause of action against the estate that could have been brought as part of Karl’s lawsuit, and, if so, would her recovery be affected by the potential defense raised by the estate based upon the eyewitness testimony?
Question No. 2: Examiner’s Analysis

1. The Court should overrule the objection based on the Dead Man’s Act and would permit Karl to testify.

Ray was the operator of the car that was involved in the accident with Karl, who was a pedestrian. The facts state that Ray died as a result of injuries sustained in the accident. There was one third party witness to the accident.

The Dead Man’s Act, 42 Pa.C.S.A. 5930, generally would disqualify a surviving party to an event involving a decedent or any other person whose interest is adverse to the decedent from being a witness against the decedent. The Dead Man’s Act is an exception to the general rule of evidence as found at Pa.R.E. 601(a), which states that every person is competent to be a witness unless otherwise provided by statute.

Permitting the sole surviving party to an accident to give testimony favorable to him and adverse to the decedent places the estate at a disadvantage. The executrix would not be in a position to directly refute or contradict the testimony of that person successfully since obviously the decedent is unavailable. See Perlis v. Kuhns, 202 Pa. Super, 80, 195 A.2d 156 (1963).

Generally the Dead Man’s Act requires that the following conditions occur before the surviving party would be disqualified. First, the deceased must have some actual interest in the outcome of the case. Here, the decedent’s estate would be subject to potential liability and thus has an interest in the lawsuit. Secondly, the testifying witness must have some interest that is adverse to the decedent. By adverse, it is not simply meant that the testimony be harmful to the decedent but that the interest of the testifying witness be adverse to the decedent. In this case, Karl’s interest as the surviving party to the accident with Ray would be adverse to the decedent since Karl is attempting to impose liability on Ray. Lastly, the deceased must have a representative of record. Here, the decedent does have an executrix to represent the estate’s interest. See In Re: Hendrickson’s Estate, 388 Pa. 39, 130 A.2d 143 (1957) and Olson v. North American Industrial Supply, 441 Pa. Super. 598, 658 A.2d 358, 364 (1995). The general rule is that in a trespass action for personal injuries against the alleged wrongdoer’s administrator, the plaintiff is not competent to testify as to anything that occurred during the wrongdoer’s life. Perlis, supra. The Dead Man’s Act would normally apply to preclude oral testimony from Karl.

Even though the Dead Man’s Act would normally apply, there are certain situations where the protection afforded by the act is deemed waived. Here the facts indicate that the attorney for the estate, Wiley, took the deposition of Karl and Emily. The law does provide that if a party takes the deposition, sends interrogatories or engages in other discovery devices with respect to an adverse party, then the application of the Dead Man’s Act is waived with respect to the person subjected to the discovery. Perlis v. Kuhns, supra. One cannot engage in discovery which includes depositions and rely upon the Dead Man’s Act. Accordingly, the objection to preclude testimony from Karl under the Dead Man’s Act should be denied by the Court. Karl should be permitted to testify in the trial as an exception to the Dead Man’s Act.
2. (a) The objection to interrogatories to obtain insurance information from Ray's estate should be overruled by the Court.

The Pennsylvania Rules of Civil Procedure recognize the need to disclose insurance information including the amount of coverage, upon request once a lawsuit has been filed.

Pa.R.C.P. No. 4003.2 is applicable to whether Ray's estate will be compelled to disclose liability insurance information. The Rule states as follows:

A party may obtain discovery of the existence and terms of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of such disclosure admissible in evidence at trial. For the purposes of this paragraph, an application for insurance shall not be treated as part of the insurance agreement.

The above Rule codifies the decision of the Pennsylvania Supreme Court in Szarmack v. Welch, 456 Pa. 293, 318 A.2d 707(1974) which permits the discovery of insurance information. Therefore, once a lawsuit has been filed against the estate, Karl and Emily can have their attorney submit interrogatories, as was done, requesting the information relating to available insurance. It should also be noted that although liability insurance information is discoverable it would not be admissible at the trial of this matter for the purpose of establishing liability since it is irrelevant to liability and highly prejudicial. Pa.R.E. 411. The material obtainable in discovery is to a large part, broader than that which may be admissible at trial. The purpose of allowing insurance information in discovery is to promote the prompt settlement of cases. Thus, the insurance information is discoverable but would not be available for use at trial.

(b) Fred's attorney should advise him that he must attend the scheduled deposition, but he may refuse to answer certain questions asked of him at his deposition based upon his privilege not to incriminate himself, contained in the Fifth Amendment to the United States Constitution as applied to the states by the Fourteenth Amendment and Article One, Section Nine of the Pennsylvania Constitution.

Fred, who is Emily's current employer, apparently maintains an employment practice of paying some employees, including Emily, cash wages and not paying applicable taxes on the wages. The facts indicate that Fred's practice would be in violation of existing law. Therefore Fred has a well-founded reason to refuse to give testimony about wage information for Emily. The Pennsylvania Rules of Civil Procedure would require Fred to appear at the scheduled deposition since it appears that the deposition was properly scheduled and Fred received a subpoena to attend. Fred does have protections under both the Fifth Amendment to the United States Constitution and the Pennsylvania Constitution, at Article One, Section Nine. The privilege contained in the Pennsylvania Constitution is interpreted similarly to that of the Fifth Amendment to the United States Constitution, and protects an individual from being called as a witness against himself in criminal and civil proceedings, both formal and informal, where the answers to the questions might incriminate the individual in future criminal proceedings.
McDonough v. PENNDOT, 152 Pa. Comwlth. Ct. 384, 390, 618 A.2d 1258, 1261 (1992). The Fifth Amendment privilege is applicable to the states under the Fourteenth Amendment to the United States Constitution. Fred’s employment practices may be a violation of federal law and thus his statements relating to these employment matters might incriminate him in criminal activity.

The privilege to raise the Fifth Amendment protection against self-incrimination applies not only at trial but during the discovery process. S.E.C. v. Grayston Nash, Inc., 25 F. 3rd 187, 190 (3d Cir. 1994). Fred’s attorney therefore should advise him that he may refuse to answer any question that requires an incriminating answer based upon the privilege to refuse to testify as is contained in the United States and Pennsylvania Constitutions.

3. The Court should sustain C City’s objection to the admission of testimony that it installed an electronic traffic signal at the scene of the accident after it received the traffic consultant’s report.

The city received a copy of the Plaintiffs’ traffic consultant report. After receipt of that report the city installed an electronic traffic signal at the intersection where the accident occurred. The facts do not discuss the rationale for installing the electronic traffic signal, however this action represents a subsequent change to the intersection. The plaintiffs are offering this evidence concerning C City’s installation of the traffic signal to support a claim of negligence.

It might be argued that admission of testimony about the traffic signal installation is relevant because it might make it more probable than not that if the signal was in place at the time of the accident, the accident would not have occurred (Pa.R.E. 401). However, subsequent remedial measures, which by definition occur in a different time frame, are of minimal relevance and thus not probative for fault.

Pennsylvania Rule of Evidence 407 would preclude the testimony. Rule 407 states:

When, after an injury or harm allegedly caused by an event, measures are taken which, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove that the party who took the measures was negligent or engaged in culpable conduct, or produced, sold, designed, or manufactured a product with a defect or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for impeachment, or to prove other matters, if controverted, such as ownership, control, or feasibility of precautionary measures.

It would appear that the purpose of this rule is to encourage remediation after an accident. See Duchess v. Langston Corp., 564 Pa. 529, 769 A.2d 1131 (2001). After receipt of the traffic consultant’s expert report, the electronic signal device was installed. Presumably the installation was done to enhance safety at that intersection. The law wants to encourage improvements which will aid those in the future without having that evidence of a subsequent remedial measure
used to punish the person making that change. Therefore, the objection to testimony concerning the installation of the electronic traffic signal should be sustained.

4. (a) Karl’s negligence should be raised as a defense, and it could limit his ability to recover against the estate based upon the percentage of his contributory negligence. It would be up to the finder of fact to determine what, if any, percentage reduction in an award is appropriate based upon Karl’s actions.

42 Pa.C.S.A. Section 7102 entitled Comparative Negligence provides in pertinent part as follows:

(a) General Rule. – In all actions brought to recover damages for negligence resulting in death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or his legal representative where such negligence was not greater than the causal negligence of the defendant or defendants against whom recovery is sought, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.

If Karl is found to have been contributory negligent, his recovery will be reduced by the percentage of his negligence, unless he is found to have been more than 50% causally negligent, in which case he is barred from any recovery. Contributory negligence is neglect of the duty imposed upon a person to exercise ordinary care for his or her own protection and safety which is a legally contributing cause of an injury. See Trayer v. King, 241 Pa. Super. 86, 359 A.2d 800 (1976). The contributory negligence of a plaintiff, like the negligence of a defendant, is lack of due care under the circumstances. Argo v. Goodstein, 438 Pa. 468, 265 A.2d 783 (1970). Under Pennsylvania law it is well settled that a plaintiff has a duty to look where he or she is going, which requires that a person exercise reasonable care and diligence in crossing a street. Villano v. Security Savings Association, 268 Pa. Super. 67, 407 A.2d 440 (1979). A plaintiff is guilty of contributory negligence with respect to injuries which are received as a result of a failure on his part to observe and avoid an obvious condition which ordinary care for his safety would have disclosed. Skalos v. Higgins, 303 Pa. Super. 107, 449 A.2d 601 (1982).

Attorney Wiley should argue that based upon the witnesses’ statement, Karl ran into the crosswalk without looking and was thus negligent. Since the final resolution of Karl’s claim is based upon a determination of credibility of the witnesses there is no indication of how this issue would be resolved other than it is an appropriate defense to be submitted to the fact finder. The fact finder would need to assess the credibility of the witnesses and then determine what, if any, reduction of an award is appropriate based on Karl’s actions. Also, if the fact finder determines that Karl’s negligence was greater than the negligence of the defendants, Karl’s claim will fail and he will not be entitled to a recovery.

(b) Emily does have a cause of action for loss of consortium that could have been brought as part of Karl’s complaint; however since her right to recover damages is dependent upon the success of Karl’s claim, her recovery would be reduced by the percentage of Karl’s contributory negligence.
Emily would have been able to include a cause of action based upon loss of consortium in the lawsuit, which is a right growing out of the marriage relationship. The interference with the right of consortium by a tortfeasor causing negligent injury to one spouse, Karl, affords the other spouse, Emily, with a legal cause of action to recover damages for that interference. See Novelli v. Johns-Manville Corp., 395 Pa. Super. 144, 148, 576 A.2d 1085, 1087 (1990).

A loss of consortium claim is grounded upon the loss of a spouse’s services after injury. Here during the recovery period, Karl was unable to perform normal and usual household tasks including yard work. Emily lost the services and society of Karl for at least the period of his recovery until he was able to perform household tasks for himself. The loss of services and society are compensable. Jackson v. Travelers Ins. Co., 414 Pa. Super. 336, 606 A.2d 1384 (1992). Consortium is a right growing out of the marriage relationship where husband and wife have a right to the society, companionship and affection of each other. Novelli, supra. Here Emily suffered a loss of the society, companionship and affection of her husband. Moreover, she lost the services of her husband and she had to perform tasks around the house that were normally Karl’s responsibility.

Since a loss of consortium is derivative of the injured spouse’s claim and it arises from the bodily injury to the other spouse (Karl), Emily is entitled to damages for loss of consortium, if Karl is successful on his claim. Barchfeld v. Nunley, 395 Pa. Super. 517, 577 A.2d 910 (1990). Emily’s claim for damages based upon a loss of consortium is dependent upon the success of Karl’s claim and would also be reduced in the same manner as Karl’s damages if the fact finder determined that Karl was negligent and contributed to his injuries. Therefore Emily could have included her cause of action for loss of consortium in the complaint filed against all Defendants.
Question No. 2: Grading Guidelines

1. **Dead Man’s Act**

Comments: The candidate should discuss the applicability of the Dead Man’s Act to the facts and the exception to the testimonial bar provided by the Dead Man’s Act based upon discovery initiated by the estate, leading to the proper conclusion that Karl would be able to testify.

5 points

2. **Insurance Interrogatories/Deposition Testimony**

Comments: The candidate should recognize that the Pennsylvania Rules of Civil Procedure permit interrogatories to request the existence and amount of insurance coverage a defendant may have. Also, Fred, who was properly subpoenaed, must appear at the deposition but may assert his Constitutional protections not to testify in response to certain questions since his testimony may incriminate him.

5 points

3. **Subsequent Change**

Comments: The candidate should identify and discuss Pa.R.E. 407 which would prohibit the introduction of the testimony concerning the traffic signal as a subsequent change for the purpose of establishing negligence.

4 points

4. **Comparative Negligence/Loss of Consortium**

Comments: The candidate should discuss Karl’s potential contributory negligence and how the fact finder would assess any reduction in Karl’s award based upon his negligence. Also, the candidate should identify and discuss the derivative action of loss of consortium which could have been filed by Emily as part of Karl’s lawsuit and recognize that recovery would be reduced by any percentage of contributory negligence assessed to Karl.

6 points
Question No. 3

Harpo is a member of the Dinero gang which controls the illegal drug trade in C City, Pennsylvania. Harpo learned that Raptor was trying to form a new gang named Condor to commence drug dealing activities in C City. If Condor began competing with the Dineros for drug sales, the Dineros’ revenue would be severely impacted. Since this is the only source of money which the Dineros rely upon, Harpo devised a plan to address this budding problem.

Harpo learned that Raptor frequented Joe’s Tavern and usually stayed until about 2:00 a.m. Harpo decided to go to Joe’s Tavern and wait for Raptor to leave. He told his fellow gang member, Louis, that he was going to shoot Raptor in the head and pin a note to his body which stated, “This is what happens when you tread on the wrong turf. Stay out of C City. The Dineros.” Harpo prepared the note and took it and his handgun and proceeded to Joe’s Tavern.

Harpo arrived at Joe’s Tavern about 1:40 a.m. and waited in his car. About 2:10 a.m., Raptor exited the tavern with a male who Harpo did not know and did not expect to be with Raptor. Harpo exited his vehicle, walked up to Raptor and shot him in the head killing him instantly. The other male, later identified as Eldridge, began to run down the street. Harpo fired a shot at Eldridge’s leg to slow him down so he couldn’t call the police. Harpo then pinned the note he had prepared to Raptor’s shirt and fled the scene. Ambulance personnel arrived soon thereafter and rushed Eldridge to the hospital. The bullet to his leg struck a major artery, and he lost a lot of blood, causing Eldridge to die as a result of the gunshot wound.

Two days after the shooting at Joe’s Tavern the C City police received a visit from Camille, Harpo’s sister. Camille told the police that she heard that her brother was involved in the shooting, and she wanted the police to arrest him because she feared the Condors were going to kill him. The police asked if she would look at a note found at the scene of the crime and she
agreed. She immediately identified the handwriting as Harpo’s. The police also located a witness named John who saw the shootings and positively identified Harpo as the shooter. Based on this information, Harpo was located and placed under arrest. A day after Harpo’s arrest, Louis came forward and informed the police that Harpo planned the shooting of Raptor.

1. What would be the most serious charge that should be filed against Harpo for (a) the shooting which resulted in the death of Raptor and (b) the shooting which resulted in the death of Eldridge?

After the charges were filed the case proceeded to a preliminary hearing where John testified to his observations regarding the shooting and his identification of Harpo. Defense counsel fully cross examined John with regard to his observations and his identification. Three days later John was found dead in a drainage ditch with a gunshot wound to his head.

2. At Harpo’s trial the Commonwealth called the lead detective in the case to read the testimony given by John at the preliminary hearing regarding his observations and identification of Harpo, and the Defense objected to the admissibility of this testimony on the grounds of hearsay. What response should the Commonwealth make to the objection, and how should the Court rule on this objection?

After the trial Camille was severely beaten by her husband, Patrick, because she ratted out her brother. Her injuries included a broken jaw and two broken ribs. This was the third time that Patrick had beaten Camille since they were married and the second time that the beating required Camille to seek medical treatment. Camille no longer feels safe living with Patrick.

3. Assume that Camille comes to you for a consultation on a potential divorce and informs you that Patrick will not agree to a divorce. (a) What would be the most appropriate ground for divorce for Camille to pursue on the facts presented, and with what likelihood of success?

(b) What is the most appropriate civil action to file against Patrick to immediately address Camille’s concerns for her personal safety, and with what likely result?
Question No. 3: Examiner's Analysis

1. A first degree murder charge should be filed for the shooting of Raptor, and a third degree murder charge should be filed for the shooting of Eldridge.

18 Pa. C.S.A. Section 2502 provides in pertinent part as follows:

(a) Murder of the first degree – A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing.

(b) Murder of the second degree - A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony.

(c) Murder of the third degree – All other kinds of murder shall be murder of the third degree. Murder of the third degree is a felony of the first degree.

Section 2502 (d) goes on to define an intentional killing as “killing by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing.”

Pennsylvania courts interpreting Section 2502(d) have held that a willful, deliberate and premeditated killing is one where the actor has a specific intent to bring about the death of the victim. *Commonwealth v. Nelson*, 514 Pa. 262, 523 A.2d 728 (1987). As stated by the Pennsylvania Supreme Court, a killing is “willful, deliberate, and premeditated if it is committed by one who is conscious of his own purpose and intends to end the life of his victim. *Commonwealth v. Stewart*, 461 Pa. 274, 279, 336 A.2d 282, 285 (1975).

One of the most commonly recognized circumstances from which a jury can infer a specific intent to kill is the use by the defendant of a deadly weapon on a vital part of the victim’s body. *Commonwealth v. Carbone*, 524 Pa. 551, 574 A.2d 584 (1990). As the Pennsylvania Supreme Court has emphasized, “if a deadly force is knowingly applied by the actor to the person of another, the intent to take life is as evident as if the actor stated the intent to kill at the time the force was applied.” *Commonwealth v. Harvey*, 514 Pa. 531, 538, 526 A.2d 330, 334 (1987).

Murder of the third degree is murder that is neither intentional nor committed during the perpetration of a felony. See *Commonwealth v. Reilly*, 519 Pa. 550, 549 A.2d 503 (1988). The term “Perpetration of a felony” is defined in Section 2502 (d) as the act of the defendant in engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit certain crimes, none of which are applicable here. Third degree murder does not require specific intent to kill, but it does require malice. *Commonwealth v. Austin*, 394 Pa. Super. 146, 575 A.2d 141 (1990). In addition to serving as the gravamen of


As applied here, Harpo should be charged with first degree murder for the death of Raptor. Harpo clearly devised a plan to kill Raptor in order to send a message to the members of the Condor gang to stay out of C City. Harpo told his fellow gang member, Louis, that he was going to shoot Raptor in the head as he left Joe's Tavern and pin a note on his body which stated, "This is what happens when you tread on the wrong turf. Stay out of C City. The Dineros." This statement to Louis, coupled with his driving to Joe's Tavern, taking his gun and the note with him, and waiting for Raptor outside the tavern are all evidence of his premeditation to kill Raptor. It can also be inferred from Harpo shooting Raptor in the head that he had the specific intent to kill him. Since Harpo clearly premeditated the killing of Raptor and demonstrated his specific intent to kill him by shooting him in the head, a charge of first degree murder should be filed against Harpo for Raptor's death.

With regard to Eldridge, Harpo should be charged with third degree murder. As stated above, third degree murder requires malice which consists either of an express intent to kill or inflict great bodily harm, or of a wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty indicating unjustified disregard for the probability of death or great bodily harm. Although Harpo did not plan the killing of Eldridge, and, in fact, did not even know that Eldridge would be accompanying Harpo, he did fire a shot at Eldridge's leg with his handgun in an attempt to slow him down. At a minimum this would constitute recklessness of consequences and a mind regardless of social duty indicating an unjustified disregard for the probability of death or great bodily harm. By firing a shot at Eldridge's leg Harpo demonstrated recklessness of consequences and completely disregarded the chance that Eldridge could be seriously wounded or killed by Harpo's actions. These facts would likely support a charge of third degree murder.

2. The Commonwealth should argue that although the testimony would be deemed to be hearsay it should be admitted under the former testimony exception to the hearsay rule. The court should overrule the defense objection to the admissibility of this testimony.

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Pa.R.E. 801. A statement includes an oral assertion of a person and a declarant is defined as a person who makes a statement. *Id* As applied here, the lead Detective is attempting to introduce the testimony of
John, made at the Preliminary Hearing, wherein he discussed his observations of the shooting incident and identified Harpo as the person who shot Raptor and Eldridge. These statements were made by John, the declarant, and would be classified as oral assertions. The statements are being offered by someone other than John, namely the Detective, to prove the truth of the matter asserted. Accordingly, John's statements would be classified as hearsay. Hearsay will not be admissible unless it falls within an exception set forth in the Rules of Evidence or some other rule prescribed by the Supreme Court or by statute. Pa. R.E. 802. The Commonwealth should argue that the hearsay statements should be admissible under the former testimony exception to the hearsay rule.

Pa. R.E. 804 (b) (1) provides for a hearsay exception where the defendant is unavailable where there has been an instance of former testimony. The rule states:

(b) Hearsay Exceptions. The following statements, as hereinafter defined, are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an adequate opportunity and similar motive to develop the testimony by direct, cross or redirect examination.

The former testimony exception to the rule excluding hearsay provides that the testimony of a witness at another hearing of the same or a different proceeding may be introduced into evidence if (1) the witness is unavailable and (2) the party against whom the evidence is to be introduced had an adequate opportunity and similar motive to develop the testimony by a direct, cross, or redirect examination. Commonwealth v. McCrae, 574 Pa. 594, 832 A.2d 1026 (2003).

As applied here, the Detective is attempting to introduce John's testimony which was taken at the Preliminary Hearing. The facts make clear that John was fully cross examined by defense counsel on his observations and identification. Counsel had adequate opportunity and motive to fully cross examine John on these areas. John is obviously unavailable because he was shot and killed. Accordingly, although this testimony would be deemed to be hearsay it will likely be admitted under the former testimony exception to the hearsay rule.

3. The most appropriate divorce ground for Camille to pursue would be a fault ground based upon cruel and barbarous treatment, and Camille could immediately seek protection under the Protection from Abuse Act and would likely be successful.

(a) 23 Pa. C.S.A. 3301 (a)(3) provides that the court may grant a divorce to the innocent and injured spouse whenever it is judged that the other spouse has by cruel and barbarous treatment, endangered the life or health of the injured and innocent spouse. Cruel and barbarous treatment implies a merciless and savage disposition leading to conduct amounting to actual
personal violence or creating a reasonable apprehension thereof, thus rendering further
(1971). Cruel and barbarous treatment, constituting a ground for divorce, consists of actual
personal violence or such course of treatment as endangers life or health and renders cohabitation

In this case, Camille was recently beaten so severely by her husband that she sustained
multiple broken bones. The facts make clear that this is the third time that she has sustained a
beating at the hands of her husband and that she no longer feels safe living with him. These
beatings endangered the life and health of Camille as evidenced by the fact that two of the
beatings required medical treatment and the most recent beating was quite severe. These facts
likely will provide ample support for a divorce on fault grounds of cruel and barbarous treatment
for which Camille should succeed.

(b) Camille could file a petition for relief under the Protection from Abuse Act, and the
Court would likely prohibit Patrick from having any contact with her.

The Petition under the Protection from Abuse Act (PFA), 23 Pa. C.S.A. 6101, *et seq* is a
civil action that can be filed by Camille against Patrick. The PFA law is intended to protect
family or household members from future abuse based upon current or past abusive actions. The
statute defines abuse to include causing bodily injury to another family member. 23 Pa. C.S.A.
6102 (a) (1). Here the multiple beatings of Camille by Patrick which caused bodily injury would
certainly fall within the above definition.

If Camille is successful in obtaining a protection order, the relief would most likely
mandate that Patrick not abuse her and have no contact with her. 23 Pa. C.S.A. § 6108. This
order might include a directive for Patrick to vacate the marital home due to the pattern of abuse.
A violation of the protection order is enforceable by the Court’s contempt power.
Question No. 3: Grading Guidelines

1. **Criminal Law**

   Comments: The candidate is expected to identify that a first degree murder charge should be brought with regard to the death of Raptor, and a third degree murder charge should be brought with regard to the death of Eldridge and discuss the law and facts related to those charges.

   7 Points

2. **Evidence**

   Comments: The candidate is expected to recognize and discuss the rules applicable to hearsay and the former testimony hearsay exception and apply those rules to the facts of this case.

   6 Points

3. **Family Law—Divorce (Cruel and barbarous treatment) and P.F.A.**

   Comments: The candidate is expected to identify and discuss the cruel and barbarous treatment fault ground for divorce and apply the applicable facts and identify and discuss the protections afforded by the P.F.A. statute and apply the applicable facts.

   7 Points
Question No. 4

Adventures R Us Airline ("Adventures Airline") is a licensed air carrier with routes around the world. It maintains its headquarters in State P and markets air flights and package tours to many countries. Adventures Airline routinely advertised in newspapers and magazines in State S and promoted "Magical Tours" to several countries, including C Country. Its flights are regulated by an agency of the United States government, as required by a federal statute, that also provides, in pertinent part: “No State ... shall enact or enforce any law...relating to rates, routes or services of any air carrier.” State S consumer protection law prohibits deceptive advertising and trade practices, defined, in part, as: “failure to list all exceptions to the terms and conditions on the front page of the offering in bold 12 point type.” The law authorizes the State S Attorney General to bring an action for declaratory and injunctive relief.

Jane and Michael Banks, residents of State S, planned a trip to Europe to visit C Country. They found a Magical Tour that suited their travel needs perfectly. The rate for round trip air fare included free lodging on the first and last nights of the tour in guest houses in the countryside. The Banks phoned an Adventures Airline sales agent and booked the tour, with stays in two different guest houses in C Country. Their trip began on February 14, 2009. Their flight to C Country International Airport landed on time, but the first guest house was several hours’ driving time away, and they reached it at 7 p.m. On arrival, they were advised that the free first and last nights’ stay was conditioned on their arrival before 5 p.m. at the first guest house; accordingly, they would be required to pay for each night in the guest houses. When they protested, they were shown the trip brochure from Adventures Airline, which stated in a footnote on a back page: “Eligibility for the free nights’ stays in the guest houses is conditioned on check-in by 5 p.m. on date of arrival in C Country.” Since they were exhausted, the Banks checked in and paid for the guest house. They
subsequently learned that it was impossible for a traveler to reach certain guest houses, including theirs, by 5 p.m., given their distance from the arrival airport.

Upon returning home, after having paid for two nights in guest houses that they thought were part of the airfare fee they paid the airline, the Banks contacted the State S Attorney General, who had received complaints from 125 other couples who had the same unfortunate experience with the airline’s tours to Europe. The State S Attorney General filed suit against Adventures Airline in state court in State S, whose law provides for personal jurisdiction “to the fullest extent allowed under the U.S. Constitution.”

1. Is personal jurisdiction over Adventures Airline proper in State S under the Federal Constitution?

2. Assuming personal jurisdiction is proper, if the State S Attorney General brought suit for violation of the state’s consumer protection law, what defense(s) is/are available to Adventures Airline based upon the Federal Constitution, and with what likely result?

3. Assume, for purposes of this question, that the State S Attorney General did not bring suit against Adventures Airline. If the Banks sought to bring suit in federal court for breach of contract against Adventures Airline, on behalf of all individuals denied free guest house accommodations for late arrival, what prerequisites would have to be satisfied?

Eugene, a flight attendant who had worked for Adventures Airline for 10 years, requested a transfer to flights to the Pacific. When he was denied, he filed a claim of sex discrimination, in violation of Title VII of the Civil Rights Act of 1964 with the appropriate agency, and he alleged that female flight attendants with less seniority had been transferred to the desired flights based on their sex because his supervisor told him that “Asian business travelers prefer women to serve them.” Adventures Airline filed a response denying discrimination. Following the filing of his claim, Eugene was reassigned to the same schedule as rookie attendants, which meant that he got last choice of flight assignment within his territory, which was the least desirable route schedule.

4. What claim under Title VII could Eugene raise to challenge the change in his schedule?
Question No. 4: Examiner’s Analysis

1. **Personal jurisdiction over Adventures Airline would be proper under the Due Process Clause of the Fourteenth Amendment.**

   At issue is whether the Due Process Clause of the Fourteenth Amendment to the Federal Constitution would allow the State S Attorney General to bring suit against Adventures Airline, which has its headquarters in another state. Since State S' long-arm statute would support personal jurisdiction over Adventures Airline if it is Constitutionally allowable, the court must then look to the Constitution, specifically the Due Process Clause, to determine if personal jurisdiction would be proper.


   Minimum contacts may give rise to general or specific personal jurisdiction. For general jurisdiction, the contacts must be “systematic and continuous general business contacts.” *Helicopteros Nacionales v. Hall*, 466 U.S. 408, 104 S.Ct. 1868 (1984). Specific jurisdiction requires that the plaintiff’s claim “arise out of or relate to those activities [in the state]...” *Burger King, supra at 472*.

   In considering the “fair play and substantial justice” element courts typically look at factors such as the burden on the defendant, the forum State’s interest in the dispute, plaintiff’s interest in obtaining convenient and effective relief, the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and the shared interests of the several states in furthering substantive social policies. *Woodson, supra*.

   Applying these principles to Adventures Airline and the claim of the State S Attorney General on behalf of the Banks and others in State S, it appears that the minimum contacts requirement for assertion of specific jurisdiction is satisfied, since it appears that plaintiffs booked their trips as a result of Adventures Airline’s contacts (advertising) in State S, which is the basis of the claim by the State S Attorney General. *See Employers Mutual Casualty Company v. Bartile Roofs, Inc.*, 2010 U.S. App. LEXIS 18690 (10th Cir. 2010). Insofar as the “fairness” element, it would appear to be less of a burden on defendant airline to appear in the courts in State S than for the individual citizens of State S to be forced to travel and litigate in State P. Additionally, since State S’ consumer protection law specifically relates to Adventures
Airline’s advertising, State S has an interest in the dispute and resolution of the matter in the courts in State S would appear to be both reasonable and efficient.

Based on the information provided, State S’s exercise of personal jurisdiction over Adventures Airline would not offend the Due Process Clause.

2. **The State S Consumer Protection Law Claim against Adventures Airline will be pre-empted under the Supremacy Clause of the Constitution, if the claim is determined to relate to rates, routes or services.**

The Supremacy Clause of the Constitution invalidates state laws that interfere with or are contradictory to federal law. Article VI, cl. 2. "[P]re-emption may be either express or implied, and is compelled whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.” *FMC Corp. v. Holliday*, 498 U.S. 52, 56-57, 111 S.Ct. 403 (1990). The language of the federal law at issue here expressly pre-empts the States from "enacting or enforcing any law … relating to rates, routes or services of any air carrier…;" accordingly, the court would analyze whether the State S Consumer Protection Law and the action by the State S Attorney General relate to rates, routes or services.

A similar issue was addressed by the Supreme Court in *Morales v. Trans World Airlines, Inc., et. al.*, 504 U.S. 374, 112 S.Ct. 2031 (1992). In that case, the Attorney General of Texas sought to prohibit deceptive trade practices by TWA and other airlines, as part of a concerted action by several states’ attorneys general. The Court, in affirming injunctive relief in favor of the airlines, found that federal law pre-empted the state law. In its Opinion, the Court discussed the term “relating to” and found that it had broad meaning, expressing a broad purpose to preempt enforcement actions having a connection or reference to airline rates, routes or services. *Id* at 383.

In *American Airlines, Inc. v. Wolens, et. al.*, 513 U.S. 219, 115 S.Ct. 817 (1995), the court invalidated claims brought under a state Consumer Fraud Act relating to rates in the form of mileage credits for free tickets and upgrades and various services, finding that the Act was an improper means to guide and police the marketing practices of airlines. Similarly, in *Flaster/Greenberg, P.C. v. Brendan Airways, LLC*, 2009 U.S. Dist. LEXIS 48653, an action under the New Jersey consumer fraud act for cancellation of flights that had been booked was found to have been pre-empted because it would “…impermissibly sanction regulation of the manner in which the airline advertises its services, interfere with the provision of those services…and would constrain the airline’s ability to cancel flights and/or routes…” *Id* at 15-16.

Here, the plaintiffs are complaining about the small print terms and conditions for free guest house accommodations which were included within the price of their airline ticket. Since the two nights’ accommodation was to be included in the price paid to the airline for a roundtrip flight, and was part of the tour offered by the airline, the claim arguably relates to “rates or services” of the airline. However, if the state action is found to affect airline fares in a manner that is too tenuous, remote or peripheral, there may be no pre-emptive effect. *Morales, supra*. A state law that is not thought to be expressly pre-empted by the federal statute, can be subject to
implied preemption where, as a result of a pervasive scheme of federal regulation, the federal statute is found to pre-empt state regulation of airlines, including their advertising and promotional materials.

3. In order to bring suit in federal court, the plaintiffs will be required to establish a jurisdictional basis which could be based on diversity under 28 U.S.C § 1332. To bring suit on behalf of all others similarly situated, the plaintiffs would likely file a class action and would have to satisfy the requirements under Rule 23 of the Federal Rules of Civil Procedure.

The Banks would be required to plead a jurisdictional basis to proceed in federal court. They would likely base federal jurisdiction on diversity of citizenship under 28 U.S.C. §1332, which provides, in relevant part:

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

1. Citizens of different States;
   * * *

(d)(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds $5,000,000, exclusive of interest and costs, and is a class action in which—

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;
   * * *

There are at least 125 potential members of the class based on the known number of complaints filed with the State S Attorney General, and there may be many more individuals in State S who did not file a complaint as well as individuals in other states who are potential members of the class. Adventures Airline would be a citizen of the state of incorporation and the state where it has its principal place of business. 28 U.S.C.A. §1332 (c). Adventures Airlines has its principal place of business in State P. At least one member of the class of plaintiffs must be a citizen of a state different from Adventures Airline. Additionally, the aggregate amount in controversy for all class members would have to meet the jurisdictional amount.

The Banks could file a class action lawsuit on behalf of themselves and others who had taken Adventures Airline’s Magical Tours to Europe and were denied free lodging based on late arrival, which would be governed by Rule 23 of the Federal Rules of Civil Procedure, which provides:

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

1. the class is so numerous that joinder of all members is impracticable;
2. there are questions of law or fact common to the class;
3. The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) Prosecuting separate actions by or against individual class members would create a risk of:
   (A) Inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
   (B) Adjudications with respect to individual class members that would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that questions of law or fact common to class members predominate over any questions affecting only individual members.

See also In Re: Mercedes-Benz Tele Aid Contract Litigation, 257 F.R.D. 46, 54-57 (D.N.J. 2009). In that case, the court stated: “Plaintiffs must establish that the proposed class meets all four of the requirements outlined in Rule 23(a) and qualifies under at least one of the three sections of Rule 23(b).” Id at 54. The criteria set forth in Rule 23 (a) are generally referred to as numerosity, commonality, typicality and adequacy of representation. Id at 54.

Here, there are at least 125 potential members of the class in State S, which is likely sufficient to satisfy the “numerosity” requirement. Id at 70. The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class members. Baby Neal for and by Kanter v. Casey, 43 F.3d 48 (3d Cir. 1994). The questions of law for the breach of contract action are the same for all members of the class, and it is likely that they share common questions of fact. The typicality requirement is intended to assess whether the action can be efficiently maintained as a class and whether the plaintiff’s incentives align with those of absent class members. Id The Banks would raise common claims and there is nothing in the facts to indicate that they would not protect the interests of other class members. Insofar as we know, the airline has acted similarly to all consumers purchasing its package tours to C Country, common questions or law or fact predominate, and the brochures on which the members of the class relied are similar in the placement of the conditions for guest house accommodations.

The requirement of adequate representation requires that the plaintiff’s attorney be qualified to conduct the litigation and that the plaintiff not have interests antagonistic to those of the class. In Re Mercedes-Benz, supra.
Additionally, with respect to subpart (b), separate actions would likely result in inconsistent adjudications and establish incompatible standards of conduct for Adventures Airline. It is also likely that a court would find that questions of law or fact common to class members predominate over any questions affecting only individual members. It appears that the Banks can meet the prerequisites for certification of a class action under Rule 23.

4. Eugene should allege that the airline impermissibly retaliated against him for filing a claim of sex discrimination in flight assignments.

Title VII of the Civil Rights Act of 1964 forbids employment discrimination based on, inter alia, sex. A separate section of the Act, known as the “anti-retaliation provision”, forbids an employer from “discriminating against” an employee or job applicant because that person “opposed any practice” made unlawful by Title VII or “made a charge, testified, assisted, or participated in” a Title VII proceeding or investigation. 42 U.S. C. § 2000e-3(a). Here, Eugene should claim that his employer unlawfully retaliated against him for filing a sex discrimination claim.

The Supreme Court has interpreted the anti-retaliation provision to require that the employer’s action must be harmful to the point that it could well “have dissuaded a reasonable worker from making or supporting a charge of discrimination.” Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53, 57, 126 S.Ct. 2405 (2006).

Here, Eugene should supplement his discrimination claim by alleging that his assignment to the least advantageous route schedule constituted adverse action in retaliation for his discrimination claim. To support a claim of retaliation, plaintiff must first establish a prima facie case of retaliation which requires proof that (1) he was engaged in an activity protected by Title VII; (2) defendant was aware of this activity; (3) defendant subsequently took adverse action against him; and (4) a causal connection existed between the protected activity and the action. See Sumner v. U.S. Postal Service, 899 F.2d 203, (2nd Cir. 1990), Burlington, supra.

It is clear that Eugene engaged in a protected activity when he filed a claim for sex discrimination and that his employer was aware of the claim. Insofar as causal connection is concerned, circumstantial evidence is admissible, as is evidence that the protected activity was followed closely by the complained of treatment. Gordon v. N.Y. City Bd. Of Educ., 232 F.3d 111, 117 (2nd Cir. 2000).

The court will need to consider all facts and testimony to determine whether the change in Eugene’s flight schedule was substantial enough to constitute an adverse action. Since Eugene has worked for Adventures for 10 years, he would appear to have sufficient seniority to choose his routes, and the fact that he was given the last choice of flight assignments resulting in being assigned the least desirable route schedule may be sufficient to constitute an adverse action because it would likely dissuade workers from filing a claim of discrimination.
Question No. 4: Grading Guidelines

1. **Personal jurisdiction – due process clause**

   Comments: Candidates should demonstrate an understanding of the Constitutional standards for long-arm jurisdiction, and apply the rules to the facts to reach a well-reasoned conclusion.

   5 points

2. **Pre-emption**

   Comments: Candidates should identify the doctrine of pre-emption and apply it to the facts to reach a well-reasoned conclusion.

   5 points

3. **Class Action**

   Comments: Candidates should demonstrate general knowledge of federal diversity jurisdiction, and Rule 23, Fed. R. Civ. Proc., and discuss the basic elements of a class action, apply them to the facts and reach a well-reasoned conclusion.

   5 points

4. **Title VII – retaliation**

   Comments: Candidates should identify unlawful retaliation and apply the elements for a prima facie case to the facts to reach a well-reasoned conclusion.

   5 points
Question No. 5

Al purchased Blackacre, a residential property in Big City, Pennsylvania, in 1988. Shortly after purchasing Blackacre, Al built a new driveway and garage that encroached more than twenty-five feet over the property line onto Whiteacre, an adjacent vacant lot owned by Bob. Al made these improvements without Bob’s permission, and he used the encroached area on a daily basis as if he owned it. Al sold Blackacre to his son, Sam, in 2000. Al’s deed conveying Blackacre to Sam included the encroached portion of Whiteacre as part of the property’s legal description. Following the conveyance, Sam used the encroached area of Whiteacre in the same manner as his father without any objection or protest from Bob.

Al also owned Big City Towers (the Towers), an apartment building located at 123 Main Street in Big City. Al rented the units in the Towers exclusively to students attending nearby Big City University. Al entered into a valid written contract under which Ed, a local contractor, agreed to renovate all of the units in the Towers by August 1, 2010, in exchange for $100,000. Several weeks into the job, Ed told Al that he had grossly underestimated his costs and that he would not complete the job unless Al agreed to pay him an additional $30,000. Since he wanted the renovations done in time for the arrival of his tenants for the upcoming fall semester, Al signed a paper stating: “I, Al, agree to pay Ed an additional $30,000 for the renovation of the Towers.” After Al reluctantly signed the paper, Ed returned to the Towers and completed the job.

Due to his dealings with Ed, Al decided that he was tired of the hassles of owning and operating an apartment building. Al posted a “for sale” sign in front of the Towers and left for a golf vacation in Augusta National, Pennsylvania.
When Al arrived at the ninth tee at the Augusta National Course, he saw a new car and several signs stating: “Any player who makes a Hole-In-One at No. 9 today wins this new car courtesy of 21st Century Motors (Motors).” Al made a hole-in-one on the ninth hole, but Motors refused to give the car to Al stating that, in order to publicize the dealership, it had provided the car as a prize for a charity golf outing held two days earlier and had simply neglected to remove the car and the posted signs prior to Al’s hole-in-one.

Seeing the for sale sign, Dave called Al about purchasing the Towers. Al and Dave agreed on a purchase price of $250,000 for the Towers with a closing to be held within thirty days. Dave gave Al $1,000 in cash as a good faith deposit and received a handwritten receipt stating:

“June 15, 2010

Received $1,000 from Dave on account toward purchase price ($250,000) of my property at 123 Main Street, Big City, PA. Settlement in 30 days.”

(Signed) Al

1. Ed demanded payment of the additional $30,000. When Al refused to make the payment, Ed filed suit for breach of contract. Will Ed’s suit be successful?

2. Al sued Motors for breach of contract to compel delivery of the new car. Motors claimed that a contract was not formed. Will Al’s breach of contract claim succeed?

3. In anticipation of putting Whiteacre on the market for possible sale to Big City University, Bob had a survey performed and discovered the twenty-five foot encroachment onto his property resulting from the garage and driveway built on Blackacre. In response to Bob’s demand that he remove the encroachment from his property, Sam filed a quiet title action. What property law theory should Sam assert in support of his quiet title action, and will it be successful?

4. After thirty days had expired and Al still refused his demand to set a closing date for the sale of the Towers, Dave filed an action against Al for specific performance. Al has raised the Statute of Frauds as his defense to Dave’s suit. Will this defense be successful?
Question No. 5: Examiner’s Analysis

1. Ed’s breach of contract suit will not be successful because he was under a pre-existing duty to perform the renovation work on the Towers, and he did not give any consideration in exchange for the payment of the additional monies.

Consideration is an essential element of an enforceable contract. Stelmac v. Glen Alden Coal Co., 339 Pa. 410, 14 A.2d 127 (1940). The performance of an act that a party has a contractual duty to perform, however, cannot serve as valid consideration for a new promise. This principle of contract law, known as the “pre-existing duty” rule, has been summarized as follows:

Where a legal obligation exists, a cumulative promise to perform it, unless upon a new consideration, is a nullity. Such promise adds nothing to and takes nothing from the original obligation ... A promise cannot be conditioned on a promise to do a thing to which a party is already legally bound ... A promise to do what the promisor is already bound to do cannot be a consideration, for if a person gets nothing in return for his promise but that to which he is already legally entitled, the consideration is unreal.

In Re Commonwealth Trust Co. of Pittsburgh, 357 Pa. 349, 354, 54 A.2d 649, 651 (1947) (citations and internal quotation marks omitted).

By operation of the pre-existing duty rule, a promise to pay additional compensation for the performance by the promisee of a contract which the promisee is already under obligation to the promisor to perform is without consideration and is not enforceable. Quarteure v. Allegheny County, 141 Pa. Super. 356, 363, 14 A.2d 575, 578 (1940).

In this case, Ed promised to complete the renovation of the Towers only if Al paid an additional $30,000. Ed, however, was already obligated to perform the Towers renovation under the existing contract. Moreover, Ed did not provide any consideration for the payment of the additional monies. Because Ed simply was promising to do something that he had a previous duty to perform, a new and binding agreement was not formed between the parties.

In short, Ed’s breach of contract suit will not be successful because he was under a pre-existing duty to perform the renovation work on the Towers and he did not give any new consideration in exchange for the payment of the additional monies.

2. Al will be successful in his breach of contract action against Motors because Motors’ signs constituted an offer to award a prize that resulted in an enforceable contract when Al accepted by rendering the requested performance of shooting a hole-in-one.

The essential elements to the formation of a contract are an offer, an acceptance and consideration. Schreiber v. Olan Mills, 426 Pa. Super. 537, 541, 627 A.2d 806, 808 (1993).
An offer is a manifestation of willingness to enter into a bargain which would justify another person in understanding that his assent to that bargain is invited and will conclude it. Restatement (Second) of Contracts, § 24 (1981). An offer creates a power of acceptance in an offeree to transform the offeror's promise into a contractual obligation. Philadelphia Newspapers, Inc. v. Unemployment Compensation Bd. of Review, 57 Pa. Cmwlth. 639, 641 n.3, 426 A.2d 1289, 1290 n.3 (1981).


Acceptance of an offer occurs when the offeree assents to the terms in a manner invited or required by the offer. Schott v. Westinghouse Elec. Corp., 436 Pa. 279, 259 A.2d 443 (1969). An offer can be accepted by performance of an act when the offer invites such an acceptance. Restatement (Second) of Contracts, supra, at §§ 30 (1), 53 (1). When one party makes a promissory offer which calls for the other party to accept by rendering a performance, a unilateral contract is formed. Martin v. Capital Cities Media, Inc., 354 Pa. Super. 199, 211, 511 A.2d 830, 836 (1986). Offers of rewards and prizes where the only acceptance that is necessary is the performance of the act requested are typical cases in which a unilateral contract is formed. Restatement (Second) of Contracts, supra, at §45, comment a.


The facts in this case are identical to those in Cobaugh v. Klick-Lewis, Inc., supra. In Cobaugh, the Pennsylvania Superior Court found an enforceable contract existed when an auto dealer posted signs at a golf course stating that any person who made a hole-in-one would win a new car and a person made a hole-in-one. The court in Cobaugh declared that the posted signs setting forth the rules of the contest for award of the new car constituted an offer that invited acceptance by performance. By making a hole-in-one, the contestant accepted the offer by performing the invited act before the auto dealer had withdrawn the offer of awarding the prize. Finally, the Cobaugh court found consideration present because the car was given in exchange for the feat of making a hole-in-one. The auto dealer received the benefit from the publicity typically associated with promotional advertising while the golfer had performed an act which he was under no duty to perform.
In sum, Al should be successful in his breach of contract action because Motors’ signs constituted an offer to award a prize that resulted in an enforceable contract supported by consideration when Al accepted the offer by rendering the requested performance of shooting a hole-in-one.

3. **Sam should assert that he is the owner of the disputed portion of Whiteacre by virtue of adverse possession.** Based upon this theory, Sam’s quiet title action should be successful.

In order to prevail in his quiet title action, Sam should assert that he now owns the twenty-five foot portion of Whiteacre by virtue of adverse possession. “Adverse possession is an extraordinary doctrine which permits one to achieve ownership of another’s property by operation of law.” *Flannery v. Stump*, 786 A.2d 255, 258 (Pa. Super. 2001), *appeal denied*, 569 Pa. 693, 803 A.2d 735 (2002). One who claims title to real property by adverse possession must prove that he or she had “actual, continuous, exclusive, visible, notorious, distinct and hostile possession of the land for twenty-one years.” *Conneaut Lake Park, Inc. v. Klingensmith*, 362 Pa. 592, 594, 66 A.2d 828, 829 (1949) (citation omitted). The claimant bears the burden of proving each element of adverse possession by credible, clear and definite proof; otherwise, the possession will not confer title. *Flannery v. Stump*, *supra*.


The elements of visible and notorious and exclusive and distinct in a claim of adverse possession refer to the specific manner of the claimant’s possession. Visible and notorious means conduct sufficient to place a reasonable person on notice that his land is being held by another person as his own and that he may have to act to recover his property. *Brennan v. Manchester Crossings, Inc.*, 708 A.2d 815, 818 (Pa. Super. 1998), *appeal denied*, 556 Pa. 683, 727 A.2d 1115 (1998). Exclusive and distinct possession is not absolute exclusivity; rather, it is a type of possession which would characterize an owner’s use. *Id*.

The hostility element of an adverse possession claim does not mean ill-will; rather, it is the intent to assert ownership rights to the property adverse to the record title holder and all others. *Vlachos v. Witherow*, 383 Pa. 174, 118 A.2d 174, 177 (1955). “An adverse possessor must intend to hold the land for himself, and that intention must be made manifest by his acts . . . he must keep his flag flying and present a hostile front to all adverse pretensions.” *Klos v. Molenda*, 355 Pa. Super. 399, 402, 513 A.2d 490, 492 (1986) (citations and quotations omitted).

Finally, a claimant must show that his possession has been continuous and uninterrupted for a designated period of time. *Fred E. Young, Inc. v. Brush Mtn. Sportsmen’s Ass’n*, *supra*. In Pennsylvania, the required period of possession - twenty-one (21) years – is established by

The facts here support the conclusion that the substantive elements for a claim of adverse possession have been satisfied. Al’s construction of a garage and driveway that encroached twenty-five feet onto Whiteacre without Bob’s permission as well as the repeated use of the garage and driveway by Al and Sam year after year constitute an exercise of ownership rights and dominion over the land sufficient to satisfy the elements of hostility and actual possession. Further, the construction of a garage and a driveway on Bob’s land and the daily use of these improvements by Al and Sam should have provided notice to Bob that others were asserting ownership over a portion of his property. The conduct of Al and Sam not only satisfies the elements of visible and notorious and exclusive and distinct use but also the element of continuous and uninterrupted use. The only remaining problem with asserting a claim of adverse possession is that neither Al nor Sam individually possessed the land for the full twenty-one year statutory period.

Pennsylvania law, however, recognizes the periods of possession of successive adverse claimants can be added together or “tacked on” to satisfy the full twenty-one year statutory period. 1 Ladner, Pennsylvania Real Estate Law, § 11.03 (b) (5th ed. 2006). In order for tacking to occur, there must be privity between the successive occupants of the property. “Privity refers to a succession of relationship to the same thing, whether created by deed or other acts or by operation of law.” Watkins v. Watkins, supra, 775 A.2d at 846. In this case, privity clearly exists because Al actually included the property subject to the claim as part of the legal description in his deed to Sam. Id. Because privity exists between Al and Sam, Al’s period of adverse possession can be tacked onto Sam’s period of adverse possession.

Therefore, Sam should prevail in his quiet title action because he can establish all of the elements of an adverse possession claim and he can tack on Al’s period of adverse possession to his own period of adverse possession to satisfy the twenty-one year statutory requirement.

4. Al’s defense will not be successful because the receipt that Al gave to Dave is sufficient to satisfy the requirements of the Statute of Frauds.


Pa. 495, 502, 55 A.2d 380, 385 (1947). Any writing containing these essential terms that has been signed by the party to be bound will satisfy the Statute of Frauds. Hessenthaler v. Farzin, 388 Pa. Super. 37, 564 A.2d 990 (1989).

In this case, the writing concerning the sale of the Towers is the receipt given by Al to Dave. A receipt can serve as a writing to satisfy the Statute of Frauds as long as it contains all of the elements for a valid real estate contract. See, e.g., Schermer v. Wilmart, 282 Pa. 55, 127 A. 315 (1925).

Al’s receipt to Dave identified the parties to the proposed sale and provided a street address of the property. The use of a street address to identify a property is a sufficiently definite and certain description to comply with the Statute of Frauds. Sawert v. Lunt, 360 Pa. 521, 62 A.2d 34 (1948).

Under longstanding Pennsylvania case law, the failure to state the consideration for the purchase of real estate in the writing makes the writing unenforceable. Soles v. Hickman, 20 Pa. 180 (1912). In this case, however, the receipt does recite the consideration for the sale of the Towers. Finally, the receipt was signed by Al, the purported seller and the party to be bound.

In short, Al’s Statute of Frauds defense to Dave’s action for specific performance will be unsuccessful because the receipt contained all of the essential terms for a valid real estate contract under Pennsylvania law and was signed by the party to be bound.
Question No. 5: Grading Guidelines

1. **Pre-existing Duty Rule**

   Comments: Candidates should recognize and provide an explanation of the pre-existing duty rule. Candidates should discuss the need for new consideration to avoid the pre-existing duty rule. Candidates should discuss the concept of consideration and reach a well-stated conclusion that new consideration was not provided and that the pre-existing duty rule prohibits recovery.

   3 Points

2. **Contract Formation – Unilateral Contract**

   Comments: Candidates should discuss the elements necessary to form a contract – offer, acceptance and consideration. Candidates in particular should recognize that a unilateral contract can be created when an offer invites acceptance by performance of a requested act. Candidates should apply these principles in reaching the conclusion that a valid contract was formed because the offer invited acceptance by performance.

   5 Points

3. **Adverse Possession and Tacking**

   Comments: Candidates should recognize that the real property of another can be acquired by the adverse possession. Candidates should discuss the various elements necessary to assert a claim of adverse possession. Candidates also should recognize that successive periods of adverse possession can be added together in order to satisfy the statutory time period. Candidates should apply these elements to the stated facts in reaching a conclusion that a claim of adverse possession would be successfully asserted.

   6 Points

4. **Essential Elements of Contract for Sale of Real Property – Statute of Frauds**

   Comments: Candidates should recognize the applicability of the Statute of Frauds to the sale of real property. Candidates should discuss the elements necessary under Pennsylvania law for a writing to satisfy the Statute of Frauds. Candidates should apply these elements to the stated facts in reaching the conclusion that the writing stated in the facts is sufficient to comply with the Statute.

   6 points
Question No. 6

Power Washer, Inc. ("Power"), a Pennsylvania corporation, is a small non-publicly traded company that manufactures and sells power washing equipment. Power is owned solely by Art, Bill, and Sara who are brothers and sister and who had each inherited their stock in Power in equal shares from their father, the founder of Power. Art, Bill, and Sara serve as Power’s board of directors. Art and Bill are actively involved in Power’s operations as officers and employees, while Sara’s involvement is limited to attending the annual shareholders’ meeting and monthly board meetings.

Power has found it hard to compete with Big Power, Inc. ("Big"), a large regional equipment manufacturer with headquarters in Pennsylvania, even though Power does cut marginally into Big’s sales. Recently, Big’s CEO approached Art and Bill and proposed that Big acquire Power through a merger. Under Big’s proposal, Art, Bill, and Sara would each receive shares of Big stock in amounts equal to the shares they each now own in Power. The deal would also include employment contracts for Art and Bill with Big. Art and Bill also believe that a merger will eliminate the need for Power or Big to deal with several breach of warranty claims that have been asserted against Power by Power’s customers.

When Sara learned of the merger plan at last week’s board meeting, she strongly protested against the plan. Sara rightfully believes that the merger will dilute her equity value because Big’s share value does not equal the current value of Power’s shares. Although Art and Bill do not disagree with Sara’s evaluation, they have a basis for believing that the deal is the best course for Power in the long run. Art and Bill, despite Sara’s protests, voted to approve the merger and have called a shareholders’ meeting to ratify the merger. Power’s bylaws require shareholder approval of all plans of merger or consolidation.
Last month, Power ordered 900 sections of tubing from Tube, Inc. ("Tube"), a Pennsylvania company located across the state from Power. Tube normally does not sell tubing in Power’s geographic area but has been hoping to expand its market into that area. When Art placed the order he made it clear to Tube that the tubing had to be stainless steel and that it had to be exactly 30 inches in length. Because of the high pressure nature of Power’s products, the length of the tubing used is critical because the use of incorrect lengths creates safety issues. Power’s order was immediately confirmed in a valid written contract executed by the buyer and seller. The contract required delivery of the tubing to Power’s factory no later than August 1, 2010, and was silent as to limitation of remedies.

Yesterday, a truck load containing 900 sections of tubing arrived at Power’s plant. Today, upon inspection, it was discovered that 300 of the sections were of incorrect length.

Power has no need for these sections due to the safety issues created by their use.

1. Under the Pennsylvania Uniform Commercial Code:
   (a) On what basis could Power attempt to reject the tubing that was delivered by Tube, and how should Power proceed if it wishes to reject the tubing?
   (b) What steps might be taken by Tube to limit Power’s right to reject?
   (c) Assuming a valid rejection occurs, what obligations, if any, does Power have to Tube relative to payment for and disposition of the tubing in its possession?

2. Upon receipt of notice of the shareholders’ meeting scheduled to approve the merger, what rights does Sara have regarding the diminished value of her shares, and how should she proceed to protect her interests?

3. If a merger occurs, are Art and Bill correct in believing that the merger will eliminate the need for Power or Big to deal with Power’s customers’ breach of warranty claims?
Question No. 6: Examiner’s Analysis

1.(a) Assuming that Power does not accept the shipment, Power may declare the goods as nonconforming and Power may notify Tube that it is rejecting the whole, accepting the whole or accepting any commercial unit or units and rejecting the rest.

The facts set forth a case where a seller of goods has failed to provide perfect tender to the buyer of the goods pursuant to the terms of the sales contract. The contract required that the tubing be exactly 30 inches in length. In this case, the goods are non-conforming because 300 of the tubes are of incorrect length. Generally, from the buyer’s perspective, if goods delivered fail to conform to the contract, and acceptance has not occurred, the buyer has the right to reject the goods (sometimes referred to as the “perfect tender rule”).

Section 2601 of the Pennsylvania Uniform Commercial Code (the “Code”) provides, “Subject to the provisions of this division on breach in installment contracts (section 2612) and unless otherwise agreed under the sections on contractual limitations of remedy (sections 2718 and 2719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may: (1) reject the whole; (2) accept the whole; or (3) accept any commercial unit or units and reject the rest.” 13 Pa. C.S.A. §2601. We are not dealing with an installment contract and the facts indicate that the sales agreement did not address limitation of remedies (i.e., there is no contract term prohibiting rejection). Therefore, it would appear that the buyer has the right of rejection set forth in Section 2601 above.

In order to reject goods a buyer must not have accepted the goods. See, White and Summers, Uniform Commercial Code, §8-3(a), 4th Ed. (1988). Acceptance occurs when the buyer “(1) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; (2) fails to make an effective rejection (section 2602(a)), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or (3) does any act inconsistent with the ownership of the seller; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.” 13 Pa. C.S.A. §2606. Since the nonconformity was just discovered and Power has taken no action signifying acceptance, an acceptance has not yet occurred.

Section 2602 of the Code provides that “Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.” 13 Pa. C.S.A. §2602(a). Accordingly, if Power wishes to reject the goods Power must give notice of the rejection within a reasonable time of delivery. Additionally, Section 2605 of the Code states, “The failure of the buyer to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach: (1) where the seller could have cured it if stated seasonably; or (2) between merchants when the seller has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.” 13 Pa. C.S.A. §2605(a). The notice of rejection, therefore, must set forth specifically the nonconformity that supports the rejection. Accordingly, if Power wished to reject the tubing due
to the nonconformity it should promptly notify Tube that it is rejecting the tubing due to the nonconforming lengths of tubing included in the shipment.

1.(b) Tube, upon receipt of the notice of rejection, has the ability to cure the nonconformity within the contract time.

Once notification of rejection is given the analysis does not end. Section 2508 of the Code provides the seller a basis to salvage the contract when nonconforming goods have been delivered. It provides, “Where any tender or delivery by the seller is rejected because nonconforming and the time of performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.” 13 Pa. C.S.A. §2508(a). In the instant case delivery is due by August 1, 2010. Therefore, assuming notice of rejection is given to the seller today, the seller can seasonably notify the buyer that it made an error, that it intends to cure the nonconformity within the contract time and may within the contract time deliver 300 correct lengths of tubing to replace the 300 lengths of tubing that were incorrectly delivered.

1.(c) Power will be relieved of its obligation to pay for the tubing but must hold the tubing for the benefit of Tube and follow reasonable instructions from Tube as to the disposition of the tubing.

Upon rejection the buyer is relieved of the duty to pay for the goods. 13 Pa. C.S.A. §2711. See also, 13 Pa. C.S.A. §2709. Thus, Power will not need to pay for the tubing if it effects a rejection.

Section 2603 of the Code sets forth the duties of a merchant buyer to the seller once a rightful rejection has occurred. It provides:

Duties of a merchant buyer as to rightfully rejected goods:

(a) General rule.—Subject to any security interest in the buyer (section 2711(c)), when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instructions to make reasonable efforts to sell them for the account of the seller if they are perishable or threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

13 Pa. C.S.A. §2603. Under the Code, a buyer has an obligation to hold the goods for a time sufficient for the seller to remove them under 2602(b)(2) unless (1) the seller has no agent or place of business at the market of rejection; (2) the buyer is a merchant; and (3) the goods are in the buyer’s possession and control, in which case Section 2603 is applicable. See, White and Summers, Uniform Commercial Code, 4th Ed., §8-3d. If Power is a merchant it would have to comply with the provisions of 2603. If Power is not a merchant it would nonetheless have an obligation to hold the goods and await instructions and could sell the goods in the event that the
seller fails to provide instructions within a reasonable time after notification of rejection. 13 Pa. C.S.A. §2604.

2. Under the Pennsylvania Business Corporation Law of 1988 ("BCL") Sara has dissenter’s rights that will allow her to receive fair value for her shares from Power if she follows certain procedural steps.

Sara can exercise dissenter’s rights under the BCL. Section 1930 of the BCL provides, “If any shareholder of a domestic business corporation that is to be a party to a merger or consolidation pursuant to a plan of merger or consolidation objects to the plan of merger or consolidation and complies with the provisions of Subchapter D of Chapter 15 (relating to dissenters rights), the shareholder shall be entitled to the rights and remedies of dissenting shareholders therein provided, if any.” 15 Pa. C.S.A. §1930(a). The BCL provides certain exceptions to dissenter’s rights (e.g., national securities exchange companies or companies with more than 2,000 shareholders) which are not applicable to the instant matter. Additionally, the bylaws of Power require approval of the merger by the shareholders, thereby eliminating a possible exception for mergers adopted by the directors without shareholder approval in certain situations. Thus, if Sara follows the BCL procedural rules to exercise her dissenter’s rights she will be entitled to a valuation of her shares and a buyout by the corporation. 15 Pa. C.S.A. §1571. It should be noted that absent a showing of fraud or fundamental unfairness the dissenter’s rights course will be Sara’s exclusive course to follow. 15 Pa. C.S.A. §1105. If there is a legitimate business reason for granting the merger, equitable relief will not be available for her.

To avail herself of dissenters rights Sara must take the following actions: (1) she must prior to the shareholder vote on the proposed merger file with the corporation a written notice of intention to demand fair value for her shares if the proposed merger is consummated; (2) she must not effect a change in the beneficial ownership of her shares from the date of her giving of notice continuously through the effective date of the proposed action; and (3) she must refrain from voting her shares in approval of the proposed merger. 15 Pa. C.S.A. §1574. Section 1575 of the BCL further provides, “If the proposed corporate action is approved by the required vote at a meeting of shareholders of a business corporation, the corporation shall mail a further notice to all dissenters who gave due notice of intention to demand payment of the fair value of their shares and who refrained from voting in favor of the proposed action.” 15 Pa. C.S.A. §1575(a). The notice should indicate where and when a demand for payment must be sent and where the share certificates should be deposited in order to get payment. Thus, upon receipt of the notice from the corporation Sara should make the required demand, deliver her shares and receive fair value for her shares.

3. The merger will not impact Power’s creditors’ ability to pursue their respective breach of warranty claims as Big, as the surviving corporation, will become liable on the claims.

Once a merger is consummated, the corporations that were parties to the merger become a single corporation and the disappearing corporation ceases to exist as a separate entity. Section 1929(b) of the BCL provides, in part, “Liens upon the property of the merging or consolidating
corporations shall not be impaired by the merger or consolidation and any claim existing or action or proceeding pending by or against any of the corporations may be prosecuted to judgment as if the merger or consolidation had not taken place or the surviving or new corporation may be proceeded against or substituted in its place.” 15 Pa. C.S.A. §1929(b). Essentially, the successor corporation is responsible for the other company’s liabilities where the transaction amounted to a consolidation or merger. Therefore, the merger will not impact the claims of Power’s customers who will now proceed against Big as the surviving entity.
Question No. 6: Grading Guidelines

1. Sale of Nonconforming Goods—Buyer’s and Seller’s Rights
   
   • Perfect tender rule gives right to rejection remedy
   
   • Requirements for rejection
   
   • Right of seller to cure
   
   • Duties of buyer regarding rightfully rejected goods

   12 points

   Comments: Candidates should recognize that the seller delivered nonconforming goods and discuss the rights of the buyer and the seller in this situation.

2. Dissenters Rights

   • Merger is a fundamental change giving rise to dissenters rights
   
   • Procedural steps to be followed to avail oneself dissenters rights

   6 points

   Comments: The candidates should discuss the steps to be followed to avail oneself of dissenters rights.

3. Liability for Claims After Merger

   • Liabilities of the target corporation flow to the surviving corporation.

   2 points

   Comments: The candidates should recognize that in a merger the liabilities of the target corporation pass to the successor corporation and that as a result the claims of Power’s customers will survive.
Supreme Court of Pennsylvania
Pennsylvania Board of Law Examiners

Pennsylvania Bar Examination
July 27 and 28, 2010

PERFORMANCE TEST
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Memorandum

Date: July 27, 2010
To: Applicant
From: Steven Sauer
Re: Johanson Litigation

Our client, Dr. Andrew H. Johanson, Jr., known to his patients and friends as “Dr. J”, has been threatened with suit in federal district court by attorney Salton Pepper, Esquire. Attorney Pepper represents Thelma Tait, the mother of Tim Tait, who was killed when he was shot by his estranged wife Mary Lam. Attorney Pepper is alleging that Dr. J was negligent in releasing confidential information concerning Tim Tait to Tait’s wife, which resulted in the death of Mr. Tait. A copy of Attorney Pepper’s letter to Dr. J is included in the File.

Dr. J is a psychologist licensed by the Commonwealth of Pennsylvania, practicing in Madison. He advertises his counseling services in Pennsylvania and State X which borders Madison. Approximately 25% of his clients are residents of State X. Mr. Tait and his estranged wife Mary began counseling with Dr. J in January of 2008. They both signed a client agreement at the time they began counseling with him, a copy of which is included in the File.

During an individual session with Dr. J, Tim indicated that he was going to kill his wife that night because he was so angry with her. Dr. J informed Mary of the threat, and when Tim came to Mary’s house that night, Mary shot and killed Tim. Mary was arrested shortly thereafter and charged with voluntary manslaughter. Thelma Tait has been appointed administratrix of Tim’s estate.

Please prepare an internal legal memorandum to me addressing whether if suit is filed in federal court based on the claims made by Attorney Pepper, we can compel that the matter be heard through arbitration, and whether Dr. J has any liability for negligence for having allegedly breached the duty of confidentiality. Assume that both the statutory and case law of State X is the same as that of Pennsylvania.

You should follow our firm’s format and guidelines for preparing internal legal memoranda, which are set forth in a memorandum in the File. The File and Library which are provided contain the only facts and legal principles you should consider and rely upon in completing this assignment.
Dr. Andrew H. Johanson, Jr.
717 W. Coriander Street, Suite 205
Madison, PA 19998

Re: Tait v. Johanson

Dear Dr. Johanson:

I represent Ms. Thelma Tait, the mother and administratrix of the estate of Tim Tait, deceased.

Ms. Tait has engaged me to represent her in bringing a wrongful death and survival action in federal District Court in Madison against you, based upon your negligence in releasing confidential information concerning her son, Tim Tait, to his wife contrary to and in violation of professional standards and the Therapist/Client Agreement which her son and you signed on January 3, 2008. But for your negligence and breach of the confidentiality provision of the Agreement, my client’s son would still be alive.

I suggest that you report this matter to your professional liability carrier and/or retain an attorney to represent you in this matter.

Very truly yours,

Salton Pepper
Salton Pepper, Esquire
On January 8, 2010, I interviewed the above-named subject in connection with the fatal shooting of Tim Tait by Mary Lam.

Subject stated, based on this therapy notes, that Mary Lam and Tim Tait were married in 1999. They were residents and citizens of State X. Beginning in January 2008, they began to have marital difficulties, and after Tim moved out of the family home, they sought both individual and couples therapy. They had two children, who lived with Mary after Tim moved out. They both signed Dr. J's standard client agreement. In late 2009, Mary and her children moved to Madison. Tim remained in State X, where he lived with his mother, Thelma.

Over the course of individual sessions, Mary related that Tim had never raised his voice to her nor subjected her to mental or physical abuse of any kind, and they were friendly toward each other whenever he came to see the children or if they were in social situations. However, in his individual sessions, Tim initially expressed frustration and rage with Mary because she would not join the same religious congregation to which he belonged. Over the last few months Tim's rage and frustration had increased as a result of his wife moving to Madison, and he often expressed a desire to inflict bodily harm upon her.

During an individual session with Tim on January 7, 2010, Tim stated that he was so angry with Mary that he was going to kill her that night when he came over to watch the college football championship game with the children. By the end of the session, he said his anger was under control and that he would not harm her.
MADISON CITY POLICE DEPARTMENT
INTERVIEW NOTES

Interviewer: Det. Samuel Spade

Interviewee: Mary Lam

Date: January 8, 2010

Case: Lam Homicide; MCPD Case No. 10-008

On January 8, 2010, I interviewed the above-named subject in connection with the fatal shooting of Tim Tait by Mary Lam. I first administered the Miranda warnings, and the subject signed a statement declining an attorney and stating that she was willing to be interviewed.

Subject stated that at approximately 5:00 P.M. on January 7, 2010, she was called by Dr. Andrew Johanson, who told her about prior threats that had been made against her by her estranged husband, Tim Tait, and warned her that Tait had threatened to kill her that night. When Tait came through the door of her home just before game time, Lam did shoot him with her hand gun.

Lam further stated that as Tim lay dying, he asked Lam why she shot him, and she said because she became afraid for her life after Dr. Johanson told her of the rage and threats. Just before he died, Tait told Mary that he had always loved her, would never have hurt her, and that his comments to Dr. J were just his way of blowing off steam and relieving his frustrations.

Interview subject became very distraught and interview was concluded.
Andrew H. Johanson, Jr., Ph.D.
Licensed Psychologist, Marriage and Family Therapist
717 W. Coriander Street, Suite 205, Madison, Pennsylvania 19998
PHONE 999-666-6666

THERAPIST/CLIENT AGREEMENT

For psychotherapy to be effective, particular ground rules are important. The following are some of the main ground rules of therapy concerning fees, missed sessions, confidentiality and privacy, coverage, and emergencies.

Fees and Appointments

There is a $150 per hour fee charged for my services. The client is responsible for paying for missed sessions. Payment is required at the beginning of each session.

Communications and Confidentiality
All contacts are limited to the scheduled therapy sessions, except for brief phone calls between sessions. Any confidential message can be left on my answering machine. No one else has access to the answering machine but me. In the case of a serious emergency, you may contact Crisis Intervention. Confidentiality and privacy are to be maintained at all times in accord with professionally mandated standards. Group therapy members maintain the confidentiality and privacy of all the members. Subject to professional responsibility requirements, I will keep all communications from clients strictly confidential.

Complementary Therapy
Although psychotherapy has been found to be highly effective for most people, its effectiveness is dependent upon the client’s willingness to be honest with his or her faults, and to freely discuss thoughts, feelings and behaviors. The responsibility for prescribing medication that may be required to help a client with anxiety or depression lies solely with the client’s physician.

Disputes
Client agrees that any disputes of any nature arising out of or relating to this agreement or the therapy provided shall be submitted to final and binding arbitration before a single arbitrator pursuant to the rules and under the auspices of the Madison County Bar Association Dispute Resolution Center. The arbitrator shall apply relevant substantive law in making the decision.

I have read and agree with intent to be legally bound to the above terms conditions.

Signature of Client: ____________________________  Date: January 3, 2008

Signature of Client: ____________________________  Date: January 3, 2008

Signature of Therapist: ____________________________  Date: January 3, 2008
Excerpt from Therapy Notes of Andrew H. Johanson, Jr.

January 7, 2010 - Conducted individual interview session with Tim Tait, regarding his relationship with his estranged wife, Mary Lam. Tim stated that he was extremely angry with Mary over her move to Madison and her refusal to join his religion, and that he was going to kill her that night. In referring to her during the course of the session, Tim used a number of very derogatory and obscene terms. This was somewhat typical of past sessions, but the language was much stronger. By the end of the session, Tim appeared to have his emotions under control and stated that he no longer felt like killing Mary.

Because of the severity of his initial statements, I consulted with Dr. Headbanger, the President of the Madison Psychotherapy Association, and Dr. Shrink, a professor of Marital Counseling at Madison University. Both advised me to warn Mary Lam of Tim’s threats.

Called Mary Lam about 5:00 P.M. and warned her that Tim had threatened to kill her, but also told her that he appeared calm and under control when he left the office.
Suite & Sauer, P.C.

Date: January 4, 2010
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:** (identify yourself only as “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 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 a full sentence in the form of a question.

**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, using a short form of citation (Blue Book format is not required). If the outcome is uncertain, identify the unresolved question(s) of fact or law which give rise to the uncertainty.

**BRIEF CONCLUSION:** State your conclusion in one short sentence that responds to the question(s) raised by the issue presented.
Statutes, Rules and Treatises

9 U.S.C. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

42 Pa. C.S.A. § 5944. Confidential communications to psychiatrists or licensed psychologists

No psychiatrist or person who has been licensed to practice psychology shall be, without the written consent of his client, examined in any civil or criminal matter as to any information acquired in the course of his professional services in behalf of such client. The confidential relations and communications between a psychologist or psychiatrist and his client shall be on the same basis as those provided or prescribed by law between an attorney and client.


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

* * *

(c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interests or property of another;

* * *

Prosser, Law of Torts, Section 30 (4th ed. 1971)

The necessary elements to maintain an action in negligence are: a duty or obligation recognized by the law, requiring the actor to conform to a certain standard of conduct; a failure to conform to the standard required; a causal connection between the conduct and the resulting injury and actual loss or damage resulting to the interests of another.

Black’s Law Dictionary

Commerce. The exchange of goods and services especially on a large scale involving transportation between cities, states and nations.
United States District Court,  
E.D. Pennsylvania.  
Joseph F. PELTZ, Administrator and  
Personal Representative of the Estate of  
Elizabeth Ann Peltz, deceased, et al.  
v.  
SEARS, ROEBUCK AND CO.

Plaintiff Joseph F. Peltz, in his own right and as Administrator of the Estate of Elizabeth Ann Peltz, and plaintiff Henry Vahey, in his own right and as Administrator of the Estate of John Leo Vahey, bring this diversity action against defendant Sears, Roebuck and Company ("Sears"). They assert claims under the Pennsylvania Wrongful Death Act, 42 PA. CON. STAT. ANN. § 8301 and the Pennsylvania Survival Act, 42 PA. CON. STAT. ANN. § 8302, for negligence, strict liability, and breach of warranty. The plaintiffs allege that on August 20, 2002, during an extremely hot summer in Philadelphia, Elizabeth Ann Peltz, age 49, and John Leo Vahey, age 61, died of heat exposure in their home when their wall-unit air-conditioner malfunctioned and Sears failed to repair it promptly.

On May 25, 2004, the plaintiffs filed an amended complaint to include, among other things, reference to a Sears maintenance agreement signed by Elizabeth Ann Peltz. . . . Sears filed a motion in this court to compel arbitration of the matter in accordance with the terms of a maintenance agreement that covered the air-conditioning unit.

***

II.

We next turn to the motion of the defendant to compel arbitration. Ms. Peltz had purchased a Maintenance Agreement ("MA") for the air-conditioner that included an arbitration clause. The arbitration clause is very broad and provides that:

Any and all claims, disputes or controversies of any nature whatsoever (whether in contract, tort, or otherwise, including statutory, common law, fraud, other intentional tort, property and equitable claims) arising out of, relating to, or in connection with (1) this Agreement, (2) the relationships which result from this Agreement, or (3) the validity, scope or enforceability of this arbitration provision or the entire Agreement ("Claim"), shall be resolved, on an individual basis without resort to any form of class action, by final and binding arbitration before a single arbitrator.
Arbitration, of course, is a matter of contract. (citation omitted). If there is "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration any controversy," the contract falls within the scope of the FAA. 9 U.S.C. § 2. It is undisputed that the MA here concerns a transaction involving interstate commerce.

The question of arbitrability is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise.

We must apply federal substantive law in passing on whether an issue is subject to arbitration. . . . However, it is state law here which governs matters "concerning the validity, revocability, and enforceability of contracts generally." (citation omitted).

We first review the plaintiffs' claims to determine whether they fall within the ambit of the arbitration clause of the MA. The plaintiffs bring survival actions on behalf of the decedents for negligence, strict liability, and breach of express and implied warranties. They also bring wrongful death actions on behalf of certain of decedents' beneficiaries. As noted above, the arbitration clause is broad and encompasses "[a]ny and all claims ... of any nature whatsoever (whether in contract, tort, or otherwise, including statutory ... claims) arising out of, relating to, or in connection with (1) this Agreement, [or] (2) the relationships which result from this Agreement...." . . . The term "relates to" has been broadly defined to mean makes "reference to." (Citation omitted).

In their amended complaint, the plaintiffs seek damages for the deaths of Elizabeth Ann Peltz and John Leo Vahey for the failure of Sears promptly to repair their home air-conditioner during extremely hot weather in Philadelphia in the summer of 2002. Their current pleading refers to the MA and states that it was "in full force and effect" at the time of the decedents' death.

. . . We find that the plaintiffs' claims, which sound in both tort and contract, relate to the MA or to the relationships which resulted from the MA and are thus covered by the language of its arbitration clause.

Before arbitration can be ordered, however, we must determine whether the plaintiffs in their various capacities are subject to the arbitration agreement. An individual cannot be compelled to arbitrate unless "'he or she is bound by that agreement under traditional
principles of contract and agency law.’” (citation omitted). This is an issue for the court, and not for an arbitrator, to decide. (Citation omitted)

It cannot be disputed that Ms. Peltz, as a signatory to the MA, and her estate, are bound to arbitrate. . . . The survival action for negligence, strict liability, and breach of warranty, is brought by her Administrator, Joseph Peltz, on behalf of her estate. (Citation omitted). These claims, which could have been brought by Ms. Peltz herself had she lived, survive her death. Id. Mr. Peltz as her Administrator merely stands in her shoes.

Mr. Peltz also brings a wrongful death action against Sears on behalf of Ms. Peltz's beneficiaries, who are not signatories to the MA. The decedent could not have brought these claims had she lived. (Citation omitted). Rather, they exist for the benefit of certain relatives of the decedent enumerated in the Wrongful Death Act. Id.; 42 PA. CON. STAT. ANN. § 8301. Because Ms. Peltz's relatives are not parties to the MA, the question arises whether they can be compelled to arbitrate. Our Court of Appeal recognizes five circumstances, based upon common law principles of contract and agency law, under which non-signatories may be bound to an arbitration agreement: (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel. (Citations omitted)

Under the equitable estoppel theory, a non-signatory to a contract will be compelled to arbitrate if he or she “knowingly exploits the agreement.” (citation omitted). The policy behind this rule is to “prevent a non-signatory from embracing a contract, and then turning its back on the portions of the contract, such as an arbitration clause, that it finds distasteful.” . . . One form of exploitation occurs when the non-signatory's claims “implicate” the agreement containing the arbitration clause. . . . Here, Ms. Peltz's beneficiaries admit that their claims “derive from [her] claims.” . . . Moreover, even if their wrongful death claims cannot be said to derive from Ms. Peltz's claims, her beneficiaries are nonetheless estopped from avoiding arbitration because their wrongful death claims rely upon the MA. . . .

Survival actions for negligence, strict liability and breach of implied and express warranties are also brought on behalf of the estate of decedent John Leo Vahey. Unlike Ms. Peltz, he was not a signatory to the MA. . . . [T]he Administrator of his estate, Henry
Vahey, who stands in his shoes, is also bound to arbitrate these claims under an equitable estoppel theory. We again note that the survival claims rely upon the MA. With respect to all of these claims, the MA and specific language from it have been incorporated by reference.

The outcome is the same for John Leo Vahey's beneficiaries with respect to the wrongful death action being brought on their behalf. The Administrator, Henry Vahey, admits that these claims "derive from [John Leo Vahey's] claims." . . . Additionally, their wrongful death cause of action incorporates by reference the MA and specific language it contains. Thus, Henry Vahey, who brings a cause of action for wrongful death on behalf of John Leo Vahey's beneficiaries, must arbitrate these claims because of equitable estoppel.

***

Thus, there is no basis to prevent arbitration of Pennsylvania survival and wrongful death claims when the contract calling for arbitration involves a transaction in interstate commerce, as it does here. Significantly, it is the plaintiffs themselves who are relying on the MA, which contains an arbitration provision, to support their claims against Sears. They cannot embrace some of its provisions and then cast aside the arbitration requirement.

Accordingly, the motion of Sears to compel arbitration will be granted.
Supreme Court of Pennsylvania
Ronald B. EMERICH, Administrator of the
Estate of Teresa M. Hausler, Appellant,
v.
PHILADELPHIA CENTER FOR HUMAN
DEVELOPMENT, INC., et al

OPINION OF THE COURT

We granted allocatur limited to the issues of one, whether a mental health professional has a duty to warn a third party of a patient's threat to harm the third party; two, if there is a duty to warn, the scope thereof; and finally, whether in this case a judgment on the pleadings was proper.

This admittedly tragic matter arises from the murder of Appellant's decedent, Teresa Hausler, by her former boyfriend, Gad Joseph ("Joseph"). At the time of the murder, Joseph was being treated for mental illness and drug problems. Appellant brought wrongful death and survival actions against Appellees. Judgment on the pleadings was granted in favor of Appellees by the trial court and was affirmed on appeal by the Superior Court.

***

Ms. Hausler and Joseph, girlfriend and boyfriend, were cohabitating in Philadelphia. For a substantial period of time, both Ms. Hausler and Joseph had been receiving mental health treatment at Appellee Philadelphia Center for Human Development (the "Center" or "PCHD") . . .

Joseph was diagnosed as suffering from, among other illnesses, post-traumatic stress disorder, drug and alcohol problems, and explosive and schizo-affective personality disorders. He also had a history of physically and verbally abusing Ms. Hausler, as well as his former wife, and a history of other violent propensities. Joseph often threatened to murder Ms. Hausler and suffered from homicidal ideations.

Several weeks prior to June 27, 1991, Ms. Hausler ended her relationship with Joseph, moved from their Philadelphia residence, and relocated to Reading, Pennsylvania. Angered by Ms. Hausler's decision to terminate their relationship, Joseph had indicated during several therapy sessions at the Center that he wanted to harm Ms. Hausler.

On the morning of June 27, 1991, at or about 9:25 a.m., Joseph telephoned his counselor . . . and advised him that he was going to kill Ms. Hausler. [The counselor] immediately scheduled and carried out a therapy session with Joseph at 11:00 that
morning. During the therapy session, Joseph told [the counselor] that his irritation with Ms. Hausler was becoming worse because that day she was returning to their apartment to get her clothing, that he was under great stress, and that he was going to kill her if he found her removing her clothing from their residence.

[The counselor] recommended that Joseph voluntarily commit himself to a psychiatric hospital. Joseph refused; however, he stated that he was in control and would not hurt Ms. Hausler. At 12:00 p.m., the therapy session ended, and, as stated in the complaint, Joseph was permitted to leave the Center “based solely upon his assurances that he would not harm” Ms. Hausler.

At 12:15 p.m., [the counselor] received a telephone call from Ms. Hausler informing him that she was in Philadelphia en route to retrieve her clothing from their apartment, located at 6924 Large Street. Ms. Hausler inquired as to Joseph's whereabouts. [The counselor] instructed Ms. Hausler not to go to the apartment and to return to Reading.

In what ultimately became a fatal decision, Ms. Hausler ignored [the counselor's] instructions and went to the residence where she was fatally shot by Joseph at or about 12:30 p.m. Five minutes later, Joseph telephoned [the counselor] who in turn called the police. . . .

Joseph was subsequently arrested and convicted of the murder of Ms. Hausler. Based upon these facts, Appellant filed two wrongful death and survival actions, alleging, inter alia, that Appellees negligently failed to properly warn Ms. Hausler, and others including her family, friends and the police, that Joseph presented a clear and present danger of harm to her.

***

This court has not previously had the occasion to address whether a mental health professional has a common law duty to warn a third party of a patient's threat of harm. However, decisions by this court in analogous situations, certain lower court decisions dealing with this issue, and public policy support the recognition of a duty to warn.

The finding of a duty to protect by warning another of future harm by a patient is consistent with this court's prior case law regarding liability of a mental health professional to a third party for the negligent discharge of a patient under the Mental Health Procedures Act (“MHPA”). In Goryeb v. Commonwealth of Pennsylvania,
Department of Public Welfare, 525 Pa. 70, 78, 575 A.2d 545, 549 (1990), this court recognized that liability may attach for committing willful misconduct or gross negligence in discharging a patient under the MHPA. The court found that a person committing willful misconduct or gross negligence would be liable for that decision or any of its consequences and that the duty was owed to those who could foreseeably be affected by a wrongful discharge of the patient.

***

After consideration of the above, we find that the special relationship between a mental health professional and his patient may, in certain circumstances, give rise to an affirmative duty to warn for the benefit of an intended victim. We find that a mental health professional who determines, or under the standards of the mental health profession, should have determined, that his patient presents a serious danger of violence to another, bears a duty to exercise reasonable care to protect by warning the intended victim against such danger.

***

Mindful that the treatment of mental illness is not an exact science, we emphasize that we hold a mental health professional only to the standard of care of his profession, which takes into account the uncertainty of such treatment. Thus, we will not require a mental health professional to be liable for a patient's violent behavior because he fails to predict such behavior accurately.

Moreover, recognizing the importance of the therapist-patient relationship, the warning to the intended victim should be the least expansive based upon the circumstances.

***

Having determined that a mental health professional has a duty to protect by warning a third party of potential harm, we must further consider under what circumstances such a duty arises. We are extremely sensitive to the conundrum a mental health care professional faces regarding the competing concerns of productive therapy, confidentiality and other aspects of the patient's well being, as well as an interest in public safety. In light of these valid concerns and the fact that the duty being recognized is an exception to the general rule that there is no duty to warn those endangered by another, we find that the circumstances in which a duty to warn a third party arises are extremely limited.

First, the predicate for a duty to warn is the existence of a specific and immediate threat of serious bodily injury that has been
communicated to the professional. We believe that in light of the relationship between a mental health professional and patient, a relationship in which often vague and imprecise threats are made by an agitated patient as a routine part of the relationship, that only in those situations in which a specific and immediate threat is communicated can a duty to warn be recognized.

Moreover, the duty to warn will only arise where the threat is made against a specifically identified or readily identifiable victim. Strong reasons support the determination that the duty to warn must have some limits. We are cognizant of the fact that the nature of therapy encourages patients to profess threats of violence, few of which are acted upon. Public disclosure of every generalized threat would vitiate the therapist's efforts to build a trusting relationship necessary for progress.

Thus, drawing on the wisdom of prior analysis, and common sense, we believe that a duty to warn arises only where a specific and immediate threat of serious bodily injury has been conveyed by the patient to the professional regarding a specifically identified or readily identifiable victim.

** **

Appellees argue that the strong policies underlying the protection of the therapist-patient privilege prohibit disclosure of confidential information, and, thus, preclude the finding of a duty to warn. . . . Nevertheless, we believe that the protection against disclosure of confidential information gained in the therapist-patient relationship does not bar the finding of a duty to warn.

This Commonwealth's statute regarding the psychiatrist or psychologist-patient privilege [42 Pa. C.S.A. Section 5944] does not explicitly recognize an exception where immediate harm to a member of the public is involved.

However, and simply stated, regulations promulgated by the State Board of Psychology, which include, inter alia, a majority of members with license to practice psychology, recognize an exception in the case of a serious threat of harm to an identified or readily identifiable person. The relevant regulations, promulgated under the code of ethics, are entirely consistent with our opinion today. Set forth in toto:

A psychologist may reveal the following information about a client:
(1) Information received in confidence is revealed only after most careful deliberation and when there is a clear and imminent danger to an individual or to society, and then only to appropriate professional workers or public authorities. This Code of Ethics does not prohibit a psychologist from taking reasonable measures to prevent harm when a client has expressed a serious threat or intent to kill or seriously injure an identified or readily identifiable person or group of people and when the psychologist determines that the client is likely to carry out the threat or intent. Reasonable measures may include directly advising the potential victim of the threat or intent of the client.

49 Pa.Code §41.61. FN10

FN10. Similarly, the law regarding the confidentiality of information between an attorney and his client, referred to in the statute, permits the disclosure of confidential information without consent in the situation of a likelihood of death or substantial bodily harm.

Thus, a duty to warn would not require a mental health professional to violate therapist-patient confidentiality. Rather, the therapist-patient privilege, as interpreted by the State Board of Psychology, embraces the concept. Therefore, the privilege clearly does not prohibit a duty to warn.

***

In summary, we find that in Pennsylvania, based upon the special relationship between a mental health professional and his patient, when the patient has communicated to the professional a specific and immediate threat of serious bodily injury against a specifically identified or readily identifiable third party and when the professional, determines, or should determine under the standards of the mental health profession, that his patient presents a serious danger of violence to the third party, then the professional bears a duty to exercise reasonable care to protect by warning the third party against such danger.

***

After consideration of the facts as pled . . . and the counselor’s specific instructions designed to prevent the threatened harm . . . we find that the counselor’s warning was reasonable as a matter of law. . . . Thus the counselor discharged any duty to warn. . . . For the foregoing reasons, we affirm the judgment of the Superior Court.
Question No. PT: Examiner’s Analysis

The applicant is assigned, as an associate in the firm of Suite and Sauer, to draft an internal legal memorandum to attorney Sauer addressing whether a certain dispute is subject to arbitration, and whether causes of action could exist in favor of the mother and administratrix of the estate of a person killed by his estranged wife against a psychologist who warned the wife of a threat against her.

The facts are presented in a straightforward manner. However, to respond to this assignment, the applicant must analyze and reason from cases, statutes, and a rule that are not exactly on point.

The applicant has been given a memorandum explaining how to structure the memorandum for attorney Sauer.

Format 2 Points

It is important for a lawyer to follow instructions. Accordingly, the applicants are expected to organize their memoranda in accordance with the instructions they are given.

Facts 5 Points

Being able to identify the key facts of a case is an important practical skill that a successful lawyer must have. The important facts in this case are:

- Dr. J is a licensed psychologist in Pennsylvania.
- Dr. J advertised in and saw patients from both Pennsylvania and State X.
- Tait and Lam had signed an agreement with Dr. J which contained a provision requiring Dr. J to maintain confidentiality subject to standards of professional conduct as well as an arbitration clause requiring that all disputes arising out of or relating to the agreement be submitted to arbitration.
- Tait and Lam lived in State X when the therapy began.
- The threatened claims are for a survival action on behalf of the estate and a wrongful death action on behalf of the beneficiaries.
- The claims reference the confidentiality provision of the agreement.
- During therapy sessions Tait repeatedly made hostile statements and threats against Mary.
- Tait made a direct threat to kill his wife on the evening of day he made the threat.
- Dr. J discussed the threat with other psychotherapists before actually warning Mary.
- When Tait arrived to watch the game, Mary immediately shot him in the belief that he was going to kill her.

ISSUE 1: Arbitrability 6 Points
ISSUE 1: Arbitrability

6 Points

The arbitrability issue is whether the decedent's personal representatives are bound by the arbitration clause.


The transaction at issue involves commerce based on the out of state advertising and clients serviced by Dr. J. *Black's Law Dictionary*

Federal substantive law is applied in determining whether an issue is subject to arbitration. *Peltz*

The arbitration clause is a broad form clause and includes the threatened claims which arise out of and relate to the confidentiality provision of the agreement. The letter from Attorney Pepper specifically references the Therapist/Client Agreement as a basis for the claims.

An individual cannot be compelled to arbitrate unless he or she is bound by the agreement to arbitrate under traditional principles of contract and agency law. *Peltz*

A non-signatory may be compelled to arbitrate based on principles of estoppel if they knowingly exploit the agreement. *Peltz*

A form of exploitation is where the non-signatory's claims implicate the agreement containing the arbitration clause. *Peltz*

In connection with the wrongful death action, although the claimant is not a signatory to the agreement, she is bound by it because she is relying on its confidentiality provision to support the claims brought against Dr. J.

In connection with the survival action, the estate is bound by the agreement because it stands in the shoes of the decedent.

Accordingly, the applicant should conclude, based on *Peltz v. Sears* that the administratrix of Tim's estate is bound by the arbitration clause.

ISSUE 2: Psychotherapist-Patient Confidentiality

7 Points

The liability issue turns on whether Dr. J's duty to keep Tait's remarks confidential is overridden by his duty to warn Mary.

The elements of actionable negligence are the existence of a duty recognized by the law requiring the actor to conform to a certain standard of conduct, a failure to conform to the
standard required, causal connection between the conduct and the resulting injury and actual loss or damage resulting to the interests of another. Prosser

A psychologist owes a duty of confidentiality to a patient. 42 Pa. C.S.A. §5944; Emerich v. Philadelphia Center for Human Development.

This confidentiality requirement has been recognized by the legislature. 42 Pa. C.S.A. §5944.

The duty of confidentiality on a psychologist is the same as the duty imposed by the attorney-client relationship. Emerich. Otherwise confidential information can be revealed to the extent that the psychologist reasonably believes necessary to prevent reasonably certain death or substantial bodily harm. Pa. R.P.C. 1.6

The agreement requires confidentiality in accordance with professional standards.

Professional standards impose upon a psychologist a duty to third parties that overrides the duty of confidentiality of patient communications in certain situations. Emerich

When a psychologist in the exercise of sound professional judgment, concludes that a patient presents a serious danger of violence to another based upon specific and immediate threats of serious bodily harm against an identifiable individual, the psychologist has a duty to warn that individual, and may be liable for failure to do so. Emerich

Tait made specific threats against a specific individual, Mary, that were immediate.

To be liable to Tim or his estate, Dr. J must have had a duty to Tim that was breached, and the breach must have proximately caused injury to Tim. Prosser.

Dr. J had reason, based on prior expressions of hostility, to believe the specific threat to kill Mary was real, and further, discussed the threat with colleagues before issuing the warning.

Dr. J had reason to conclude that the threat was immediate, since Tait said he would kill Mary that evening.

A possible weak counter-argument could be raised that the threat might not have been immediate, given the uncertainty as to the amount of time that elapsed between the close of the session, and the 5:00 P.M. telephone call to Mary. Likewise, there is a weak counter-argument that Dr. J. could have found the threats not credible based on the fact that Tait appeared calm at the end of the session. It is unlikely that either of these arguments would be sufficient to overturn the reasonableness of Dr. J’s belief that there was an immediate and real threat to kill Mary.

By disclosing the threats, Dr. Johanson did not breach any duty of confidentiality to Tait, and the cause of action for negligence will not likely succeed.