Table of Contents

Index .................................................................................................................................ii

Question No. 1: Facts and Interrogatories, Examiner's Analysis and Grading Guidelines ..........1
Question No. 2: Facts and Interrogatories, Examiner's Analysis and Grading Guidelines ..........8
Question No. 3: Facts and Interrogatories, Examiner's Analysis and Grading Guidelines ..........15
Question No. 4: Facts and Interrogatories, Examiner's Analysis and Grading Guidelines ..........22
Question No. 5: Facts and Interrogatories, Examiner's Analysis and Grading Guidelines ..........29
Question No. 6: Facts and Interrogatories, Examiner's Analysis and Grading Guidelines ..........36
Performance Test and Grading Guidelines .........................................................................42
Index

Question No. 1

1. Decedents' Estates: requirements for will – testamentary intent
2(a). Decedents' Estates: contractual obligations of decedent
2(b). Decedents' Estates: ademption
3. Federal Income Tax: scholarships
4. Professional Responsibility: direct solicitation of clients

Question No. 2

1. Criminal Law: exigent circumstances, plain view
2. Criminal Law: search incident to arrest
3. Family Law: spousal support, child support
4. Family Law: alimony pendente lite

Question No. 3

1. Civil Procedure: preliminary objections
2. Torts: negligence – duty to business invitee
3. Evidence: insurance policy as proof of ownership, payment of medical bills

Question No. 4

1. Employment Discrimination: ADEA – prima facie case
2. Employment Discrimination: ADEA defenses – BFOQ, reasonable factors other than age
3. Constitutional Law: procedural due process – liberty interest
Question No. 5
1. Property: easement
2. Property: marketable title
3. Contracts: promissory estoppel
4. Contracts: unilateral mistake

Question No. 6
1. Business Organizations: shareholder's derivative action
2. Business Organizations: liability of promoter for pre-incorporation contracts
3. U.C.C. Art. II – Sales: seller’s right to demand adequate assurances
4. Conflict of Laws: Full Faith and Credit Clause
Question No. 1

Gina was a single woman living in E County, Pennsylvania. She had never had any children and worked all her life, accumulating substantial assets, which included her home, Greenwood, which was unencumbered, two vehicles, stocks, artwork, and cash. Early in the year 2006 she had her attorney Walter prepare a will which left Greenwood and half of the residue of her estate to her niece Jane, a college student working toward an engineering degree who was Gina’s only living relative. The other half of the residuary was left to Ralph, a neighbor who helped her with yard work and home repairs. E National Bank was named as Executor. The will was properly signed and witnessed.

For her final year of college, Jane was granted $15,000 in scholarships by her school, $7,500 of which was given to her in September 2006 with no conditions or restrictions. For the other $7,500 which she received in January 2007, the scholarship terms required Jane to provide 20 hours per week for research or teaching assistance for freshman classes as directed by her engineering professors during the 15-week Winter Term. She used all of the money for tuition, books, and fees.

Late in 2007, Gina became unhappy with Jane because Jane rarely called or visited her, and Gina began to rely more on Ralph for assistance with her home maintenance as well as grocery shopping and other tasks. Finally, in early 2008, Gina moved into an assisted-living apartment complex because of her physical decline and decided to sell Greenwood through a realtor. She soon found a purchaser for fair market value, who gave the real estate agent a deposit of $1,000. Both parties signed an agreement of sale for the property, requiring a closing to be held within 30 days after the buyers obtained mortgage approval. The buyers obtained a mortgage a week after the agreement was signed and had their lawyer schedule the closing to be within 30 days.

Within a few days of signing the sales agreement, Gina typed on plain paper the
following, “To Attorney Walter: I’m considering changing my will to reduce Jane’s share of my estate. I want to give Ralph a larger share of the estate. I’ll decide on a charity to share the rest of it with Jane. Call me to discuss these changes as soon as you have time.” Gina then signed and dated the letter in front of two of her neighbors in the assisted-living apartment building. She mailed the letter to Walter with a copy to Ralph. Two weeks later she died suddenly of a heart attack before the closing on the sale of Greenwood could be completed. The will from 2006 was found in her apartment, unmarked and undamaged, among her personal papers, including the deed to Greenwood and her insurance policies.

Soon after Gina’s death, Sam, another E County attorney who advertised for estate clients, became aware that there was an apparent controversy regarding Gina’s estate when his secretary, a friend of Jane, told him that Jane was thinking of contacting an attorney for advice, and the secretary suggested she call Sam. Sam first e-mailed Jane one of his brochures. When he did not hear from Jane in a few days, he decided to telephone her and called to offer his advice or services to represent her, emphasizing his experience with wills and estate practice.

1. Was Gina’s 2008 letter a valid and enforceable will or codicil qualifying for probate?

2. Assume for purposes of this question only that the 2006 will is admitted to probate unchallenged. (a) What effect does Gina’s death have on the sale of Greenwood pursuant to the agreement of sale? (b) If the sale of Greenwood had been completed before Gina’s death and the sale was financed by a promissory note payable to Gina that was secured by a mortgage on Greenwood, how would the proceeds of the payments on the note which were owed at Gina’s death be distributed in her estate?

3. What are the federal income tax consequences, if any, regarding the scholarship money received by Jane, a cash-basis taxpayer, for calendar years 2006 and 2007?

4. Did Sam’s e-mail or phone call to Jane violate any of the Pennsylvania Rules of Professional Conduct?
Question No. 1: Examiner’s Analysis

1. Gina’s letter was not effective as a new will or a codicil because it lacked the required testamentary intent.

The Pennsylvania Probate Estates and Fiduciaries Code allows a significant range of documentary forms and expressions to constitute a will or codicil to a will, including letters and memoranda. See In Re Kuzma’s Estate, 487 Pa. 91, 408 A. 2d 1369 (1979), Appeal of Thompson, 375 Pa. 193, 100 A.2d 69 (1953). A central requirement regardless of form is “testamentary intent,” that the person writing the document must display an obvious intent that it be a will to dispose of property after the writer’s death, rather than a present gift or a mere plan to make a will. In Re Ritchie’s Estate, 480 Pa. 57, 389 A. 2d 83 (1978). Where a further act or writing is contemplated in order to make the will or codicil, the writing is non-testamentary in nature. Id.

All wills must be in writing and be signed by the testator at the end thereof. 20 Pa. C.S.A. §2502. The same formalities of execution and testamentary intent that apply to a will also apply to a purported codicil. In Re Sando’s Estate, 362 Pa. 1, 66 A. 2d 312 (1949), In Re Estate of Moore, 443 Pa. 477, 277 A.2d 825 (1971).

When there is an ambiguity regarding the testamentary nature of a document presented as a will or codicil, extrinsic evidence is admissible regarding the testator’s intent. If, however, the determination of whether testamentary intent exists is clear as a matter of law, then no extrinsic evidence is necessary or permissible, as the case may be. In Re Richie’s Estate, supra. In Re Estate of Moore, supra, citing Appeal of Thompson.

Gina wrote a letter in 2008 directed to her attorney, Walter, which expressed her desire to make certain changes to the will she executed in 2006. She signed and dated this letter in the presence of two witnesses, which complies with the signature requirement for a will or codicil of 20 Pa. C.S.A. 2502, as well as the requirement that two witnesses, whether signatory to the will or not, verify the signature of the testator at the time of probate. In Re Brantlinger’s Estate, 418 Pa. 236, 210 A.2d 246 (1965).

The letter, however, fails to express a present testamentary intent. In Estate of Moore, supra, the Supreme Court noted the fact-sensitive nature of the inquiry as to the testamentary intent of a purported will or codicil by stating that “no will has a twin brother.” The decedent in that case had written a letter to her lawyer five years after she had executed her will, which itself was found in her safe along with the letter. The letter was somewhat more specific as to proposed changes than the present narrative specifies, but the Court affirmed the rejection of the letter as non-testamentary as a matter of law. It was found to be merely “a letter of instruction to her attorney,” which began with the phrase “I wish to change Article 2 of my Will . . . .”

The decision in Estate of Richie, supra rejected the probate of a letter directed to two individuals designated “Executors” and setting forth a list of assets with an ambiguous “50/50” division. The court found that the writing at best was an appointment of those persons as executors of the decedent’s prior will, and concluded that the writing was a memorandum for use in having a will drafted in the future and did not contain a testamentary disposition.
Gina's letter was simply an instruction to her attorney which contemplated both an additional document to be prepared and additional specific decision-making regarding the very general desires set forth in the letter. It appears precatory, and thus ineffective to change any of the directives set forth in her 2006 will. Nor does it act as a revocation of the will; and Gina's maintenance of her will, unmarked and undamaged, within her important papers to the end of her life, is further indication that the letter was not written with a present intent that it cancel, amend or replace the existing will.

2(a) **Notwithstanding Gina’s death, Greenwood will be sold pursuant to the agreement of sale.**

A decedent's death does not extinguish the decedent's contractual obligations such as paying debts or transferring title required by a contract of sale. E National Bank, as Executor of Gina's estate, has the power to complete the unfinished business of the decedent, including the conveyance of real estate which the decedent had agreed to sell. The PEF Code at 20 Pa.C.S.A. 3390 provides that the personal representative of a decedent, who had made a legally binding contract to buy or sell real estate before their death, has the power to complete the transaction, and if the personal representative does not do so, a court may order specific performance, if such an order would have been appropriate had the decedent not died.

Prior to the enactment of this section of the Code in 1972, appellate case law had established a similar framework for the analysis of executory contracts in a decedent’s estate. In *Young v. Gongaware*, 275 Pa. 285, 119 A. 271 (1922), the Supreme Court noted that Pennsylvania law requires the Personal Representative of a decedent to carry out the contractual obligations which the decedent had made which were not of a personal nature, or which relate to property. Only those contractual obligations which can be considered as purely personal to the decedent expire at death. In *Huffman v. Huffman*, 311 Pa. 123, 166 A. 570 (1933) the Court reaffirmed *Young v. Gongaware*, and described the two categories of cases limiting contract performance to the lives of the parties by implication as being either “where the personal qualities of one party to the contract constituted a potential inducement to its making” or where “the performance required would extend beyond the time during which executors and administrators are, by statute, to settle the estate in their charge, or is not consistent with their duties as such.”

Because Gina had agreed to sell Greenwood to purchasers who complied fully with their obligation to set a closing date within 30 days of having obtained mortgage financing, Gina’s death during the time the closing was pending does not extinguish the obligation to deed the property free and clear to the purchasers.

2(b) **If the sale of Greenwood had been completed before Gina’s death, the proceeds of the payments on the note would be distributed to Jane under the statutory exception to ademption.**

At common law, when a testator sells or otherwise disposes of property which had been specifically devised in his or her will written previously, the testamentary gift is considered to be adeemed, or extinguished, even though the proceeds can be traced to other assets in the estate, unless the will had stated an intent that such proceeds are included in the devise. *Harshaw v. Harshaw*, 184 Pa. 401, 39 A. 89 (1898), *In Re Frost’s Estate*, 354 Pa. 223, 47 A.2d 210 (1946).
Pennsylvania, however, has altered the common law rule by statute at 20 Pa. C.S.A. 2514 (18)(i) with respect to property specifically devise or bequeathed. The devisee or legatee of such property "has the right to any of that property which the testator still owned at his death and any balance of the purchase price or balance of property to be received in exchange, together with any security interest, owing from a purchaser to the testator at his death by reason of a sale or exchange of the property by the testator."

The specific devise of Greenwood to Jane would have adeemed at common law if Gina had closed the sale of the property before her death. However, pursuant to the above referenced statute, since the buyers had given a promissory note for the purchase price payable to Gina, the devise would not have adeemed, as their payments on the note which were owed at Gina’s death would be the balance of the purchase price still due at Gina’s death, and the mortgage would be a security interest regarding the balance on property which was specifically devised. The proceeds of the sale still owed at Gina’s death would belong to Jane and would not be distributed as part of the residuary estate.

3. **Jane’s scholarship funds received in 2006 are excluded from income, but at least a portion of the 2007 funds are income because she was required to work for them.**

The Internal Revenue Code at section 61(a), 26 U.S.C.A. §61, defines gross income generally as "all income from whatever source derived." Nevertheless, some types of income are excluded by other provisions of the Code. Scholarships are dealt with in section 117, which excludes from income a scholarship or fellowship grant received by a student who is a candidate for a degree at an eligible educational institution and uses the funds to pay "qualified tuition and related expenses," which include tuition, fees, books, supplies and equipment—but not room, board or other living expenses. Part (c) of Section 117, however, limits the applicability of the exclusion to funds which are not "payments for teaching, research or other service by the student required as a condition for receiving the qualified scholarship or qualified tuition reduction" unless the scholarship or tuition reduction was received under the National Health Service Corps Scholarship Program or the Armed Forces Health Professions Scholarship and Financial Assistance Program.

Jane received half of her total scholarship funds, $7,500, in September of 2006 with no conditions. She was a candidate for an engineering degree, and used the funds entirely for qualified tuition and related expenses. For calendar year 2006, she clearly had no income from the scholarship funds.

For 2007, however, the $7,500 she received in January had the significant distinction of a requirement that Jane perform 20 hours of work per week within the engineering department for the scholarship funds she received. While she may have used all the funds for qualified expenses, she was actually being compensated for work. Therefore, that portion of the $7,500 that represents compensation for services provided by Jane is income to Jane for the year 2007.

The facts do not provide a basis to allocate Jane’s 2007 scholarship between a pure grant amount and a payment for her services. However, if all the funds are treated as payments for services, she would be deemed to have earned $500 per week of the 15-week term, which equates to $25 per hour for a 20-hour week. It is likely that the college would determine a reasonable amount of the $7,500 to be allocated as payment for services using factors such as the compensation paid for similar services to students who did not receive a scholarship or paid to
other employees performing similar services. This amount would be reported by the college as compensation for services and would constitute income to Jane in 2007. Therefore, at least some part of the funds received in 2007 are income to Jane.

4. **Sam violated Rule of Professional Conduct 7.3 by making an unsolicited telephone call to a prospective client. His e-mail would not have been a violation.**

Pennsylvania Rule of Professional Conduct 7.3 governs Direct Contact With Prospective Clients, and states in part:

(a) a lawyer shall not solicit in-person or by intermediary professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain, unless the person contacted is a lawyer, or has a family, close personal, or prior professional relationship with the lawyer. The term ‘solicit’ includes contact in-person, by telephone or by real-time electronic communication, but, subject to the requirements of Rule 7.1 and Rule 7.3(b), does not include written communications, which may include targeted, direct mail advertisements.

Sam is not related to Jane, nor do the facts indicate any prior professional or close personal relationship, and his contact attempts are significantly motivated by his pecuniary interest. Under such circumstances, his unsolicited telephone call clearly violates the Rule.

The e-mail attempt, however, appears to comply with Rule 7.3. Part (b) of the Rule specifically permits a lawyer to “contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment” unless the lawyer knows or reasonably should know that the person’s physical, emotional or mental state prevents reasonable judgment in employing the lawyer; the person has previously told the lawyer not to communicate, or the communication is abusive in nature. While “real-time electronic communication” is prohibited, ordinary e-mail is distinguished from such direct communications as instant messaging or internet live chat both by Explanatory Comment 3 to the rule and by definition of “writing” or “written” set forth in Rule 1.0, which denotes a “tangible or electronic record of a communication or representation,” including e-mail.

Sam e-mailed one of his advertising brochures to Jane. This was not an improper means of solicitation. It could have been read by Jane at her leisure, saved for further review, or simply discarded, with no direct communicative pressure from Sam, which is what Rule 7.3 prohibits. Neither do the facts indicate any abusiveness to the brochure’s content, nor any significant mental, emotional or physical problems which would render Jane incapable of reasonable judgment in employing a lawyer.

The nature of the e-mail as a brochure used by Sam for general advertisement also implicates Rule 7.1 Communications Concerning a Lawyer’s Service and Rule 7.2 Advertising. Advertising through a brochure is proper so long as it is not false or misleading, and there is nothing in the facts to suggest that the brochure sent to Jane by Sam was false or misleading or otherwise failed to comply with Rule 7.2.
Question No. 1: Grading Guidelines

1. Requirements for a will or codicil

Comments: Candidates should recognize that testamentary intent is vital to a will; that the letter may meet some of the elements of a will or codicil, but it’s vagueness and uncertainty render it a mere instruction. The letter would not be a valid and enforceable will or codicil.

5 points

2. Unfinished business of decedent; ademption

Comments: Candidates should recognize that the completion of decedent’s outstanding contracts is generally among the administrative duties of the estate, and that the sale of the real estate is not an exception to that rule. The concept of ademption generally and as to the Greenwood devise to Jane should be discussed; as well as a recognition that Pennsylvania law would provide an exception to common law ademption to give Jane the remaining sale proceeds if Gina had sold Greenwood while alive.

4 points

3. Scholarship income taxability

Comments: The general rule that a scholarship is not income under the Internal Revenue Code should be noted, along with the requirements of degree candidacy, qualified institution and related expenses. A distinction should be made between the pure scholarship funds in 2006 which did not constitute income and the 2007 funds, at least a portion of which constituted income because they were a reimbursement for services.

6 points

4. Direct contact of potential clients

Comments: Candidates should recognize the general prohibition of in-person solicitation under the Rules of Professional Conduct; the clear prohibition of the direct phone solicitation of Jane; the distinction between an e-mailed brochure and prohibited “real-time electronic communication” and the fact that advertising through a brochure is generally permissible if it is not false or misleading.

5 points
Question No. 2

At the time of their marriage five years ago, Ed and Darlene were very successful and highly paid executives. Two years later they had a son, Charles. Ed was not ready to have children and wanted nothing to do with Charles which placed a severe strain on their marriage. One year ago Ed moved out of the marital home which was located in X County, Pennsylvania, when Darlene admitted to an affair in front of witnesses. At that time he and Darlene entered into a written agreement that addressed the distribution of their property and that also provided that Darlene would not seek financial assistance for Charles from Ed and that Ed would never attempt to have any contact with Charles. Since then Ed never had contact with Charles or paid any support for him. Six months ago Darlene lost her job, and she and Charles moved in with her former boyfriend with whom she had engaged in an affair over the last two years. Out of financial necessity she filed an action in the Court of Common Pleas in X County seeking both spousal support and child support from Ed who was still a very highly paid executive.

Ed and his cousin Al were staying in separate rooms at a motel located in X County while Ed litigated the claim filed against him for child support by Darlene. After a support hearing, Ed was upset and went to a local tavern where he consumed a substantial amount of alcohol resulting in his being well over the legal blood alcohol level for operating a motor vehicle. On his way from the tavern to the motel Ed was stopped by police officers due to his erratic driving and was directed to get out of his vehicle. The police observations were sufficient to justify the vehicle stop and Ed’s arrest for driving under the influence of alcohol. Upon his arrest, Ed’s car was immediately searched at the scene by one of the officers who found items that had recently been stolen in a burglary in closed boxes on the back seat of the vehicle.

While Ed was at the tavern, the X County, Pennsylvania drug strike force went to the motel to arrest Al on a warrant for drug possession. When confronted by police officers, and in an attempt to get a deal, Al said that Ed was in court at that time but he had marijuana in his
motel room. Police officers then contacted the motel manager, and with the manager’s assistance, used a passkey to enter Ed’s room. The police officers smelled recently burnt marijuana in the hallway in front of Ed’s door. Prior to the entry into Ed’s room, the manager said the hallway in front of Ed’s room often smelled of marijuana when Ed stayed there. The manager told the police that Ed stayed in the motel in the past and never caused any problems. Entry into Ed’s room with the passkey was made after the officers knocked, announced their purpose, waited a reasonable period of time, and received no response. Marijuana was found on Ed’s dresser, in plain view.

In addition to the driving under the influence charge, Ed was also charged with possession of marijuana and receiving stolen goods.

1. Ed’s attorney filed a suppression motion to challenge the search of the motel room and seizure of the marijuana as a violation of Ed’s rights under the Fourth Amendment of the United States Constitution. The District Attorney has argued that the search was valid based on exigent circumstances and the seizure was valid since the drugs were in plain view. How should the Court rule on the suppression motion?

2. Ed’s attorney filed a suppression motion challenging the search of his car and the seizure of the stolen goods under both the United States and Pennsylvania Constitutional provisions prohibiting unreasonable searches and seizures. What argument should the District Attorney make in response to the motion, and how should the Court rule under both the United States and Pennsylvania Constitutions?

3. How should the court rule on Darlene’s request for (a) spousal support and (b) child support for Charles?

4. If Ed files for a divorce, what other action could Darlene pursue to obtain financial assistance from Ed?
Question No. 2: Examiner's Analysis

1. The warrantless search of Ed's motel room should be deemed illegal and the marijuana should be suppressed as being obtained in violation of his protections under the United States Constitution.

The police went to the motel to arrest Ed's cousin Al on a drug charge. While at the motel, Al volunteered information indicating that Ed had marijuana in Ed's room. The police contacted the motel manager and requested that the passkey be used to gain entrance to the motel room. The motel manager advised the police that he previously smelled marijuana in the hallway in front of Ed's room when Ed stayed there in the past. When the police officers went to the motel room, they noted the smell of marijuana in the hallway in front of Ed's room.

The officers knocked, announced their purpose and waited a reasonable length of time before entering the room with the passkey. The officers had no reason to believe that there was anyone in the motel room since they were advised that Ed was in court. Further there is nothing in the facts to indicate the officers heard any noise coming from inside of the room that would indicate the destruction of potential evidence. Additionally, the officers were made aware that Ed had not caused problems in past stays.

The law provides that a hotel room can be the object of Fourth Amendment protection just as is a home or office. Stoner v. State of California, 376 U.S. 483, 84 S.Ct. 889 (1964). In the absence of consent or exigent circumstances, entry into a home to conduct a search is unreasonable under the Fourth Amendment unless done pursuant to a warrant. Steagald v. U.S., 451 U.S. 204, 101 S.Ct. 1642 (1981). Here, Ed could expect certain people such as maids or repairmen to enter the room in the performance of their duties, but not law enforcement personnel. "Warrantless searches and seizures inside a home (hotel room) are presumptively unreasonable unless the occupant consents or probable cause and exigent circumstances exist to justify intrusion." Commonwealth v. Dean, 2008 Pa. Super. 3, 940 A.2d 514, 521 (2008).

In Commonwealth v. Demshock, 2004 Pa. Super. 263, 854 A.2d 553 (2004), the Pennsylvania Superior Court addressed the issue of a police entry without a warrant where there is an allegation of exigent circumstances and looked at various factors such as the following to determine the existence of exigent circumstances:

1. The gravity of the offense;
2. Whether the suspect is reasonably believed to be armed;
3. Whether there is a clear showing of probable cause;
4. Whether there is a strong reason to believe that the suspect is within the premises being entered;
5. Whether there is a likelihood that the suspect will escape if not swiftly apprehended;
6. Whether the entry is peaceable;
7. The timing of the entry;
8. Whether there is hot pursuit of a fleeing felon;
9. Whether there is a likelihood that evidence will be destroyed if the police take the time to obtain a warrant;
10. Whether there is a danger to police or other persons inside or outside the dwelling to require immediate and swift action.
Based upon the *Demshock* factors it would appear that exigent circumstances did not exist in our case. In fact, the *Dean* case is strikingly similar to our case and the court determined that the warrantless entry into a motel room was in violation of the United States Constitution. The police officers could have obtained a search warrant based upon the information from Al, the smell of marijuana and the motel manager’s testimony, and there is no reason that a search warrant could not have been obtained. Since there was no consent or exigent circumstances the warrantless search of the hotel room was in violation of Ed’s Fourth Amendment rights.

The courts have universally held that in order for plain view to be an exception to the search warrant requirement an officer must legally be in a position to observe items in plain view. *Harris v. United States*, 390 U.S. 234, 88 S.Ct. 992 (1968). Since no lawful consent had been given for the warrantless search and there were no exigent circumstances to support the search, there was no justification for entry into the motel room without a search warrant. Therefore, the evidence could not be seized even though it was in plain view once the officers entered the hotel room. The Common Pleas Court should suppress the evidence found.

2. The District Attorney should argue that the search was authorized as a search incident to a lawful arrest, and the court would find that the warrantless entry into the passenger compartment of Ed’s car and the search of boxes found therein were not in violation of the United States Constitution but were however, in violation of Article I, Section 8 of the Pennsylvania Constitution.

Ed was arrested for driving under the influence of alcohol. The facts state that there was probable cause to arrest him and that the arrest itself was valid.

An officer searched the vehicle, including the passenger compartment and ultimately found items that came from a burglary. The Fourth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution protect individuals from unreasonable searches and seizures. Under both the United State and Pennsylvania Constitutions a warrantless search and seizure is unreasonable and therefore prohibited except for a few exceptions. The District Attorney should argue that the search was justified as a search incident to a lawful arrest.

The officer’s entry into the car after the arrest of Ed and the search and ultimate seizure of items would be valid under the United States Constitution. Under the United States Constitution, it is permissible for an officer to search the passenger compartment (which includes the back seat) of an automobile including the contents of any containers found therein, incident to a lawful arrest. *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860 (1981). The officer need not suspect any criminal activity other than that for which the person was arrested or articulate any probable cause for such a search. Simply, the search of the passenger compartment and the seizure of the items therein would be properly obtained incident to the lawful arrest for driving under the influence.

The Pennsylvania Supreme Court has made it clear that greater protection may be provided under the Pennsylvania Constitution than is provided by the federal courts under the United States Constitution. *Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887 (1991). The Pennsylvania Supreme Court in *Commonwealth v. White*, 543 Pa. 45, 669 A.2d 896 (1995) held that under the Pennsylvania Constitution a lawful arrest does not serve as justification for the search of all property belonging to the arrestee, and limited the search incident to arrest to the
person and the immediate area occupied by the person during custody; thus distinguishing Pennsylvania constitutional law from Belton. Since there was no evidence that Ed was in the vehicle and the officer did not have a search warrant to enter the vehicle, open the boxes and ultimately seize the stolen goods, said evidence should be suppressed under the Pennsylvania Constitution. Ed was in custody and there was nothing in the facts to indicate that Ed had access to his vehicle, since he had been directed to get out of his vehicle prior to his arrest.

Based upon the existing law, the suppression motion would be granted only based upon Article I, Section 8 of the Pennsylvania Constitution.

3. The Court of Common Pleas should deny Darlene's request for spousal support but grant her request for child support for Charles.

(a) Darlene would not be entitled to receive spousal support from Ed under these circumstances. Normally, the economically superior spouse has an obligation under Pennsylvania law to pay support to the financially dependent spouse until divorce. Levine v. Levine, 360 Pa. Super. 297, 520 A.2d 466 (1987), 23 Pa.C.S.A. §4321. The duty to pay spousal support normally terminates upon divorce. Levine, supra.

There are exceptions to the obligation to pay spousal support. The obligation of support terminates when it is shown that the conduct of the financially dependent spouse provides a ground for divorce. Keller v. Keller, 275 Pa. Super. 573, 419 A.2d 49 (1980). Since there are grounds for a divorce due to Darlene's continuous affair with her boyfriend while she resided with and was married to Ed, the award of spousal support would be denied. Ed would be able to establish grounds for a divorce since Darlene admitted the marital affair to him in front of witnesses. Thus the Court of Common Pleas should deny the request filed by Darlene for spousal support.

(b) Ed would be obligated to pay child support even though he entered into an agreement with Darlene that specified that she would not take financial support for their child from him. The law provides that parties may validly bargain between themselves in domestic matters using child support as one of the bargaining factors. However, the case law clearly holds that the parties cannot bargain away a child's right to support. As a matter of public policy within the Commonwealth of Pennsylvania, a child's right to receive support from biological parents is held as an enforceable right belonging to the child and not the parents. In fact, the Supreme Court in Knorr v. Knorr, 527 Pa. 83, 588 A.2d 503 (1991) held that parents cannot bargain away a child's right to support from either of the parents due to an overriding and compelling public policy argument to provide support for children. The obligation and duty to provide support for children can be found at 23 Pa.C.S.A. 4321. Therefore, the Court of Common Pleas would order Ed to pay child support to Darlene for Charles.
4. Since Ed filed a divorce action, Darlene could successfully pursue a claim for alimony pendente lite.

Since Ed filed for divorce Darlene would be entitled to file a claim for alimony pendente lite. 23 Pa. C.S.A. §3702. The Pennsylvania courts have distinguished claims for spousal support from claims for alimony pendente lite. Levine supra.

Spousal support and alimony pendente lite each serve a sharply distinct purpose. The purpose of an order of support is to assure a reasonable living allowance to the party requiring support. (citation omitted) The duty of providing spousal support arises out of the marital relationship itself and terminates when the marriage ends. (citation omitted). Alimony pendente lite, on the other hand, is awarded to sustain the dependent spouse on a basis of equality with the other spouse while maintaining or defending the divorce action. (citation omitted). Id.


Based upon the difference in income between Ed and Darlene, the court would award alimony pendente lite to her. The award of alimony pendente lite would give her needed financial assistance pending the outcome of the divorce action.
Question No. 2: Grading Guidelines

1. Suppression: exigent circumstances/plain view

Comments: The candidate should recognize that under the Federal Constitution, the search of the motel room was improper and the marijuana should be suppressed as evidence against Ed. In reaching the proper conclusion, the candidate should discuss the need for a search warrant since there were no exigent circumstances to justify the warrantless search, and the inapplicability of the plain view exception since the officers were not lawfully present in the motel room.

5 points

2. Suppression: search incident to arrest

Comments: The candidate should identify and discuss the District Attorney’s argument that the seizure was proper since the search was incident to a lawful arrest. The distinction between the United States and Pennsylvania Constitutions with respect to a search incident to an arrest should be discussed and a proper conclusion should be reached.

5 points

3. Support

Comments: The candidate should discuss why spousal support will not be awarded to Darlene while child support will be awarded despite the parties’ written agreement. The candidate should reach the proper conclusion on both issues.

6 points

4. Alimony Pendente Lite

Comments: The candidate should discuss the distinction between spousal support and alimony pendente lite, and recognize that since a divorce was filed, alimony pendente lite should be awarded to Darlene since Ed is the financially superior spouse.

4 points
Question No. 3

Kelley is the owner of Kelley's Grocery Store (Kelley's) in C County, Pennsylvania, and has owned the store for five years. She received three lawsuits naming Kelley's as a Defendant and has referred the cases to Attorney Able for handling. All three lawsuits were commenced via Civil Complaint containing a notice to defend. All of the Complaints were timely filed in the Court of Common Pleas of C County, Pennsylvania, and were properly served on Kelley's.

The first lawsuit (L-1) was filed against Kelley's by Herbert, one of its former employees, and was served on Kelley's on February 10, 2009. The suit alleges that Kelley's breached its written contract with Herbert in dismissing him without good cause in violation of their six-page written employment agreement. The Complaint made reference to the following provisions as being included in the employment agreement:

A. Kelley's will employ Herbert for one year commencing June 1, 2008, at $30,000 per annum.

B. Kelley's will not dismiss Herbert except for good cause shown.

C. All disputes between Kelley's and Herbert shall be arbitrated in accordance with AAA Arbitration Rules.

Before filing the Complaint, Herbert's attorney read the entire employment agreement between Kelley's and Herbert, which was provided to him by Herbert, and referred to parts of the agreement in the Complaint but did not attach the agreement to the Complaint as an exhibit.

1. What preliminary objections, if any, should be filed to the Complaint filed by Herbert against Kelley's in the Court of Common Pleas of C County and with what likelihood of success?

The second lawsuit (L-2) was filed by Mary against Kelley's and alleges that on June 5, 2008, while shopping for food at Kelley's store, Mary slipped and fell on a wet substance near the dairy cooler at 9:17 a.m. This lawsuit specifically alleges that the store was negligent in not cleaning up the liquid substance, thereby causing Mary to sustain serious and permanent injuries to her lumbar spine. Upon being assigned L-2, Attorney Able prepared and filed the appropriate
responsive pleadings and engaged in discovery, which revealed via a detailed log kept by Kelley’s that the floor in the area of the fall was inspected by a store employee at 9:00 a.m. on the date of the incident and that no liquid was detected at that time. During discovery Able took the deposition of a customer, Paul, which revealed that he spilled a small amount of liquid on the floor at about 9:10 a.m. and reported it to the front-end manager at 9:22 a.m. when he was checking out of the store. In response to discovery, Plaintiff was unable to show that anyone else was aware of or should have been aware of the spill from the time it occurred until Mary slipped and fell.

2. Assume that discovery is now complete and the above facts regarding the incident are not in dispute, what steps can be taken by Able in order to attempt to dismiss the Plaintiff’s lawsuit prior to trial and with what likelihood of success?

The third lawsuit (L-3) alleges that on January 8, 2008, Kelley’s was negligent in maintaining a sidewalk area immediately outside the store in that an accumulation of ice was permitted to occur. As a result of the dangerous condition created by the store, it was alleged by Jody that she fell on the ice and sustained serious personal injuries. Assume that Kelley’s disputes that it was either the owner of or responsible for the sidewalk area outside the store where Jody fell. Counsel for the Plaintiff informed Able that he intends to introduce Kelley’s general liability policy obtained in pre-complaint discovery, which indicates that the policy covers the entire premises which is owned by Kelley’s, including the store and the sidewalk area immediately outside the store. After the fall, Kelley’s paid Jody’s medical bills for the injuries caused by the fall. Plaintiff’s attorney also indicates that he will introduce evidence at trial that Kelley’s paid the medical bills of Jody to show that Kelley’s was liable for Jody’s injuries.

3. If Able filed a Motion in Limine prior to trial to attempt to prevent Jody from introducing (a) the liability insurance policy to prove that Kelley’s owned the area where the fall occurred and (b) the fact that the store paid Jody’s medical bills to establish liability, how would the trial court likely rule?
Question No. 3: Examiner’s Analysis

1. Preliminary objections should be raised to the complaint raising agreement for alternative dispute resolution which objection will likely be granted and the matter will be referred to arbitration. An objection should also be raised that the complaint fails to conform to law or rule of court which is also supported by the facts.

Initially, a preliminary objection should be raised that there is an agreement for alternative dispute resolution which should govern the disposition of the action. This objection is raised under Pa. R.C.P. No. 1028(a)(6). In particular, the agreement between the parties requires that all disputes between the parties will be submitted to AAA Arbitration. By filing the action in county court Herbert has failed to follow the terms of his agreement with Kelley’s. It is likely that this objection would be granted by the court and that the matter would be referred to AAA Arbitration in accordance with the terms of the agreement between the parties.

Pa. R.C. P. No. 1028(b) requires that all preliminary objections shall be raised at one time and that they shall state specifically the grounds relied upon and the preliminary objections may be inconsistent. Thus, an objection should also be raised that Herbert’s Complaint fails to conform to law or rule of court in violation of Pa. R.C.P. No. 1028(a)(2). In particular, Pa. R.C.P. No. 1019(i) provides in pertinent part that when any claim is based upon a writing, the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is sufficient to so state, together with the reason, and set forth the substance in writing. As applied here, Herbert’s attorney was required to attach the written employment agreement to the Complaint in order to comply with Pa. R.C.P. No. 1019(i). It is clear that he had a copy of the agreement prior to the Complaint being filed as it was provided to him by his client. Although he did summarize portions of the agreement in the Complaint he did not comply with the mandatory provisions of Pa. R.C.P. No. 1019 (i), and therefore failed to conform to rule of court. If the complaint was not amended by the plaintiff within 20 days by attaching a copy of the agreement, and if the court did not refer the matter to arbitration, as indicated above, it would likely grant this preliminary objection.

2. A Motion for Summary Judgment should be filed and it is likely that the Motion would be granted based upon the facts presented.


The mere fact that an accident occurred does not give rise to an inference that the injured person was the victim of negligence. McDonald v. Aliquippa Hospital, 414 Pa. Super. 317, 321, 606 A.2d 1218, 1220 (1992). Pennsylvania law places the burden on the plaintiff to establish the existence of negligence on the part of the defendant by proving four elements: (1) a duty or obligation recognized by law; (2) a breach of that duty; (3) a causal connection between the conduct and the resulting injury; and (4) actual damages. Pittsburgh National Bank v. Perr, 431 Pa. Super. 580, 584, 637 A.2d 334, 336 (1994).

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1 A Note to this rule provides that where this issue cannot be determined from facts of record, the preliminary objection must be endorsed with a notice to plead. Here, the facts indicate that the complaint referenced the arbitration provision as being included in the employment agreement.

The nature of the duty which is owed in any given situation hinges primarily upon the relationship between the parties at the time of the plaintiff’s injury. *Pittsburgh National Bank v. Perr*, supra. The standard of care that a possessor of land owes to one who enters upon the land depends upon whether the entrant is a trespasser, a licensee or an invitee. *Carrender v. Fitterer*, 503 Pa. 178, 184, 469 A.2d 120, 123 (1983). Here, Appellants have pled facts which establish the Decedent was a business invitee. A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land. *Palange v. City of Philadelphia Law Department*, 433 Pa. Super. 373, 378, 640 A.2d 1305, 1308 (1994). As such, Decedent was entitled to the highest duty of care. *Beary v. Pennsylvania Electric Co.*, 322 Pa Super. 52, 59, 469 A.2d 176, 178 (1983). Applying section 343 of the Restatement (Second) of Torts, this court has explained that a party is subject to liability for physical harm caused to an invitee only if:

- he knows of or reasonably should have known of the condition and
- the condition involves an unreasonable risk of harm, he should expect that the invitee will not realize it or will fail to protect themselves against it, and the party fails to exercise reasonable care to protect the invitees against the danger.


An invitee must prove either the proprietor of the land had a hand in creating the harmful condition, or he had actual or constructive notice of such condition. *Moultrie v. Great Atlantic & Pacific Tea Co.*, 281 Pa. Super. 525, 535, 422 A.2d 593, 598 (1980).

The occupier of a business premises ordinarily owes a business visitor an affirmative duty to use reasonable care to discover unreasonably dangerous conditions of the premises and either put the premises in a reasonably safe condition for use in a manner consistent with the purpose of the invitation or warn him of the danger. *Crotty v. Reading Industries, Inc.*, 237 Pa. Super. 1, 345 A.2d 259 (1975).

As applied to this case, it appears that Mary would be classified as a business invitee as she was going to the store to purchase food, which the store had available for retail sale. This purpose was related to the business dealings of the grocery store. Thus, Mary, as a business invitee, must prove that Kelley’s either had a hand in creating the harmful condition or had actual or constructive notice of such condition.

The discovery in this case revealed certain facts that are not in dispute. The discovery has disclosed that the substance was spilled on the floor at about 9:10 a.m. which was only approximately 10 minutes after the area had been inspected and found to be clean by Kelley’s employees. A customer of the store admits that he spilled the substance on the floor just 7
minutes prior to Mary’s fall. Although he reported the spilling of the substance to the front end store manager at 9:22 a.m. this was five minutes after the fall and did not provide the store with time to take corrective action. Under the circumstances, it appears that Kelley’s acted entirely appropriately in conducting an inspection and they clearly did not have actual notice of the condition prior to the fall. As to constructive notice, there is nothing in the facts to indicate that the store should have had notice of the dangerous condition prior to the fall. Only a short period of time elapsed between the time the substance was spilled and the fall and the facts indicate that only a small amount of liquid was spilled on the floor. Further, there is no evidence that anyone else, including other customers, saw or even should have seen the substance before the fall.

Since discovery is now closed and it does not appear that Mary will be able to sustain her cause of action going forward, a Motion for Summary Judgment should be filed pursuant to Pennsylvania Rule of Civil Procedure 1035.2 which provides in relevant part as follows:

After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law.

(2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

As applied here, there is a strong argument that Mary will not be able to produce evidence of facts to sustain the elements of her cause of action as explained above and Kelley’s would prevail on a Motion for Summary Judgment. While an argument can be made that the issue of whether there was enough time between the spill and the fall to place the store on constructive notice of the dangerous condition should be a question for the jury, the undisputed facts discussed above, including Mary’s inability to present any facts to indicate that anyone should have been aware of the spill from the time it occurred until Mary slipped and fell, should be sufficient to support the grant of summary judgment.

3. The trial court would likely deny the Motion in Limine which seeks to prevent the introduction of the liability insurance policy to prove that Kelley’s owned the area where the fall occurred and would likely grant the Motion in Limine to prevent the introduction of the fact that the store paid Jody’s medical bills for the purposes of establishing liability.

Pennsylvania Rule of Evidence 411 provides that evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. However, this rule does not exclude evidence of insurance against liability when offered for another purpose, such as proof of ownership or control. This rule is identical to Federal Rule of Evidence 411 and is consistent with prior Pennsylvania case law that evidence of insurance may be admitted, notwithstanding some prejudicial effect, if the evidence is relevant to prove an issue in the case other than negligence or wrongful conduct. Beechwoods Flying Service. v. Al Hamilton Contracting Corp., 504 Pa. 618, 476 A.2d 350 (1984).
As applied here, Kelley's is disputing that the area where Jody's fall occurred was owned or controlled by Kelley's store. However, Kelley's liability insurance policy provides insurance coverage for the subject area which would tend to indicate that Kelley's believed that it owned the area at the time that the insurance was placed. Accordingly, an argument can be made pursuant to Pennsylvania Rule of Evidence 411 that the insurance policy should be admitted for the purposes of establishing ownership and the Judge would likely deny the Motion in Limine to exclude that evidence.

Pennsylvania Rule of Evidence 409 provides that evidence of furnishing or offering to or promising to pay medical, hospital or similar expenses occasioned by an injury is not admissible to prove liability for the injury. The Rule is identical to F.R.E. 409 and is consistent with prior Pennsylvania case law. As applied here, it is undisputed that Kelley's paid Jody's medical bills after the accident. However, Pennsylvania Rule of Evidence 409 clearly provides that the payment of these bills cannot be admitted into evidence to show that Kelley's was liable for those injuries. Accordingly, the Motion in Limine to prevent this evidence from being introduced at trial will likely be granted.
1. **Civil Procedure - Preliminary Objections**

   Comments: The candidate should identify and discuss the preliminary objections of alternative dispute resolution and failure to conform to law or rule of court and conclude that the matter would likely be referred to alternate dispute resolution and that if it was not so referred the objection to the complaint failing to conform to law or rule of court would likely be sustained as a complete copy of the subject agreement was not attached to the complaint.

   6 Points

2. **Civil Procedure – Summary Judgment**

   Comments: The candidate should recognize that a Motion for Summary Judgment should be filed and conclude that the Motion would likely be granted based upon the facts presented. As part of the analysis the candidate should discuss the rules governing the duty owed to business invitees and apply these rules to the facts.

   9 Points

3. **Evidence – Liability Insurance / Payment of medical bills.**

   Comments: The candidate should discuss the rules concerning liability insurance and conclude that the insurance would likely be admitted for the limited purpose of showing ownership and control of the area of the fall and should discuss the fact that the payment of medical bills is generally not admissible to establish liability and the bills would not be admissible at trial.

   5 Points
Question No. 4

Nina is a 40-year-old employee of Beautiful You Department Store ("BUD") in C City, Pennsylvania, which employs 60 individuals. BUD is a full-service store with 10 departments, including the designer dress department where Nina has worked as a sales assistant since age 19. She has always received good performance evaluations, earned substantial sales commissions in addition to her salary, and was store employee of the month on several occasions. Nina’s department caters to young wealthy women who buy the latest in designer clothing. One of BUD’s best customers is Alicia, an independently wealthy woman who is an at-will employee working as an accountant in the tax collection office for C City at a salary of $40,000 per year.

One year ago, Nina attended a mandatory briefing session for sales staff in her department, conducted by BUD’s human resources director, at which the sales assistants were given a copy of a new policy that stated that in order to meet the needs of the store’s “trendy young customers,” and as a result of some customer complaints about older sales assistants, no sales assistant could be 40 years of age or older. Employees were told that, in advance of their 40th birthday, each sales assistant would be reassigned if jobs were available. Nina was shocked, as she had never worked in any other capacity and she was almost 40. When Nina turned 40 she was transferred to a less visible position in BUD’s warehouse. That evening, furious about her transfer, Nina went onto a fashion industry blog and typed in some unflattering but true facts about BUD executives and customers, including that Alicia spent more than $100,000 per year on clothes.

After the requisite administrative requirements were met, Nina filed an age discrimination suit against BUD in federal court challenging her transfer to the warehouse.
BUD filed an Answer to the Complaint, which set forth the following as Affirmative Defenses:

1. Defendant affirmatively states and alleges that any and all actions it took with respect to Plaintiff’s employment with Defendant were taken in good faith and in full compliance with state and federal laws, and that age is a Bona Fide Occupational Qualification for employment as a sales assistant and necessary to the operation of Defendant’s business.

2. Defendant utilized reasonable factors other than age in its actions because its policy was driven by a desire to maximize sales based on customer preference.

At a non-jury trial, the evidence established that Nina was transferred to the warehouse position when she turned 40 based on BUD’s new policy, and that the warehouse position paid the same base salary as her sales job but provided no opportunity for customer contact or sales commissions. The only evidence presented at trial as to the basis for the policy came from the CEO of BUD who testified that 25 of BUD’s customers, including Alicia, had requested younger sales assistants in the women’s designer dress department and indicated that they would “take their business elsewhere” if younger sales assistants were not hired.

1. Does the evidence presented at trial make out a prima facie case of age discrimination under the ADEA?

2. Assume for purposes of this question only that a prima facie case of age discrimination was established by Nina. Based on the evidence presented at trial, will BUD’s defenses be successful?

The Mayor of C City read Nina’s blog, and without speaking to Alicia, suspected that she had misappropriated funds that had been missing from the office because she could not afford such expensive purchases on her salary. He informed the C City Council at the next public meeting that Alicia was being terminated from her job for financial misconduct. When Alicia arrived at work the day after the Council meeting, the Mayor ignored her request to provide an explanation and terminated her employment.

3. What claim(s) based on the United States Constitution should Alicia assert as a result of her termination, and with what likelihood of success?
Question No. 4: Examiner’s Analysis

1. The evidence presented at trial established a *prima facie* case of age discrimination because Nina suffered an adverse change in the compensation, terms, and conditions of her employment as a result of a policy that was discriminatory on its face.

   The purpose of the Age Discrimination in Employment Act (ADEA) is “...to promote employment of older persons based on their ability rather than age [and] to prohibit arbitrary age discrimination in employment.” 29 U.S.C.A. § 621 (b). Under the ADEA it is unlawful for an employer “…to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual’s age.” 29 U.S.C.A. § 623 (a)(1) (emphasis added). This prohibition applies to private employers with 20 or more employees, 29 U.S.C.A. §630(b) and protects all individuals who are at least 40 years of age from discrimination because of their age. 29 U.S.C.A. §631.

   BUD has more than 20 employees, and is, therefore, subject to the ADEA. Nina is 40 years of age and she was involuntarily removed from her position as a sales assistant, which she had held for 21 years, and transferred to a warehouse position with no opportunity for the commissions she had earned in the sales position, and with no customer contact. Nina’s workplace is no longer the retail store in which she has worked for 21 years, but a warehouse. Her compensation has been adversely affected because, although she earns the same base salary, she has no opportunity to earn the substantial commissions on sales that she has merited in the past. The terms and conditions of her employment have been adversely affected because she is off the sales floor and working in a warehouse, where she no longer has any customer contact. Based on these factors, Nina’s transfer is likely to constitute an adverse change in the compensation and terms and conditions of her employment.¹

   The company policy at issue discriminates on its face against sales assistants 40 years of age and older and has resulted in adverse action against Nina with respect to the compensation and terms and conditions of her employment. Reliance on a facially discriminatory policy requiring adverse treatment of employees who are 40 years of age establishes a *prima facie* claim of disparate treatment under the ADEA by providing direct evidence of discriminatory intent. See *Trans World Airlines, Inc. v. Thurston, et al.*, 469 U.S. 111, 121, 105 S.Ct. 613 (1985) - policy that required pilots over the age of 60 to “bid” for flight engineer positions following their mandatory retirement as captains or first officers, but allowed pilots under 60, who retired for other reasons, to obtain flight engineer positions automatically, was held to be discriminatory on its face and violative of ADEA.

   Accordingly, Nina has set forth a *prima facie* case of discrimination under the ADEA.

¹ In the context of establishing a *prima facie* case of discrimination based on indirect evidence, an adverse employment action has been found to occur when there is a materially adverse change in the terms and conditions of employment such as a termination, demotion evidenced by a decrease in wage or salary, a less distinguished title or diminished material responsibilities. *Galabya v. New York City Board of Education*, 202 F.3d 636, 641 (2d Cir. 2000).
2. The defenses raised by BUD are unlikely to prevail, as BUD cannot establish that its new policy is "reasonably necessary to the normal operation of its business" and the defense of "reasonable factors other than age" is unavailable because the policy is based on age.

The ADEA prohibits policies, such as the one at issue here, which directly discriminate against older workers because of their age. An exception exists where age is a "...bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C.A. 623(f)(1). The "BFOQ" exception under the ADEA, like its Title VII counterpart, "...is meant to be an extremely narrow exception to the general prohibition of age discrimination contained in the ADEA." Western Air Lines, Inc. v. Criswell et. al., 472 U.S. 400, 105 S.Ct. 2743 (1985).

BUD has attempted to establish that being under age 40 is a BFOQ for sales assistants based on the preferences of 25 of its customers for younger sales assistants in the designer dress department. A two-part test has been established for determining the validity of a BFOQ defense. The employer must show that: (1) the requirement is reasonably necessary to the essence of its business; and (2) an employer has reasonable cause for believing that all or substantially all persons within the class would be unable to safely and efficiently perform the duties of the job or an attempt to assess individual capabilities would be pointless or impractical. See Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 236 (5th Cir. 1976), Criswell, supra., 29 C.F.R. §1625.6(b).

BUD is a large full service department store with 60 employees and 10 departments, including the designer dress department in which Nina worked. Accordingly, the "essence" of the business is not the single department that sells dresses to wealthy women, some of whom have demanded younger sales associates. The entirety of the BUD business must be evaluated to determine whether the age-based policy is necessary for its operation. Since there is no evidence that the age limitation for sales associates is necessary to the business as a whole, BUD's defense is likely to fail.

Further, there is no evidence that age affects an individual's ability to perform the duties of a sales associate. BUD would have to establish that "all or substantially all" members of the excluded class could not safely and effectively perform the job duties. There is no evidence to establish that substantially all persons over 40 are unable to effectively make sales to BUD's customers. In fact, Nina was performing well, had won awards and earned sales commissions prior to being transferred upon reaching age 40. While BUD might consider the ability of each sales assistant to make required sales, it cannot exclude all employees over a certain age because some might not perform well. BUD cannot justify its requirement as a BFOQ.

Additionally, BUD's argument that its customers demanded the changes will not prevail. In Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir. 1971), cert. den., 404 U.S. 950 (1971), the court rejected a claim that purported to justify a female-only qualification for flight attendant. The District Court had upheld the qualification as a BFOQ because the airline's passengers preferred female flight attendants. The Court of Appeals rejected the defense, stating that a pleasant environment and the ability of females to perform non-mechanical functions "are tangential to the essence of the business involved." The court concluded that "...discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively." Id. at 388.
Customer preference is generally not a factor to be considered in meeting the requirements for a BFOQ. The court in *Diaz* found that it would be anomalous to allow the preferences of customers to determine whether discrimination was valid and concluded that “customer preference may be taken into account only when it is based on the company’s inability to perform the primary function or service it offers...” *Id* at 389. The discrimination must be reasonably necessary to the essence of the employer’s business, not its ability to compete or maximize its profits. *Wilson v. Southwest Airlines Company*, 517 F.Supp. 292, 304 (N.D. Tex., 1981). A BFOQ for sales assistants being younger than age 40 must be denied where being younger than age 40 is merely useful in attracting certain customers but where retaining individuals who are 40 years of age or older will not alter the essential function of the employer’s business. See *Wilson, supra*. Here, limited customer preference for younger sales assistants in one of 10 departments cannot be considered in establishing a BFOQ, because there has been no showing by BUD that retaining sales assistants over the age of 40 will alter its primary function of selling its products.

BUD will not be able to establish either of the required prongs necessary to establish a BFOQ defense and, as a result, this defense will fail.

An additional statutory defense is where the action is based on a reasonable factor other than age. In *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, *cert. denied*, 522 U.S. 808, 118 S.Ct. 47 (1997), a policy that required employee directors to retire by age 62 was found to violate the ADEA. In its opinion, the court, quoting EEOC regulations, stated: “...when an employment practice uses age as a limiting criterion, the defense that the practice is justified by a reasonable factor other than age is unavailable.” *Id* at 1540. The court found that the defense is available where a policy is based on reasonable factors other than age not where the policy is reasonably based on age. Here, since the policy, on its face, is age based, it must be concluded that BUD’s transfer of Nina was not based on a “reasonable factor other than age.” Consequently, BUD’s second defense will not succeed.

Accordingly, BUD’s affirmative defenses are unlikely to succeed.

3. Alicia should assert that her right to procedural due process under the Due Process Clause of the Fourteenth Amendment was violated, and she will likely be successful.

Alicia should raise a claim based on the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. Procedural due process is applicable to government decisions or actions which deprive an individual of life, liberty, or property. *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976). The governmental action requirement has been met here since the action against Alicia was taken by C City.

Since Alicia was an at-will city employee, she has no property interest in continued employment as an accountant for C City. However, the Due Process Clause of the Fourteenth Amendment also protects the liberty interests of an employee. In *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507 (1971), the Supreme Court recognized that an individual has a protectable interest in reputation, and that “where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.” *Id* at 437, 91 S.Ct. at 510.
In order to assert a liberty interest claim, the government action must involve a publication that is substantially and materially false. See *Codd v. Velger*, 429 U.S. 624, 627-29, 97 S.Ct. 882, 883-885 (1977). In the context of government employment, the content of the publication must adversely affect the reputation of the employee and be taken in connection with a termination of employment. See *Paul v. Davis*, 424 U.S. 693, 699-701, 96 S.Ct. 1155 (1976). In such a circumstance, the employee must be afforded a right to clear her name.

Here, the Mayor made statements to the C City Council that Alicia was being terminated for financial misconduct. There is nothing in the facts to suggest that Alicia’s independent wealth was in any way related to missing C City monies, or that the accusation leveled by the Mayor was true. Alicia’s reputation was certainly adversely affected, especially since she worked as an accountant, a position of trust with others’ money. Assuming that the Mayor’s statement was untrue, the fact that Alicia’s employment was terminated in connection with this defamatory statement would give rise to a claim that her liberty interest was violated.

Given the nature of Alicia’s profession, the Mayor’s allegations in connection with her termination will likely qualify as a violation of her liberty interest because of the level of stigmatization. See *Hill v. Borough of Kutztown et. al.*, 455 F.3d 225 (3d Cir., 2006) – when an employer creates and disseminates a false and defamatory impression about the employee (stigmatization) in connection with his termination it deprives the employee of a protected liberty interest; *Edwards v. California University of Pennsylvania*, 156 F.3d 488 (3d Cir. 1998) – both damage to reputation and the extinguishment of government employment are a predicate for a due process violation. The failure to afford Alicia a hearing or other opportunity to respond to the allegation violated her right to due process. Alicia should have been given a hearing or an opportunity to clear her name and reputation.
Question No. 4: Grading Guidelines

1. **Age Discrimination in Employment Act – *prima facie case***

   Comments: Candidates should recognize that BUD is subject to the ADEA, and they should identify the elements of an actionable claim where the policy discriminates on its face against employees over the age of 40. Candidates should apply these elements to the facts and reach a well-reasoned conclusion.

   7 points

2. **ADEA – affirmative defenses**

   Comment: Candidates should analyze the requirements for the affirmative defenses pled by defendant and apply these requirements to the facts in reaching a well-reasoned conclusion as to whether the defenses will be successful.

   7 points

3. **Due Process- Liberty Interest**

   Comments: Candidates should recognize that the Due Process Clause of the 14th Amendment requires government action, and that it protects liberty interests, including injury to reputation, for an at-will employee who is terminated, and should analyze the facts and reach a well-reasoned conclusion.

   6 points
Question No. 5

Gus owned two adjoining vacant lots located in Pennsylvania known as Lot 1 and Lot 2. Gus conveyed Lot 1 to Meg by a valid deed containing the following provision: "Reserving unto Gus and all future owners of Lot 2, the right to use an unimproved road on the granted property for ingress and egress to Blue Lake." Gus then conveyed Lot 2 to Jim, a local contractor, by a valid deed that did not refer to the right to use the unimproved road on Lot 1.

Jim entered into a loan agreement with Big Bank (Bank) under which Bank provided Jim with funds to build a log cabin on Lot 2 in exchange for a mortgage on Jim's personal residence. The loan agreement expressly required Jim to carry fire insurance on his personal residence. After Jim signed the loan papers, Bank's lending officer, who was authorized to act for Bank in all matters, told Jim that Bank would obtain the required fire insurance for him and add the cost to Jim's loan. In reliance upon the lending officer's promise, Jim did not purchase fire insurance. The lending officer, however, forgot to obtain the fire insurance for Jim.

After completing the log cabin, Jim entered into a written agreement to sell Lot 2 to Bob. The agreement stated that Jim would convey good and marketable title "free and clear of all liens and encumbrances excepting existing restrictions, ordinances, and easements, if any." The agreement further stated that time was of the essence and set a closing for November 30, 2008. A week before the closing, a survey of Lot 2 showed that the log cabin had been built too closely to Lot 1 in violation of the local zoning ordinance. That ordinance authorized the zoning officer to prevent occupancy of any dwelling built or used in violation of the ordinance and provided for a fine of $100 per day for each day that the violation remained unabated. Bob told Jim of the zoning violation and demanded the return of his cash deposit. Citing the sales agreement's language referenced above excepting existing ordinances, Jim refused to return the money, and Bob failed to appear for the closing.
Thereafter, in an attempt to help Jim avoid the daily fine for the zoning violation, Meg, who had a romantic interest in Jim, agreed to transfer Lot 1 to Jim with the understanding that Jim would convey the property back to her as soon as Jim obtained a zoning variance for Lot 2.

After signing the deed conveying Lot 1 to Jim, Meg was injured in an accident with a car driven by Deb. An adjuster from Deb’s insurance company offered to settle Meg’s claim. Meg refused and, without using a lawyer, sued Deb for her injuries. After a court found Deb not liable for Meg’s injuries and the time for appeal had expired, a second adjuster telephoned Meg. The second adjuster told Meg that the first adjuster had gone on maternity leave and handed the case off to him without leaving any records of the status of Meg’s claim. During the call, Meg learned that the second adjuster did not know about Meg’s earlier rejection of the settlement offer or the court decision. When the second adjuster offered to settle the matter for $3,500 in lieu of a trial, Meg accepted and the parties signed an agreement settling Meg’s claim.

Jim obtained his zoning variance on February 1, 2009, and immediately conveyed Lot 1 back to Meg by a valid deed that made no mention of a right to use the unimproved road on Lot 1. While celebrating the award of the variance, Jim set off fireworks and burned down his residence. Upset over Jim’s lack of concern about her traffic accident, Meg placed a chain across Lot 1’s unimproved road preventing Jim from traveling from Lot 2 to Blue Lake.

1. (a) What recognizable property interest did Gus retain when he conveyed Lot 1 to Meg? (b) Following his conveyance of Lot 1 back to Meg, does Jim have a recognizable property interest in Lot 1 that would require Meg to remove the chain preventing travel from Lot 2 to the lake?

2. How should the court rule on a suit by Bob against Jim for return of his cash deposit?

3. What contract law theory can Jim use to support a cause of action against Bank for failing to obtain fire insurance on Jim’s personal residence?

4. In an action by Meg to enforce the settlement agreement, Deb’s insurance company raises the defense of mistake. Would the defense be successful?
Question No. 5: Examiner's Analysis

1. (a) When Gus transferred Lot 1 to Meg, he reserved for himself and future owners of Lot 2 an easement appurtenant to travel across the unimproved road on Lot 1 to the lake.

   “An easement is defined as an interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose.” Stanton v. Lackawanna Energy, Ltd., 584 Pa. 550, 565 n.7, 886 A.2d 667, 676 n. 7 (2004) (citation omitted). Easements generally are of two types: easements appurtenant and easements in gross.

   An easement is appurtenant when it affords “a right or privilege in one man’s estate for the advantage or convenience of the owner of another estate.” Perkinson v. Hogan, 47 Pa. Super. 22, 25 (1911). Creation of an easement appurtenant requires two parcels of property: a dominant tenement or estate, which is the land benefited by the easement, and a servient tenement or estate, which is the land burdened by the easement. R. BOYER, H. HOVENKAMP and S. KURTZ, THE LAW OF PROPERTY: AN INTRODUCTORY SURVEY, § 10.1.1, at 309 (4th ed.).

   Easements may be expressly created either by a direct grant or by reservation. Brady v. Yodanza, 493 Pa. 186, 425 A.2d 726 (1981). To reserve an easement to use land conveyed to another, the grantor must disclose his intent to do so by the plain meaning of the words used in the instrument. Piper v. Mowris, 466 Pa. 89, 351 A.2d 635, 638 (1976).

   In his conveyance of Lot 1 to Meg, Gus expressly created an easement by reservation. The deed specifically stated that Gus reserved the right for him and all future owners of Lot 2 to use an unimproved road located on Lot 1 to obtain ingress and egress to Blue Lake. The easement reserved by Gus would be an easement appurtenant because one parcel, Lot 2, would receive the benefit of the easement while the second parcel, Lot 1, would be burdened by the easement.

(b) Absent some necessity or a valid and legitimate purpose, Jim will not be able to compel Meg to remove the chain preventing travel from Lot 2 across the unimproved road on Lot 1 to the lake because the easement appurtenant that Jim automatically received from Gus, even though it was not mentioned in the deed, was extinguished when Jim became the owner of both Lot 1 and Lot 2.

   Once created, an easement appurtenant automatically passes by conveyance of the land which it benefits. Piper v. Mowris, supra. A failure to mention an easement appurtenant in a subsequent deed in the chain of title will not extinguish the easement. Brady v. Yodanza, supra, 493 Pa. at 189, 425 A.2d at 727. See also, 21 P.S. § 3 (2001). Thus, Jim automatically received the benefit of the easement appurtenant even though the deed from Gus to Jim transferring Lot 2 does not refer to the easement.

   The Pennsylvania Supreme Court, however, has observed that “[n]o man…can have an easement in his own land.” Schwoyer v. Smith, 388 Pa. 637, 640, 131 A.2d 385, 387 (1957). If there is a union of title and possession of the dominant and servient lands in the same person, the easement will deemed to have been swallowed up in a “merger” of the two estates and extinguished. Moreover, a separation of title and possession by a subsequent transfer of one of

When Meg transferred Lot 1, Jim gained title and possession to both the dominant and servient estates. Thus, the easement appurtenant that Jim automatically received upon the transfer of Lot 2 by Gus was extinguished by a merger of the two estates. Jim’s conveyance of Lot 1 back to Meg did not specifically reserve an easement to use the unimproved road on Lot 1 to travel from Lot 2 to Blue Lake. Unless Jim can demonstrate some valid and legitimate purpose for reviving the easement or a necessity for the easement, he will not have the legal ability to compel Meg to remove the chain preventing his access to the lake.

2. The court should rule in Bob’s favor because Jim was not able to convey marketable title to Lot 2 by November 30, 2008 due to the zoning violation.

Pursuant to the sales agreement, Jim was required to convey good and marketable title “free and clear of all liens and encumbrances, excepting existing restrictions, ordinances and easements, if any.” “A marketable title is one that is free from liens and encumbrances and is a title ‘which a reasonable purchaser, well informed as to the facts and their legal bearings, willing and ready to perform his contract, would in the exercise of that prudence which businessmen ordinarily bring to bear upon such transactions, be willing to accept and ought to accept.’” Barter v. Palmerton Area School District, 399 Pa. Super. 16, 20, 581 A.2d 652, 654 (1990), quoting 77 Am. Jur. 2d Vendor and Purchaser, §131 (1975). If there is a reasonable doubt as to title or where the title is in such condition that the purchaser will be exposed to the hazard of a lawsuit, the title to the real estate is not considered marketable. Id., citing LaCourse v. Kiesel, 366 Pa. 385, 77 A.2d 877 (1951). If there is only a mere possibility of some future litigation concerning title, the title is considered good and marketable. Rice v. Shank, 382 Pa. 396, 115 A.2d 210 (1955).

Although the existence of a zoning restriction does not render title unmarketable, a violation of a zoning restriction existing at the time of closing is a defect entitling the buyer to reject title. J.Z. Krasnowiecki, REAL PROPERTY LAW AND PRACTICE, §11-3.4 at p. 467 (2006). In Moyer v. DeVincenzi Const. Co., 107 Pa. Super. 588, 164 A.111 (1933), the Superior Court held that a title to a property upon which a contractor had built a new house was not marketable when the buyer discovered that the house had been built three feet closer to the street than permitted under the local zoning ordinance. The court in Moyer concluded that the zoning violation rendered title unmarketable because the buyer could not take possession of the property without immediately becoming a violator of the zoning ordinance and subject to litigation and a fine for each day that the house remained in violation.

The facts here are similar to those in the Moyer case. If Bob had proceeded with the purchase of Lot 2, he in essence would be buying a lawsuit because he would be in immediate violation of the zoning ordinance and possibly subject to a fine for each day that the violation remained unabated. Moreover, the sales agreement between Jim and Bob specified that time was of the essence. Where the parties have expressly agreed that time should be treated as the essence of the contract, courts will ordinarily accept the agreement as made and refuse to decree performance of the contract’s terms in the event of failure to do what was required within the stipulated time. Morrell v. Broadbent, 291 Pa. 503, 140 A. 500 (1928).
Therefore, the court should rule in favor of Bob because Jim could not convey marketable title to Bob on the date specified in the sales agreement due to the zoning violation.

3. **Jim can bring an action against Bank based upon the doctrine of promissory estoppel.**

The issue initially presented under the facts is whether an oral contract was created between Jim and Bank. Whether an oral contract is found to exist here depends, in part, upon whether there is consideration. Consideration is "an essential element of an enforceable contract." *Stelmack v. Glen Alden Coal Co.*, 339 Pa. 410, 414-415, 14 A.2d 127, 128 (1940). Whether a contract is supported by consideration requires a finding of legal value and bargained-for-exchange. John Edward Murray, MURRAY ON CONTRACTS § 55 (4th ed. 2001). Under the facts presented, it is not clear that there was consideration to support a contract between Jim and Bank.

If consideration is not found, Jim can bring an action based upon promissory estoppel. The doctrine of promissory estoppel, which also is referred to as detrimental reliance, allows a party, under certain circumstances, to enforce a promise even though that promise is not supported by consideration. *Crouse v. Cyclops Industries*, 560 Pa. 394, 402, 745 A.2d 606, 610 (2000); Restatement (Second) of Contracts, §90. Pennsylvania has long recognized promissory estoppel as a vehicle by which a promise may be enforced in order to remedy an injustice. See, *Fried v. Fisher*, 328 Pa. 497, 196 A. 39 (1938).

To establish a cause of action based upon promissory estoppel, a plaintiff must prove three elements: (1) the promisor made a promise that would reasonably be expected to induce action or forbearance on the part of the promisee; (2) the promisee actually took action or refrained from taking action in reliance on the promise; and (3) injustice can be avoided only by enforcing the promise. *Holewinski v. Children’s Hospital of Pittsburgh*, 437 Pa. Super. 174, 178, 649 A.2d 712, 714 (1994), *appeal denied*, 540 Pa. 641, 659 A.2d 560 (1995). In determining whether a promise has satisfied the third element of injustice, one factor that a court must consider is "the reasonableness of the promisee’s reliance." *Thatcher’s Drug Store of West Goshen, Inc. v. Consolidated Supermarkets, Inc.*, 535 Pa. 469, 476, 636 A.2d 156, 160 (1994), quoting, Restatement (Second) of Contracts §90, cmt. b.

In *Shoemaker v. Commonwealth Bank*, 700 A.2d 1003 (Pa. Super. 1997), the Superior Court considered whether a mortgagor who is obligated by a mortgage to maintain insurance on his property can establish a cause of action in promissory estoppel based upon an oral promise made by the mortgagee to obtain insurance. Relying upon case law in other jurisdictions (and in particular a precisely-on-point illustration (number 13) to comment e of section 90 of the Restatement (Second)), the court in *Shoemaker* held that an oral promise to obtain insurance could be enforced by a mortgagor by promissory estoppel. *Id.* at 1007.

*Shoemaker* squarely governs Jim’s situation. Based upon the stated facts, Jim can assert that he has satisfied all three elements needed to support a claim against Bank under the doctrine of promissory estoppel.
4. The insurance company would be successful in defending against Meg’s action to enforce the settlement agreement on the grounds of mistake unless it is determined that the insurance company bore the risk of the mistake.


A party adversely affected by a mistake may receive relief if both parties are mistaken as to existing facts at the time of the contract’s execution. *Ehrenzeller v. Chubb*, 171 Pa. Super. 460, 90 A.2d 286 (1952). Relief may only be granted if the mutual mistake: (1) relates to the basis of the bargain, (2) materially affects the parties’ performance, and (3) the mistake is not one where the injured party bore the risk. *Loyal Christian Ben. Assoc. v. Bender*, 342 Pa. Super. 614, 493 A.2d 760 (1985).

If a mistake is not mutual, but unilateral, and is not due to the fault of the party not mistaken, but to the negligence of the one who acted under the mistake, it generally affords no basis for relief. Where the mistake is unilateral, but the non-mistaken party knows or has reason to know of the unilateral mistake, relief will be granted to the same extent as a mutual mistake. *Kramer v. Schaeffer*, 751 A.2d 241, 246 (Pa. Super. 2000). Further, Section 153 of the Restatement (Second) of Contracts provides that if at the time of the making of the contract one party made a material mistake as to the basic assumption underlying the contract, the contract is voidable by that party if it does not bear the risk of the mistake, and (a) enforcement of the contract would be unconscionable or (b) the other party had reason to know of the mistake. Restatement (Second) of Contracts § 153.

Here, Deb’s insurance company entered into the settlement agreement based upon the second adjuster’s mistake that Meg’s claim was still pending. Even though the mistake was unilateral, the insurance company can argue that the settlement agreement should be avoided because the mistake not only went to a basic assumption underlying the contract but also had a material adverse effect upon its performance of the agreement. More importantly, the insurance company will contend that Meg knew or had reason to know about the second adjuster’s mistake based upon the telephone conversation prior to entering the settlement agreement during which Meg learned that the adjuster did not know about Meg’s earlier rejection of a settlement offer or the court decision in Meg’s lawsuit.

If the court finds that Meg knew or had reason to know about the unilateral mistake, then the question becomes whether the insurance company bore the risk of the mistake. Section 154 of the Restatement (Second) of Contracts provides that a party bears the risk of a mistake when: (a) the risk is allocated to the party by the agreement, or (b) when the party has limited knowledge with respect to the facts to which the mistake is made but treats the limited knowledge as adequate, or (c) the risk is allocated to him by the court on the ground that it is reasonable to do so under the circumstances. Restatement (Second) of Contracts § 154.

Unless Meg can provide facts showing that the insurance company should bear the risk of loss based upon the factors in Section 154 of the Restatement (Second), the insurance company’s defense based on mistake most likely would be successful.
Question No. 5: Grading Guidelines

1. Creation and Extinguishment of an Easement Appurtenant

Comments: Candidates should express an understanding of the basic principles applicable to easements. Candidates should recognize that an easement can be created by reservation and discuss how the benefits and burdens associated with an easement appurtenant are affected by subsequent transfers of the dominant and servient parcels. Candidates should recognize that easements can be extinguished by unity of ownership of the dominant and the servient estates and are not automatically revived when there is a separation of the ownership of the parcels.

6 Points

2. Marketable Title and Time of the Essence Clause

Comments: Candidates should express an understanding of the concept of marketable title. Candidates should distinguish between the existence of a governmental regulation and the violation of a governmental regulation and discuss how that difference affects marketability. Candidates should consider how a time of the essence clause in a real estate sales agreement would affect efforts to convey a marketable title.

5 Points

3. Promissory Estoppel

Comments: Candidates should recognize the applicability of the doctrine of promissory estoppel. Candidates should discuss the elements of the doctrine and apply this doctrine to the stated facts in the course of reaching a well-reasoned conclusion.

5 Points

4. Unilateral Mistake

Comments: Candidates should discuss the general principles of law when only one party to a contract makes a mistake and the circumstances under which a court will provide relief for such a mistake. Candidates should apply these principles to the stated facts and reach a well-reasoned conclusion concerning whether judicial relief is likely to be granted.

4 Points
Question No. 6

Repair Company, Inc. ("RCI"), is a Pennsylvania corporation engaged in rail car repair. RCI’s current stockholders consist of Art, Ben, Carl, Diane, and Earl. Art, Ben, and Carl are actively involved in RCI’s operations and serve as its board of directors. Art is president, Ben is secretary, and Carl is treasurer. Art has been the driving force at RCI, so Ben and Carl usually defer to his judgment.

Art has developed a gambling problem and has amassed serious gambling debt. Art conceived a plan to request that the RCI board declare a $50,000 bonus to each director. Art has also convinced the board to allow him, through a new corporation he intends to form ("Newco"), to purchase the scrap steel that has been lying on RCI’s property for years. At its meeting last week, at Art’s request, the board approved the $50,000 bonus for each director and executed a bill of sale transferring title to all of its scrap steel to Newco in exchange for Newco’s promissory note for $100,000. Art signed the note as Newco’s president.

RCI buys the gas and welding products necessary for its business from Gasco pursuant to a written contract that provides RCI a 2% discount on its invoices if paid within 10 days of receipt and requires all payments to be made within 30 days. With the exception of the last two months, RCI has taken advantage of the 2% discount on all of its purchases over the past three years. For the last two months, however, not only has RCI not taken advantage of the discount but also has failed to pay within the 30 days required by Gasco. Yesterday, RCI received a letter from Gasco stating that all future orders will require cash payment until satisfactory proof is provided that RCI will pay on a timely basis.

Two weeks ago, Art received notice that a $30,000 judgment obtained by Casino had been properly filed in Art’s home county in Pennsylvania. Art had been sued in Nevada by Casino to recover on a gambling debt incurred by Art in Las Vegas. After service of the suit on Art, he completely ignored the suit and all notices he had received. As a result, Casino obtained
a default judgment. No appeal was filed and the time to appeal has lapsed. Art's attorney has concluded that: (i) the Nevada court, in which the Nevada judgment was obtained, had subject matter and personal jurisdiction; (ii) Casino followed all procedural and notice requirements required by the Nevada rules of civil procedure, which complied with due process; (iii) the judgment is now final; (iv) the Pennsylvania rules of civil procedure would have afforded Art greater protection than the Nevada rules; and (v) had the suit been filed in Pennsylvania, the gambling debt would have been unenforceable and void under Pennsylvania law.

Diane, who works for the accounting firm that does RCI's accounting, just learned about the bonuses to the RCI directors and the scrap deal. Diane has properly concluded that the bonuses were grossly excessive, will prevent RCI from being able to pay its debts as they come due, and never should have been approved. Diane properly concluded that the scrap deal is fair so long as payment is received on the promissory note. Diane confronted Art about the bonuses. Art, having already spent his bonus, advised Diane that the board members did not intend to repay the bonuses.

1. Assume Art, Ben, and Carl refuse to refund the bonuses and as a result have breached their fiduciary duties as directors of RCI. On behalf of RCI, what type of legal action could be filed by Diane to recover the bonuses and what steps should be taken by Diane relative to the board of directors of RCI prior to filing such an action?

2. Given that Newco has never been formed, does Art have any personal liability on the promissory note if RCI seeks to enforce the note?

3. Was Gasco within its legal rights as a merchant to make the demand for cash payments in its letter to RCI?

4. Art filed a petition in his home county to open the Casino judgment on the basis that Pennsylvania law (a) would have provided him with greater procedural protection, and (b) would have rendered the debt void and unenforceable. What arguments based on the federal constitution should Casino make to enforce the judgment and with what likelihood of success?
Question No. 6: Examiner’s Analysis

1. Diane should demand, in writing, that the RCI board of directors sue themselves in the name of RCI to recover the improperly granted bonuses. If the RCI board fails to change their position, Diane should file a shareholder’s derivative action on behalf of RCI to recover the bonuses.

A shareholder’s derivative action is a suit filed by a shareholder on behalf of the corporation to assert a corporate right that the corporation’s management has failed or refuses to enforce. It is an equitable action brought by a shareholder to enforce a right of the corporation itself and not a personal right of the shareholder. Derivative suits developed as a way for shareholders to protect the interests of the corporation from the malfeasance of its directors.

A shareholder’s derivative suit may be filed if the party filing the action meets certain criteria under Section 1782 of the Pennsylvania Business Corporation Law of 1988 (hereinafter the “BCL”). 15 Pa. C.S.A. §1782. A shareholder’s derivative action is filed on behalf of the corporation and not to enforce a direct claim held by the shareholder. See, Sell and Clark, Pennsylvania Business Corporations, §1782.2 (Rev. 2d Ed. 1998). In this case, Art, Ben and Carl have breached their fiduciary duty to the corporation by declaring improper bonuses to themselves. Payment of the bonuses will prevent RCI from being able to pay its debts as they come due, generally harming RCI’s credit reputation and operations. Therefore, Diane, not having a direct claim against Art, Ben and Carl, should take the necessary steps to assert the right of RCI to recover the improper bonuses from Art, Ben and Carl.

Diane should send a written notice to Art, Ben and Carl, demanding that they reconsider repayment of the bonuses or sue themselves on behalf of RCI to recover the improperly granted bonuses. If none of the directors now faced with the potential of a suit reconsider, then Diane should sue anyone who does not reconsider on behalf of RCI to recover the improper bonuses. This demand would satisfy the requirement of Pennsylvania Rule of Civil Procedure 1506(a)(2) that requires the filer of a shareholder derivative action to state in the complaint “the efforts made to secure enforcement by the corporation or similar entity or the reason for not making any such efforts.” The Pennsylvania Supreme Court has recognized an “irreparable injury” exception to the demand requirement. See, Ciker v. Mikalauskas, 547 Pa. 600, 692 A.2d 1042 (1997)). If Diane could establish that making demand in this case would cause the corporation irreparable injury the demand would be unnecessary. Although Diane might proceed without making demand, sending the written notice coupled with the failure of Art, Ben and Carl to act, eliminates this potential procedural defense and is not unduly burdensome on Diane.

If Art, Ben and Carl fail to act, Diane’s counsel should prepare and file a shareholder’s derivative action on behalf of RCI naming Art, Ben and Carl as defendants. See, Pa. R.C.P. No. 2177. The complaint should reference the demand made by Diane, should indicate that Diane was a shareholder of RCI at the time the bonuses were awarded and claim that Art, Ben and Carl have breached their fiduciary duty to RCI by awarding the bonuses. These allegations are required by Rule 1506 and by Section 1782(a) of the BCL which requires the plaintiff to aver that she was a shareholder of the corporation at the time of the transaction of which she complains.

Given the clear breach of fiduciary duty by Art, Ben and Carl it is likely that the derivative action against Art, Ben and Carl will be successful.
2. As a promoter, Art would have personal liability on the note if Newco does not pay.

As a promoter, Art would have personal liability on the note if Newco does not pay. A "promoter" is a person who assumes to act on behalf of a corporation to be formed that has not yet been incorporated. Generally, a promoter is someone who takes an active part in creating, organizing and projecting the corporation. *Fletcher Cyc. Corp. §189 (Perm. Ed. 1999)*. An officer of a corporation not yet formed who executes a pre-incorporation contract has the legal status of a promoter. *Id.*

In the absence of an express or implied agreement to the contrary, a promoter is liable on a pre-incorporation contract even though it purports to have been made on behalf of the corporation to be formed. *Id. at §215.* "Even though they purport to act on behalf of the proposed corporation and not for themselves, promoters may be held personally liable on contracts made by them prior to the actual formation of the corporation. In the absence of a novation or an agreement by the other party to a release of liability, the promoter will remain liable after the corporation is formed." *John W. McLamb, Jr. and Wendy C. Shiba, Pennsylvania Corporate Law & Practice, §2.2 (1993).* Promoter liability draws largely from agency principles. The promoter is personally liable given the fact that his principal does not yet exist.

Art was acting as a promoter. He negotiated for the scrap on behalf of Newco, a corporation that never was formed. He further executed a note on behalf of Newco as its president. Accordingly, RCI should be successful in asserting a claim against Art for payment of the note if Newco is not formed or if it is formed and fails to make payment on the note. *See, RKO-Stanley Warner Theatres, Inc. v. Graziano et al.*, 467 Pa. 220, 355 A.2d 830 (1976).

3. An agreement for the sale of goods imposes an obligation on each party that the other party's expectation of due performance will not be impaired. If reasonable grounds for insecurity exist a party may demand adequate assurances of due performance and may suspend performance until adequate assurances are made.

An agreement for the sale of goods imposes an obligation on each party that the other party's expectation of due performance will not be impaired. If reasonable grounds for insecurity exist a party may demand adequate assurances of due performance and may suspend performance until adequate assurances are made.

The Pennsylvania Uniform Commercial Code (the "Code") provides:

A contract for sale imposes an obligation on each party that the expectation of the other of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

13 Pa. C.S.A. §2609(a).

A buyer who has always taken advantage of a discount and who suddenly falls behind in making timely payments arguably has impaired the seller's expectation of due performance. Between merchants, the reasonableness of the seller's concerns are determined by commercial standards. 13 Pa. C.S.A. §2609(b). In this situation, it is reasonable for the seller to seek reasonable assurance from the buyer that the seller will receive future payments on a timely basis. Gasco has a reasonable basis to believe that RCI is having financial problems. A reasonable seller would have legitimate concern over his ability to be paid if he sells additional goods to such a buyer. Gasco could suspend future sales on credit and its demand for cash
payment until reasonable assurances of payment is received is reasonable under the Code. See, 13 Pa. C.S.A. §2609, comment 4.

4. Casino should argue that it has a final judgment and that the Pennsylvania court must recognize and enforce the judgment under the Full Faith and Credit Clause of the United States Constitution.

It is clear from the facts that Casino holds a final judgment against Art. Under the Full Faith and Credit Clause of the United States Constitution which provides "Full Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State," the court should recognize the judgment and allow Casino to enforce the judgment. The Pennsylvania superior court in considering judgments entered in sister states has stated:

judgments entered in sister states are entitled to full faith and credit in Pennsylvania so long as 'there was jurisdiction by the court which originally awarded the judgment and the defendant had an opportunity to appear and defend.' The courts in Pennsylvania will refuse to give full faith and credit to a foreign judgment if it was obtained in derogation of a basic, due process right of the defendant. However, when 'the court of another state has purported to act on the merits of a case, its jurisdiction to do so and the regularity of its proceedings are presumptively valid.' The party challenging the validity of the judgment, therefore bears the burden of showing any irregularity in the proceedings. (citations omitted)


Additionally, a judgment for the payment of money must be final in order to be enforced in another state. *Everson v. Everson*, 494 Pa. 348, 431 A.2d 889, 894 (1981). Art seeks to have the final Nevada judgment opened because he would have been afforded greater procedural safeguards under the Pennsylvania rules of civil procedure than he was under the Nevada rules. He has not contended that the Nevada rules were not followed nor has he asserted that he was not afforded an opportunity to appear and defend or to challenge the judgment in Nevada after it was entered. When he failed to contest the Nevada judgment it became final and absent a showing of a lack of due process in the entry of the judgment the Pennsylvania court should give it full faith and credit. See, *Great Bay Hotel & Casino, Inc.*, supra.

Art further contends that Pennsylvania should open the judgment because the underlying debt would have been unenforceable under Pennsylvania law. "A state is required to give full faith and credit to a money judgment rendered in a civil suit by a sister state even where the judgment violates the policy or law of the forum where enforcement is sought. *Everson, supra at 896*. To open the judgment would have the effect of failing to recognize and enforce the final judgment of the Nevada courts. This would violate the Full Faith and Credit Clause and should not be done. See, *Great Bay Hotel & Casino, Inc.*, supra."
Question No. 6: Grading Guidelines

1. Corporations—Shareholder Derivative Suit

Comments: The candidates should recognize that the proper course is to file a shareholder’s derivative action to enforce the corporation’s rights and should discuss the need for demand, the need to be shareholder and the basis for the suit.

6 points

2. Corporations—Promoter Liability

Comments: The candidates should recognize that a promoter of a corporation not yet formed will be held liable for contracts entered into on behalf of the corporation unless there is an agreement to the contrary.

4 points

3. Uniform Commercial Code—Sales—Adequate Assurance

Comments: Where expectation of due performance is impaired a party may seek adequate assurance of performance.

5 points

4. Conflicts of Law—Enforcement of Foreign Judgments

Comments: The Full Faith and Credit Clause requires enforcement of a valid, final judgment entered by a sister state even though the state in which the judgment is entered for enforcement would have afforded the defendant greater procedural protection and even though the debt would have been unenforceable in that state.

5 points
Supreme Court of Pennsylvania
Pennsylvania Board of Law Examiners

Pennsylvania Bar Examination
February 24 and 25, 2009

PERFORMANCE TEST
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# TABLE OF CONTENTS

**File**

Memorandum to Applicant Assigning Task ................................................................. 1

Letter from Barbara Barrister, Esquire ........................................................................ 2

Memorandum Containing Notes of Interview with Client ............................................ 3

Employment Agreement ............................................................................................... 5

Memorandum Containing Facts About Complaining Party ........................................ 6

**Library**

42 Pa. C.S.A. §5301 ..................................................................................................... 7

42 Pa. C.S.A. §5308 ..................................................................................................... 7

42 Pa. C.S.A. §5322 ..................................................................................................... 7

*Kenny v. Alexson Equipment Company* (Pa. Supreme Court) .................................. 8

*Churchill Corporation v. Third Century, Inc.* (Pa. Superior Court) ........................... 11
FILE
Suite and Sauer, P.C.
123 Pepper Street
Madison, Pennsylvania 19998
(999) 999-9999

Memorandum

To: Applicant
From: Steven Sauer
Date: February 24, 2009
Re: Megahealth Services Group, Inc. v. Carol Caris

Our client Carol Caris, who resides in Hometown, State X, was engaged as an independent contractor by Megahealth Services Group, Inc. She had executed a contract which prohibited her from seeking or accepting employment with any client or former client of Megahealth for three years after termination of her services. Ms. Caris commenced employment with a former client of Megahealth shortly after her service with Megahealth was terminated, and as a result, Barbara Barrister, Esquire, outside general counsel for Megahealth Services Group, Inc., sent a demand letter to Caris threatening to seek injunctive relief against Caris in the court of common pleas of Madison County, Pennsylvania, to restrain and enjoin her from employment with her new employer.

Barrister is a very experienced trial lawyer who is noted for representing her clients zealously. She is also scrupulously fair and is amenable to well-reasoned arguments based on authoritative law. Your assignment is to draft a persuasive letter to Attorney Barrister for my signature seeking to dissuade her from filing suit in Pennsylvania based on a lack of jurisdiction.

Based on preliminary research, I have concluded that Megahealth will be unsuccessful if it tries to assert its claims in the courts of State X because the contract provision on which Megahealth relies is so repugnant to the public policy of State X that it will not be enforced regardless of the choice of law provision in the contract. Therefore, if we can persuade Barrister that suit cannot be brought in Pennsylvania, Caris is not likely to be sued at all.

Your letter should be in standard business letter format. The first paragraph of the letter should briefly reference the nature of the dispute and the issue that is being raised. In the following paragraphs you should provide all of the arguments that support our position by applying the controlling legal principles to the relevant facts. Be sure to include citations to the relevant legal authorities to strengthen our argument. The closing paragraph should state a conclusion supporting our position and indicate the action that will be taken if suit is filed in Pennsylvania.

The File and Library which are provided contain the only facts and legal principles you should consider and rely upon in completing this assignment. You may assume that Pennsylvania law applies to all aspects of this matter and that the law of Pennsylvania and State X relating to enforcement of forum selection clauses is very similar.
Ms. Carol Caris  
422 First Avenue  
Hometown, State X 77777

Re: Megahealth Services Group, Inc. v. Carol Caris

Dear Ms. Caris:

This firm represents Megahealth Services Group, Inc., by whom you were formerly engaged as an independent contractor in connection with the services contract that you entered into in June 2008.

This contract forbids you from accepting any position with any current or former client of Megahealth for a period of three years after you cease providing services for Megahealth. It also authorizes Megahealth to seek injunctive relief against you in the courts of Madison County, Pennsylvania.

You were engaged by Megahealth as an independent contractor assigned as a housekeeper to Golden Years Nursing Home in Hometown, State X, from June 1, 2008, until December 31, 2008, when Golden Years terminated its contract with Megahealth, and your contract was terminated by Megahealth. On February 2, 2009, you accepted the position of supply room supervisor at Golden Years. This is a direct violation of your contract.

Unless you resign from Golden Years immediately, I have been instructed to bring an appropriate action against you in Madison County, Pennsylvania, and to ask the court to restrain and enjoin you from employment in violation of your contract.

I await your decision.

Very truly yours,

Barbara Barrister
Barbara Barrister
To: File
From: Steven Sauer
Date: February 24, 2009
Re: Megahealth Services Group, Inc. v. Carol Caris/Client Interview Notes

On February 23, 2009, I had a lengthy conversation with our new client, Carol Caris. This memorandum summarizes that conversation.

Caris is a 24-year-old single mother who lives with her unemployed parents in Hometown, State X. She is a high school graduate, but other than training she received when in the military, she has no post-secondary education.

Hometown is a rural community located about 70 miles from the county seat, where the closest airport is located. To travel to Madison County, Caris would either have to drive to the county seat and then take a three-hour airplane trip to Madison County or drive there from Hometown which would take more than 12 hours.

Hometown has been severely economically distressed due to the loss of several manufacturing businesses. It has one of the highest unemployment rates in the state. As a result, most residents who have employable skills have since moved away.

Caris graduated high school in 2004. Because she could not then find a job in Hometown, she enlisted in the Air Force. After basic training and administrative school, she was assigned to the supply squadron of the 96th Bomb Wing based at a nearby air base in State X. By the time her enlistment was up, she had risen to the rank of staff sergeant and was in charge of the supply room for the base infirmary. After receiving her discharge, Caris returned to Hometown but could not find work commensurate with her training and experience.

The only medical facility remaining in Hometown is Golden Years Nursing Home. Notwithstanding the high unemployment, Golden Years could not fill all of the positions it had available because of the talent drain described above. Therefore, in 2005, Golden Years entered into a contract with Megahealth whereby Megahealth, for a fee, would provide staffing for Golden Years with its own employees or independent contractors. The contract could be terminated by either party on December 31 of any year.

Megahealth engaged Caris as an independent contractor on June 1, 2008, and assigned her in an entry-level position as a custodian at Golden Years at an hourly rate of $7.50. Golden Years paid Megahealth $16.00/hour for Caris’s services. Caris was required to sign a standard...
form contract with Megahealth or she would not have been engaged to work at Golden Years. A copy of the contract, which was signed by both parties in Hometown, is attached. Since she needed this income, Caris signed the contract without reading all of its provisions and was unaware of the forum selection provision. Under her contract with Megahealth, Caris was responsible for her own benefits and estimated tax filings. Caris’s duties included sweeping floors, changing bed linens, emptying bed pans, removing food trays from rooms, and similar activities.

Toward the end of 2008, the chief operating officer of Golden Years lawfully terminated its contract with Megahealth because she became fed up with Megahealth’s telephone menu system and inability to reach a person whenever she called. As a result, Caris’s independent contractor agreement was terminated by Megahealth effective December 31, 2008.

Despite diligent searches, Golden Years could not thereafter fill its senior positions, and Caris could not find a job in Hometown. At the end of January 2009, Golden Years called Caris and offered her the position of supply room supervisor at an hourly rate of $12.50, plus health and retirement benefits. Caris accepted the position and began work on February 2, 2009.

Caris received the letter from Barbara Barrister on February 19, 2009.
INDEPENDENT CONTRACTOR AGREEMENT

THIS INDEPENDENT CONTRACTOR AGREEMENT is entered into as of this 1st day of June 2008, between Megahealth Services Group, Inc. (hereafter “Megahealth”) and Carol Caris (hereafter, “Contractor”).

1. Megahealth hereby engages Contractor as a custodian with an initial assignment to the Golden Years Nursing Home in Hometown, State X.

2. Contractor’s initial compensation shall be $7.50 per hour, which shall be paid weekly.

3. Contractor acknowledges that he/she is an at-will Contractor of Megahealth and not an employee of any client of Megahealth, and that this Agreement may be terminated by Megahealth without notice for any lawful reason. Contractor agrees to give Megahealth one week’s notice if Contractor terminates this Agreement.

4. If the client to which Contractor is assigned terminates its arrangement with Megahealth, Megahealth has the right but not the obligation to transfer Contractor to another client, and Contractor has the right but not the obligation to accept such transfer.

5. If Contractor’s contract with Megahealth terminates for any lawful reason, Contractor agrees that he/she will not seek or accept employment directly with any client or former client of Megahealth or any competitor of Megahealth anywhere in the United States for a period of three years after the date of termination. Because Megahealth will have no adequate remedy at law for a breach of this covenant, Contractor recognizes and agrees that Megahealth will be entitled to equitable relief, including but not limited to a temporary restraining order, preliminary injunction, permanent injunction, and disgorgement of the payments received by the Contractor during any employment which violates this covenant.

6. The parties agree that regardless where they execute this agreement, it shall be conclusively deemed to have been entered into in the Commonwealth of Pennsylvania, that all disputes shall be litigated only in the Court of Common Pleas of Madison County, Pennsylvania, that process may be served on Contractor by first class mail, that any process issued against Megahealth may only be served by the Sheriff, and that the substantive law of Pennsylvania shall govern.

IN WITNESS WHEREOF, the parties have entered into this agreement with intent to be legally bound as of the date first mentioned above.

MEGAHEALTH SERVICES GROUP, INC

By:  Harry Hardheart ___________________________ Carol Caris
      State X District Manager

49
Memorandum

To: Applicant
From: Steven Sauer
Date: February 24, 2009
Re: Megahealth Services Group, Inc. v. Carol Caris/Information about Megahealth

The following information was taken from Megahealth’s website and its filings with the Securities and Exchange Commission.

Megahealth Services Group, Inc., is a Pennsylvania corporation which was incorporated in 1990. Its original registered office and headquarters was in Madison, Pennsylvania. However, by 2000, it needed more space and built an office building in Millard, Pennsylvania, the county seat of nearby Fillmore County, and changed its registered address when it moved. It has since principally operated from its Millard offices.

Megahealth’s business is to provide staffing through its own employees or independent contractors to hospitals and other medical facilities. As of the close of its 2007 fiscal year (the last year for which data is currently available), Megahealth provided services to over 1,300 hospitals, nursing homes, and similar facilities in 44 states, including State X. It services one other facility in State X which is located 350 miles from Hometown. It has over 18,500 employees and independent contractors nationally, of which 1,650 are managers. As of September 30, 2008, Megahealth had working capital of over $95,000,000, of which $45,000,000 was in cash or cash equivalents. Its revenue for the fiscal year was $312,500,000, and its net profit was $8,000,000. Its five highest executives, as a group, earned salaries and bonuses in excess of $2,000,000.

Megahealth’s website included a statement that it will not hire employees or engage independent contractors unless they sign a contract with a non-competition restrictive covenant, because it was reasonably necessary for Megahealth to retain both employees/independent contractors and clients.
Library
Statutes

Title 42 Pa. C.S.A. Judiciary and Judicial Functions
Chapter 53. Bases of Jurisdiction and Interstate and International Procedure
Subchapter A. General Provisions

42 Pa. C.S.A. § 5301. Persons

(a) General rule.--The existence of any of the following relationships between a person and this Commonwealth shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction over such person, or his personal representative in the case of an individual, and to enable such tribunals to render personal orders against such person or representative:

(1) Individuals.--

(i) Presence in this Commonwealth at the time when process is served.

(ii) Domicile in this Commonwealth at the time when process is served.

(iii) Consent, to the extent authorized by the consent.

42 Pa. C.S.A. § 5308. Necessary minimum contacts

The tribunals of this Commonwealth may exercise jurisdiction under this subchapter only where the contact with this Commonwealth is sufficient under the Constitution of the United States.

Subchapter B. Interstate and International Procedure

42 Pa. C.S.A. § 5322. Bases of personal jurisdiction over persons outside this Commonwealth

(a) General Rule.—A tribunal of this Commonwealth may exercise personal jurisdiction over a person . . . who acts directly or by an agent, as to a cause of action or other matter arising from such person:

(1) Transacting any business in this Commonwealth.

(2) Contracting to supply services or things in this Commonwealth.

(3) Causing harm or tortious injury by an act or omission in this Commonwealth.

* * *

(b) Exercise of full constitutional power over nonresidents. — In addition to the provisions of subsection (a) the jurisdiction of the tribunals of this Commonwealth shall extend to all persons who are not within the scope of section 5301 . . . to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States.
Supreme Court of Pennsylvania
Gerard M. KENNY, et al.

v.
ALEXSON EQUIPMENT COMPANY, et al.

Gerard M. Kenny (Kenny) and his wife, Kathleen Kenny, instituted suit in the Court of Common Pleas of Philadelphia County as a result of injuries sustained by Kenny on November 8, 1973 while riding on a construction elevator powered from ground level by a hoist. The elevator dropped from a high elevation at a construction site in Philadelphia.

Edmund Kollhoff (Kollhoff) and his wife, Helen Kollhoff, also instituted suit in the Court of Common Pleas of Philadelphia County for injuries sustained by Kollhoff as a result of the same occurrence while riding on the elevator with Kenny.

Kenny and Kollhoff were a pipefitter and sheetmetal worker, respectively, in the employ of Wm. M. Anderson Company (Anderson) which was engaged in construction of the Federal Court Building in Philadelphia. Their respective complaints, which were identical except as to personal data of the individual plaintiffs, named as defendant Alexson Equipment Company (Alexson) (appellee herein). The complaints alleged that Alexson had leased the hoist elevator to their employer Anderson.

Alexson joined Piracci Construction Co., a Maryland corporation, as an additional defendant alleging it was the seller of the hoist which powered the elevator. Thereafter, Alexson petitioned the court and was granted leave to join Dominic A. Piracci, Sr., (Piracci, Sr.) (appellant herein) as an additional defendant on the grounds that Alexson had purchased the hoist from Piracci, Sr. rather than Piracci Construction Co.

***

On January 24, 1977, Piracci Sr. filed a preliminary objection to the Writ of Summons on the ground that the Court of Common Pleas of Philadelphia County was without personal jurisdiction over him. The Court of Common Pleas dismissed the preliminary objection and denied the motion to dismiss the Writ of Summons. Consolidated appeals from the orders of the Court of Common Pleas were filed in the Superior Court and heard by a panel of that court which affirmed. We granted allowance of appeal and now reverse.

Piracci, Sr. is an individual who is not and has never been a resident of the Commonwealth of Pennsylvania. At all times relevant to this action he was and continues to be a resident of Maryland. Piracci, Sr. does not and has never done
business in Pennsylvania nor has he maintained an office or usual place of business here.

The hoist alleged by Alexson to have been defective and to have caused injuries to Kenny and Kollhoff, was sold by Piracci, Sr. to Alexson. The sale was negotiated in Maryland where delivery and payment were made. Alexson maintained an office in Baltimore, Maryland to which Piracci, Sr. invoiced the sale of the hoist. Alexson also maintained offices in Gloucester City, New Jersey and Philadelphia. . . .

The facts upon which the lower courts relied as the basis for bringing Piracci, Sr. within the reach of the Long-Arm Statute was that the check with which Alexson paid Piracci, Sr. for the hoist was drawn on a Philadelphia bank and was imprinted with the address of Alexson's Philadelphia office. The lower courts reasoned that Piracci, Sr. was, thus, put on notice that the hoist would be shipped to Philadelphia.

** * **

The analysis of whether a state may exercise jurisdiction over a non-resident individual must be tested against both statutory and constitutional standards. The due process clause of the Fourteenth Amendment imposes a limit on the state's exercise of jurisdiction over a non-resident defendant. (citation omitted).

It is well settled that a state court may exercise personal jurisdiction over a non-resident defendant only so long as there exist “minimum contacts” between the defendant and the forum state. (citation omitted). The due process clause “does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties or relations.” This requirement is based on the proposition that maintenance of suit against a non-resident defendant must not offend traditional notions of “fair play and substantial justice.” (citation omitted).

In order for a state to assert jurisdiction over a non-resident defendant, the nature and quality of the defendant's activity must be such that it is reasonable and fair to require him to conduct his defense in that state. (citation omitted). “Like any standard that requires a determination of ‘reasonableness,’ the ‘minimum contact’ test . . . is not susceptible of mechanical application; rather the facts of each case must be weighed to determine whether the requisite ‘affiliating circumstances' are present.” (citation omitted). It is essential in each case that there be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state.
Moreover, the minimum contacts requirement serves two distinct interests. It protects a non-resident defendant from the burden of litigation in an inconvenient or distant forum and also insures that the individual states, through their courts, do not exceed the limits imposed on them by their status as co-equal sovereigns under our federal system.

In the instant case, the sale of the hoist from Piracci, Sr. to Alexson was negotiated and consummated in the state of Maryland. Piracci, Sr. invoiced the hoist to Alexson’s Maryland office. . . .

In order for jurisdiction to attach in this situation, the nonresidents’ activities in the forum state must be “so continuous and substantial as to make it reasonable for the Commonwealth to exercise jurisdiction over an admittedly unrelated cause of action. (citation omitted). Piracci, Sr. did not conduct any continuous business activity within the Commonwealth of Pennsylvania. He cannot be said to have purposefully availed himself of the privilege of conducting activities within the Commonwealth nor purposefully availed himself of the benefits of the protection of the laws of Pennsylvania. . . .

On these facts, Piracci, Sr. cannot be said to have reasonably anticipated being haled into court in Pennsylvania nor be found to have maintained sufficient minimum contacts with this jurisdiction.

Accordingly, the Orders of the Superior Court are reversed and the Writ of Summons against Piracci, Sr. is dismissed.
Superior Court of Pennsylvania

CHURCHILL CORPORATION, Appellant,
v.
THIRD CENTURY, INC., A/K/A Chase Third Century Leasing Company, Inc., Appellee
Benson FISHMAN and TRANSMEDIA, INC., Appellees

v.
THIRD CENTURY, INC., A/K/A Chase Third Century Leasing Company, Inc., Appellant

This consolidated appeal involves two cases in which small Pennsylvania companies who had each leased a single office machine from Chase Third Century Leasing Co., Inc., a Missouri corporation doing business in Pennsylvania, sought to enjoin that company from bringing suits against them in a rural Missouri county. The Courts of Common Pleas in Philadelphia and Montgomery counties reached inconsistent decisions in these factually similar cases. After an extensive review of applicable Pennsylvania, Missouri, and federal law relating to jurisdiction and due process, choice of law, and the enforceability of forum selection clauses, we conclude that the Court of Common Pleas of Philadelphia County was correct in enjoining Third Century from pursuing its Missouri suit and that the Court of Common Pleas of Montgomery County erred in not doing the same. Therefore the injunction entered September 13, 1989 in the Philadelphia (No. 2676 Philadelphia 1989) case is affirmed and the March 8, 1989 denial of the injunction in the Montgomery County case (No. 961 Philadelphia 1989) is reversed and the case remanded with instructions.

The facts of each case are as follows. Plaintiff-appellant in the Montgomery County case is Churchill Corporation, a Pennsylvania corporation doing business within the state. Churchill entered into a contract with Chase Third Century. Churchill did not seek out Chase but rather was induced to sign the lease through an office equipment dealer, Select Copy, which secured financing for a facsimile machine through Chase. Churchill used the facsimile machine owned and leased by Chase for a few months until it failed to operate properly. For some time after the machine ceased to function properly, Churchill continued to make payments but when the machine could not be fixed, Churchill ceased to make payments and Chase repossessed the machine. Thereafter, Chase sought to recover the remaining payments on the lease after giving Churchill a small credit.

Chase brought an action for $1,700.00, the sum total of the remaining payments under the lease minus the credit,
in the Circuit Court of Randolph County, MO, pursuant to a boilerplate forum selection clause appearing on the reverse side of the lease. That clause stated that jurisdiction would be deemed proper in the Missouri courts and that venue would lie in the Circuit Court of Randolph County. In addition, the lease contained a choice-of-law provision stating that Missouri law would govern the contract and that the contract would be deemed executed in Missouri, regardless of where it was signed. In both the Churchill and Transmedia cases, the leases were actually negotiated and executed in Pennsylvania.

It is not disputed that Churchill's president, who signed the lease, never read the forum selection clause and was unaware of its import. The court of Randolph County is located in Moberly, MO, which is sixty miles north of Jefferson City and is accessible only by automobile. Indisputably, it would have cost Churchill far more to defend against the Missouri suit due to the enormous transportation expenses than to have satisfied a default judgment against it. Churchill chose not to defend the suit, but instead brought an action in the Court of Common Pleas of Montgomery County to have Chase dissolve any judgment. In the alternative, Churchill sought to restrain Chase from docketing a default judgment in the Court of Common Pleas of Montgomery County.

... the court refused to issue a preliminary injunction and dismissed the action with prejudice for lack of personal jurisdiction over the defendant Chase. Churchill filed this timely appeal.

In the Philadelphia County case, the defendant-appellant is Chase Third Century and appellees are Benson Fishman and Transmedia, Inc., doing business as Professional Marketing Advisors [collectively referred to as Transmedia]. Transmedia is a Pennsylvania corporation which conducts no business in the state of Missouri.

In June 1986, Chase and Transmedia entered into a lease for a Minolta copying machine. The machine delivered to Transmedia was in fact a Royal copier. Transmedia did not seek out Chase but rather leased the machine from Chase, for financing purposes, at the suggestion of the dealer of the machine, American Duplicating, Inc. As in the other case, the signatory, Mr. Fishman, never read the forum selection clause, which appeared on the back of the lease. (It should be noted that in both leases, the lessee's signature appears on the bottom of the front side of the lease; however, there is a notation on the front to see the reverse side for additional terms and conditions.)
The copier machine failed to operate properly. Investigation revealed that the serial number on the machine was not genuine and that the machine, though represented to be new, was actually used. Transmedia made twelve lease payments before it ceased to make further payments. Chase repossessed the machine and thereafter filed suit in the Circuit Court of Randolph County for the remaining payments on the lease. In its Missouri petition [equivalent to a complaint under Pennsylvania law], Chase did not set forth any credit due to Transmedia for the value of the repossessed machine.

After being served with the Missouri petition, Transmedia sought injunctive relief in the Court of Common Pleas of Philadelphia County. Chase filed a petition to remove the case to the U.S. District Court for the Eastern District of Pennsylvania; it was denied and the case remanded back to Philadelphia. Chase filed preliminary objections for lack of jurisdiction by reason of the forum selection clause contained in the lease. The court denied the preliminary objections and granted injunctive relief following a hearing on the matter. Chase has appealed from the injunction which prevents it from continuing prosecution of its suit in Randolph County.

In these cases, we must determine, first, whether the Pennsylvania courts have jurisdiction to hear these cases and, second, whether the granting of injunctive relief is proper under the circumstances. We must do so by reference to the appropriate law, since this case involves choice-of-law issues as well. Finally, constitutional considerations of due process must inform our decision since the fundamental question in this appeal is whether Churchill and Transmedia, by virtue of each having leased a single office machine, should be required to defend suits brought in Missouri, a forum with which neither has significant ties.

Chase argues that Pennsylvania courts do not have jurisdiction to hear these cases. It contends that the forum selection or “consent-to-jurisdiction” clause appearing in the form lease deprives any court except the Circuit Court of Randolph County of jurisdiction and venue to hear cases arising under the lease.

However, even if we momentarily assume the validity of the forum selection or consent-to-jurisdiction clause to create personal jurisdiction in the Missouri courts over Churchill and Transmedia, it does not necessarily follow that the clause operates to deprive Pennsylvania courts of jurisdiction as well. *In Central Contracting v. Youngdahl*, 418 Pa. 122, 209 A.2d 810 (1965), the Pennsylvania Supreme Court reviewed the law relating to contractual forum selection and found that it would be
against public policy where the parties are brought before a competent tribunal to allow an agreement made in advance of the dispute to oust the tribunal's jurisdiction. . . . Therefore, the Court of Common Pleas of Montgomery County erred in finding that the lease deprived that court of its jurisdiction to hear the case.

Pennsylvania does have personal and subject matter jurisdiction over these disputes. Chase Third Century is a corporation doing business nationwide and licensed to do business in Pennsylvania. It negotiates and contracts to finance and lease office equipment to Pennsylvania companies and individuals for the purpose of realizing pecuniary benefit. Therefore, Chase is amenable to suit under the Pennsylvania long-arm statute. . . . The exercise of jurisdiction by Pennsylvania is also constitutional under federal law: Chase has purposefully availed itself of the privilege of conducting activities within the Commonwealth thus invoking the benefits and protections of its laws. (citation omitted)

Next, we must determine whether Pennsylvania should decline to exercise jurisdiction because of the forum selection clause. A Pennsylvania court should decline to proceed with the cause when the parties have freely agreed that litigation shall be conducted in another forum and where such agreement is not unreasonable at the time of litigation. Youngdahl, supra. An agreement is unreasonable where its enforcement would, under all circumstances existing at the time of litigation, seriously impair plaintiff's ability to pursue its cause of action. Id. Mere inconvenience or additional expense is not the test of unreasonableness if the plaintiff received under the contract consideration for its agreement to litigate in a specified forum. See, Id. If the agreed upon forum is available to plaintiff and said forum can do substantial justice to the cause of action then plaintiff should be bound by its agreement. Id. See also, Continental Bank v. Brodsky, 225 Pa.Super. 426, 311 A.2d 676 (1973) (forum selection or consent to jurisdiction by prior consent may be enforced when the parties have dealt on an equal basis and there is nothing unfair about their agreement).

Applying these factors to the instant cases, we find that Pennsylvania should not decline to exercise jurisdiction. The requisites for the enforcement of the forum selection clause under the circumstances of these cases at the time of litigation are not present. Enforcement of forum selection under these leases would also offend notions of due process, see infra, and is therefore per se unreasonable.

First, we note that enforcement of these clauses would seriously impair
Churchill's and Transmedia's ability to pursue their defenses. Where it is more expensive to defend a cause of action than to pay a default judgment solely because of the location in which the matter is being adjudicated, litigation in the foreign forum is no longer a matter of mere inconvenience or additional expense; rather it rises to the level of serious impairment of the parties' ability to defend against the action.

Second, there is absolutely no indication that Churchill or Transmedia received any consideration for agreeing to the forum selection clause. The testimony was uncontroverted that neither entity's representative read or was aware of the clause in question. The forum selection clause was simply not an aspect of the agreement for which the parties bargained. Moreover, the forum selection clause is unfair and arguably unconscionable as well.

Third, the "agreed upon" forum cannot do substantial justice because no resolution of the case in Missouri could compensate Churchill and Transmedia for the extraordinary expenses they will incur litigating in a forum to which they have virtually no connections whatsoever.

Having determined that the lower courts should have exercised jurisdiction to hear these cases, we must still determine whether the standards for preliminary injunctions have been met and whether the injunctions should issue. Churchill and Transmedia are requesting the injunctions based on the Missouri court's lack of jurisdiction to hear these cases, the unfairness and inconvenience of forcing Churchill and Transmedia to litigate in the foreign forum, and the immediate and irreparable harm which the parties will suffer if Chase is not enjoined from pursuing its actions in the Randolph County Circuit Court. Before we decide whether the standards for the issuance of a preliminary injunction against Chase have been met, we must address the underlying jurisdictional concerns.

We have already determined that Pennsylvania has jurisdiction over these cases. However, it must be borne in mind that these cases were initially filed in the Circuit Court of Randolph County. Normally, we would defer to the jurisdiction of our sister state where the cases were first filed. Nonetheless, Churchill and Transmedia argue that Missouri lacks jurisdiction and that they will be seriously prejudiced if the cases are allowed to proceed in that forum, where raising a defense would cost more than paying a subsequent default judgment.

The first issue, then, is whether the forum selection clauses, while not ousting Pennsylvania jurisdiction, have nonetheless conferred personal jurisdiction on the
Missouri courts so that the actions, once having been brought there, should be heard there. We are of the opinion that Missouri lacks jurisdiction pursuant to the forum selection clause.

The parties have briefed the issue of whether this court should apply Missouri or Pennsylvania law to determine the validity of the forum selection clause in the lease.

* * *

However, it is not necessary for us to address the choice-of-law issue for two reasons. First, Churchill and Transmedia are amenable to the application of Missouri law. Presumably Chase is as well, since it was the party responsible for drafting the Missouri choice-of-law provision into the equipment leases. Also, Chase has cited certain Missouri cases on the subject in its brief. Second, our research discloses that Pennsylvania and Missouri law relating to the enforcement of forum selection clauses is very similar.

We have already discussed Pennsylvania law relating to contractual forum selection. Missouri courts have evinced the same reluctance to enforce these clauses where they are unfair or unreasonable.

It is undisputed that transportation and witness expenses for Churchill and Transmedia would render access to the Circuit Court of Randolph County impractical. It would simply cost less to pay the costs of a default judgment. Moreover, the contracts containing the clause are small loan financing agreements drawn up by a large and established company which possessed superior bargaining power and resources and, in effect, dictated the terms of the agreement by using a form lease. . . .

* * *

Affirmed as to the order entered by the Court of Common Pleas of Philadelphia, reversed as to the order entered by the Court of Common Pleas of Montgomery County. The Montgomery County case is remanded for entry of an order enjoining Chase from further action against Churchill in the Missouri courts and preventing Chase from docketing any default judgment entered in Missouri against Churchill in the courts of this Commonwealth.

Jurisdiction relinquished.
**Instructions**

The performance test is designed to test an applicant’s ability to perform the legal task that has been assigned using the factual information contained in the File and legal principles that are provided in the Library.

The File contains the only factual information that you should consider in performing the assigned task. The task to be completed is set forth in the first document in the File in the form of a memorandum to the applicant. The Library contains the only legal principles that you should consider to complete the assigned task. Although your general knowledge of the law may provide some background for analyzing the problem, the factual information contained in the File and the legal principles contained in the Library are the only materials that you should use in formulating your answer to the assigned task.

Your response should be written in the answer book that has been provided. Be sure to allow sufficient time for reading the materials, organizing your answer and completing the task assigned. Your answer should demonstrate an understanding of the relevant facts, recognition of the issues and the applicable principles of law and the reasoning that supports your answer. Your grade will be based on the content of your response and your ability to follow instructions in performing the assigned task.

The events depicted and the persons portrayed by the information in the File are fictitious and such information does not depict nor is it intended to depict or portray any actual person, company or occurrence. Any similarity to any person, living or dead, or any occurrence is purely coincidental.
Question No. PT: Grading Guidelines

The applicant is tasked, as an associate in the firm of Suite and Sauer to draft a letter from Attorney Sauer to opposing counsel to persuade her that it would be futile to try to sue the firm’s client, Carol Caris, in the local court of common pleas on behalf of Megahealth Services Group, Inc., because the court does not have personal jurisdiction over Caris. Attorney Sauer believes that if the client is not sued in Pennsylvania she will not be sued at all, because the substantive law of her home state will not enforce the contractual provision Caris admittedly disregarded.

A persuasive letter has been chosen to accomplish this objective because it is not as confrontational as a pleading, and if successful, would certainly be less expensive for the client, who has limited resources. The assigning partner believes that this tactic may be successful, because opposing counsel will favorably consider a well reasoned, well documented, argument. In order to carry out this assignment, the applicant must review the statutory bases for jurisdiction of the Pennsylvania court, and persuasively argue that there is no basis for jurisdiction. The applicant has been given general instructions for the content and organization of the letter.

Format

2 Points

Paying attention to instructions is an important part of the skill set of a lawyer. The applicant is expected to begin the letter with an appropriate salutation, such as “Dear Ms. Barrister” and to end with an appropriate closing such as “Sincerely yours” for the signature of Attorney Sauer. The introductory paragraph should briefly reference the nature of the dispute and the issue that is being raised. The body of the letter should set forth all of the arguments that support the client’s position by applying the controlling legal principles to the relevant facts. Finally, the closing paragraph should state a conclusion supporting the client’s position and indicate the action that will be taken if suit is filed in Pennsylvania.

Arguments

Minimum Contacts

6 points

Under 42 Pa. C.S.A. Section 5322(a), Pennsylvania courts may exercise jurisdiction over a person not in the Commonwealth if the cause of action arose out of the defendant’s transaction of business in Pennsylvania, contracting to supply services or things in Pennsylvania, or causing harm or tortious injury in the Commonwealth. It is apparent from the facts that Caris did none of those things, and this section would not provide a basis for jurisdiction.

Pennsylvania courts are permitted to exercise jurisdiction over a defendant if the defendant has contacts with this state that are sufficient under the United States Constitution. 42 Pa. C.S.A. § 5308, 5322(b).

The due process clause of the Fourteenth Amendment imposes a limit on the state’s exercise of jurisdiction over a non-resident defendant. Personal jurisdiction over a non-resident defendant may be exercised only where minimum contacts exist between the defendant and the forum state. 

Kenny
The due process clause does not contemplate that a state may make a binding judgment in personam with an individual with which the state has no contacts, ties or relations. There must be some act by the defendant by which the defendant purposefully avails herself of the privilege of conducting activities within the forum state. *Kenny*

The nature and quality of the defendant’s activity must be such that it is reasonable and fair to require her to conduct her defense in that state. The nonresidents’ activities in the forum state must be “so continuous and substantial as to make it reasonable for the Commonwealth to exercise jurisdiction over an unrelated cause of action. *Kenny.* An isolated transaction involving a non-resident does not meet this test. *Kenny*

In this case Caris had absolutely no activities in Pennsylvania. There is no evidence of continuous and substantial activities in Pennsylvania which would support the minimum contacts necessary to satisfy due process under the federal constitution, and as a result the Pennsylvania courts do not have personal jurisdiction over Caris on this basis.

**Section 5301**

3 points

Under 42 Pa. C.S.A. Section 5301, a court would have jurisdiction over Caris’s person if she were served with process in Pennsylvania, was domiciled in Pennsylvania, or consented.

Caris is not domiciled in Pennsylvania, nor is she amenable to service of process in Pennsylvania. Therefore, the only possible basis of jurisdiction is her consent.

Since none of the other statutory tests is met, absent Caris’s consent, the court of common pleas would not have personal jurisdiction over Ms. Caris.

A forum selection clause can provide a basis for consent to jurisdiction. *Churchill.* Accordingly, the focus must shift to the question whether the forum selection clause of the contract is enforceable.

**Enforceability of Forum Selection Clause**

8 points

A forum selection clause is enforceable if it is not unreasonable at the time of litigation. *Churchill*

The enforcement of a forum selection clause that offends due process is per se unreasonable. *Churchill.* As noted previously, but for Caris’ purported consent, the exercise of jurisdiction by Pennsylvania courts would offend due process because of the lack of any activities or contacts in Pennsylvania on the part of Caris.

A forum selection clause is also unreasonable where its enforcement would under all circumstances existing at the time of litigation seriously impair a defendant’s ability to pursue her defenses. *Churchill.* The test is whether the forum can do substantial justice to the defense. *Churchill*

Here the clause would seriously impair the defendant’s ability to defend against plaintiff’s cause of action. In this case, we have a multimillion dollar national corporation which requires every employee or contractor to litigate his or her dispute in Madison, Pennsylvania, regardless where
they live or work, or how expensive it is to travel to Madison to have a day in court. A contract
which requires an employee earning slightly over $15,000 per year to incur substantial expense
to travel to Madison from State X to defend a claim in a state in which the defendant has no
connection whatsoever is oppressive, unreasonable and unenforceable.

Facts that a court would consider are that the contract was entered into in Hometown, State X,
that the contract is a standard form drafted by Megahealth that all employees and contractors are
required to sign, that the defendant has had no contact with Pennsylvania, that the cause of action
did not arise in Madison County or out of a transaction or occurrence in Madison County, that
Megahealth has no present connection to Madison County, that all of the witnesses and records
are in State X, that Megahealth can afford to litigate anywhere whereas Caris is an impetuous
person who would be substantially impaired in her ability to defend if required to so in
Pennsylvania, and that Megahealth has a presence in State X. Churchill

The forum selection clause may be enforced where the parties have dealt on an equal basis and
there is nothing unfair about their agreement. Here it is clear that Caris and Megahealth did not
deal on an equal basis; and the fact that Caris will incur an extraordinary expense by being
required to defend an action brought in Madison County Pennsylvania provides support for the
unfairness of the agreement.

There is no evidence that Caris received any consideration for agreeing to the forum selection
clause because she had not read the clause and was unaware of its contents. Since the clause was
not bargained for it is not enforceable and does not provide a basis for consent to jurisdiction.
Added expense and inconvenience can support the unreasonableness of the clause where there
was no consideration for the agreement to litigate in a specified forum.

Conclusion

There is absolutely no basis under which the court in Madison, Pennsylvania, would have
personal jurisdiction over Caris. If suit is filed by Megahealth in Madison, Pennsylvania, Caris
could file preliminary objections to jurisdiction in the matter and would be successful in having
the matter dismissed. Alternatively, Caris could seek injunctive relief in State X to have the
action dismissed or to restrain Megahealth from docketing any judgment in State X.