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Performance Test: Sample Answer

July 29, 2014

Mr. Brian Mull

RE: Response to your various legal questions
    raised in letter dated July 23, 2014
    File No. 1700

Dear Mr. Mull:

We are in receipt of your letter dated July 23, 2014 where you raised various legal questions for our review, consideration and legal opinion. After careful consideration, our responses and opinions to your questions are outlined herein.

1. Would the proposed amendment giving preference for a covered parking spot to owner-occupiers, and permitting "bumping" out a tenant who had previously had a covered parking spot under the old parking standard be permissible?

   First it is necessary to establish whether or not the Executive Board has the power to take this proposed action, and then the next step is to determine what standard of review is applicable to this type of Board action. To do this, we must look to the applicable state statutes and the bylaws of the Association.

   Since the Hickstown Condominium was properly created after 1980, we know that the Uniform Condominium Act applies. The applicable statute in this instance states that "Except as provided in the . . . bylaws . . . the executive board may act in all instances on behalf of the association. 68 Pa. C.S.A. 3303. In the performance of their duties, the officers and members of the executive board shall stand in a fiduciary relation to the association and shall perform their duties . . . in good faith in a manner they reasonably believe to be in the best interests of the association and with such care . . . as a person of ordinary prudence would use in similar circumstances." 68 Pa. C.S.A. § 3303.

   The statute provides that the Board may act on behalf of the association, except as provided in the bylaws, as long as that action is consistent with the fiduciary duty to the association, and made in a good faith manner reasonably believed to be in the best interests of the association. Your letter from July 23rd states that the Association's bylaws authorize the Executive Board to make amendments to the rules including amenities such as parking. It is clear from both the bylaws and the applicable statutes that the Board has the authority to make this parking amendment. Based on the facts stated in your previous letter, I see nothing that would indicate a breach of the Board's fiduciary duty to the Association or a lack of good faith. It is clear from the facts that each unit does indeed have its own parking space; the only issue is whether or not the space is covered. This is quite different from the claims presented in Lyman v. Boonin where tenants were actually being deprived of a parking space and being forced to find
off-site parking, thus resulting in rental difficulties, possible loss of income, and a cost for a benefit not being received. In your Association everyone has a parking space that is maintained by the fees collected from the members; and no one is being forced to find off-site parking. This will weaken the claims of anyone trying to persuade the court that they suffered financial losses by not providing covered parking.

Furthermore, there is nothing to indicate self-dealing despite the fact that a Board member may benefit from this proposed amendment. The court in Lyman v. Boonin clearly stated that "where a governing body's action benefits its own members it is not of itself dispositive of a claim of self-dealing. To find self-dealing there must be a demonstration of a benefit that was gained at the expense of imposing an impermissible burden on the other owners." Based on the above mentioned reasons, I do not believe there was an "impermissible burden placed on the other owners."

It is my opinion that this proposed amendment is permissible.

2. The second question raised concerns your proposal to offer certain services to the Association. Your proposal to offer your services to the Association will be valid if you meet certain conditions of disclosure and fairness.

The Condominium Act provides that its provisions be supplemented by general principles of the law of corporations where there is no inconsistency with its provisions. 68 Pa. C.S.A. § 3108. In general, under the Business Corporation Law a contract or transaction between a corporation and one or more of its directors shall not be void solely for that reason, or solely because the interested director attends the meeting and votes on the transaction, if the following conditions are satisfied:

(a) the material facts to the relationship or interest must be disclosed to the board of directors, and a majority of disinterested directors present at the meeting must approve the transaction,

(b) the material facts surrounding the interested director's relationship to the transaction must be disclosed to shareholders entitled to vote and the contract is approved in good faith by those shareholders, or

(c) the transaction is fair to the corporation as of the time it is approved by the board of directors. 15 Pa. C.S.A. §1728.(a)(1)-(3)

In this case, your proposal to offer your services to the Association will not be void simply because you are a member of the Board or participate in the vote, as long as you disclose the material facts of your interest in the transaction and a majority of disinterested directors present at the meeting approve the transaction. There are ten directors, and nine of them are disinterested. You will need to establish a quorum, which will comprise at least 5 directors (including yourself). At a minimum, if five directors are present, you will need a vote of approval from at least three of them (you may vote but it will not count toward the disinterested director majority approval threshold).
Furthermore, the transaction appears to be fair to the corporation. Given the preliminary facts you have provided pertaining to the discount from market rate for your services, the transaction looks like it will be fair.

In sum, you will be able to attend the meeting and participate in the discussion about your transaction. You will be permitted to vote, however, your vote will not count toward the required disinterested director threshold set forth in the previous paragraph. Assuming you are fully candid about your interests, obtain the required disinterested director approval, and your proposal is fair to the corporation, the transaction will not be invalid for reasons of self-dealing.

3. In your final question to us, you asked whether Suite and Sauer, P.C. is able to agree to a proposed fee sharing arrangement with you for referring the Association's legal work to our firm. Under the Rules of Professional Conduct of a lawyer, Suite and Sauer is not permitted to enter into such an agreement.

In Pennsylvania, Professional Rule of Conduct 5.4 forbids a law firm from sharing legal fees with a non-lawyer except in a non-lawyer employee’s compensation or retirement plan. A non-lawyer, according to the Supreme Court of Pennsylvania includes in its scope a suspended lawyer. (See ODC v. Jackson).

Under your proposed plan, you wish our firm to hire you as an IT consultant at a salary equal to 15 percent of the fees paid to the firm by the Association. This proposal violates Rule 5.4 because it constitutes fee-sharing with a non-lawyer. Although you have passed the PA bar, your status in the state is currently suspended based on your failure to meet CLE requirements. This status as a suspended PA lawyer makes your status with respect to our firm a non-lawyer, because under PA law a non-lawyer is equivalent to a suspended lawyer. Given your status as a non-lawyer, it is impermissible for our firm to enter into a fee-sharing agreement with you. The 15% of fees paid by the Association would constitute such an arrangement because it would base your pay on an amount the firm receives in legal fees, from one client in particular. Under Rule 5.4, even if this was an arrangement we would want to make, we would not be permitted to make it.

Therefore, your proposal constitutes a fee sharing arrangement forbidden by the PA Rules of Professional Conduct and we are required to respectfully decline the offer.

Sincerely,

Shirley Sauer
Attorney
Question No. 1: Sample Answer

1. Buffy's conviction would not allow her to keep any survivorship interest in the home or in the joint funds. Buffy and Roger had a joint tenancy with a right of survivorship in the home. Under Pennsylvania law, a person who intentionally kills a fellow joint tenant cannot benefit from her action. The killing severs the joint tenancy, and as a result of the severance, she loses her interest. Although Buffy was convicted of voluntary manslaughter rather than first-degree murder, voluntary manslaughter establishes the intent for purposes of severing a joint tenancy in a civil action.

   Pennsylvania's law of decedents' estates allows a person who intentionally kills someone with whom she co-owns funds to have a life estate in half of the funds while the other half goes to the victim's estate. At the slayer's death, the remaining half will also go to the victim's estate. Again, voluntary manslaughter counts as an intentional killing for purposes of the civil action that Roger's estate might file.

2. Buffy would need to establish that Roger had given her use of the money at the present time and did not intend for the receipt of the money to be contingent upon his death. During the lifetime of the parties to a joint account the money belongs to the parties in proportion to their contribution unless there is evidence of a gift. In Pennsylvania a valid gift is one that is given with intent and is delivered to the donee.

   The money in the joint account was only meant to be used by Buffy if Roger died. His words were "you will get that money if I die." Although he did make her a joint owner of that money, it was clear that Roger did not want her to remove that $10,000 because he confronted her about it a few weeks after he noticed that it happened. Buffy would not likely be able to keep these funds if Dennis, the Administrator of Roger's estate, files an action for conversion to recover the money. This is because Buffy took the money that belonged to Roger with the intent to permanently deprive Roger of the money.

3. Roger would not likely be able to claim a deduction anymore in 2013 for his use of the office in his residence for work.

   Under the Federal Tax Code, one may make certain deductions for business expenses. One such deduction is for an area in the home that is used for business purposes. The use of this area must be exclusively used as the principal place of business, and cannot be used for other uses. This includes areas of an individual's primary residence if a certain percentage of the residence is being used for solely business purposes. Oftentimes, this is one room of the house used as a business office.

   In 2012, Roger used an office in his home "exclusively for his work". In this year, he would be permitted to deduct from his income tax return, a percentage of the house that the room constitutes in the house and deduct a fair rental amount for that room, considering it a business expense. However, in 2013, the use of the room changed. While Roger continued to work in the room, "he often had to go elsewhere in the house to work while visitors were using it". The
room was not used exclusively by Roger for business purposes in 2013, but others used his office for different reasons. He also changed use in 2013 by not having clients to the house anymore. Since in 2013 the office was not exclusively used for business purposes, he could no longer deduct use of the room as a business expense for his income tax return.

Roger's use of the room for non-business related reasons in 2013 likely nullified his ability to deduct the use of his home for business.

4. Larry complied with the Rules of Professional Conduct regarding Buffy's testimony at her criminal trial.

Under the Rules of Professional Conduct, an attorney is an officer of the court who owes a duty of honesty and candor to the tribunal. While zealously representing a client, the attorney cannot knowingly allow a client to testify falsely on the stand. Where the attorney has a reasonable belief that the client is about to lie in testifying, the attorney should attempt to persuade the client not to do so and warn of the legal ramifications in doing so. If the client does present false testimony, the attorney has a duty to take some remedial action. Criminal defendants have the right to make the decision on whether or not they will testify at their trial.

Larry conducted a reasonable inquiry in questioning Buffy thoroughly regarding her remarkable strength of the punch that caused Roger's death. It was reasonable for him to believe that Buffy did in fact gain the strength due to her desperation to marry Roger. In a passionate state, she punched him extremely hard. While Larry had a conversation with his friend Betty that Buffy looked like a girl she had seen in karate class a few years ago, this was not enough to impute knowledge to Larry that Buffy had special training. In continuing with a reasonable investigation into the matter, he again asked Buffy if she had any karate training in which she said no. If he reasonably believed at this point that she did have karate training, he could have spoken with her about not testifying. Buffy, as the criminal defendant, had the right to insist on testifying. Larry did not directly ask her such a question such that he did not bring out any potential false testimony at the trial and did not know that her testimony was false. The prosecutor questioned Buffy and she denied receiving such training. If Larry had knowledge that this was a lie he would have had to take some action to remedy the matter. He did not have such knowledge and Buffy did not appeal the conviction. His duty of candor owed to the tribunal was thus completed upon the case becoming finalized.

Therefore, Larry has complied with his duty of candor to the tribunal.
Question No. 2: Sample Answer

The complaint against Tom will be dismissed, while the case against Jerry will proceed.

Tom and Jerry's attorney has filed a Motion for Judgment on the Pleadings requesting dismissal of the negligence suit. The granting of such a motion requires there be no issue of material fact to be determined and the moving party is entitled to judgment as a matter of law. The court will view the pleadings and draw all inferences in favor of the non-moving party. In Pennsylvania, children under the age of 7 are, by law, incapable of negligence. For children between the ages of 7 and 14, there is a rebuttable presumption that the children are incapable of negligence. This presumption may be overcome by evidence indicating that a child of like age, intelligence, and experience of the alleged tortfeasor would not have conducted him or herself in the manner in which the tortfeasor did.

In this case, because Tom is under the age of 7, he is unable, by law, to be liable for negligence. His age is not in dispute as it was raised in new matter that he is 6 years old, and that fact was admitted in the reply to new matter. As matter of law, therefore, the case cannot proceed against Tom. Therefore, the court should dismiss the case against Tom.

As for Jerry, a rebuttable presumption is created indicating that it is presumed he is unable to be liable, but that presumption may be overcome. While his age is not in dispute as it too was raised in the new matter, and admitted in the reply to new matter, it would be improper for the court to grant a motion for judgment on the pleadings without any evidence as to how Jerry may have been negligent. Those facts have not yet been determined, and thus are in dispute. The judge should allow the case to proceed against Jerry.

2. The court should consider whether Billy is competent to testify.

Under the Pennsylvania Rules of Evidence, a lay witness is allowed to testify if their testimony is rationally related to their personal perception and their testimony would aid the fact finder in the case to determine the relevant facts at hand. Age is not a determinative factor to disqualify a child from testifying. The court will consider several factors to determine if a witness is competent. They include whether the witness can communicate their perception; whether their testimony is based on their perception; whether they have a good memory of the perception; that they recognize their obligation to tell the truth; and that they are to recognize the effect of solemnly promising to tell the truth while testifying.

Here, Billy is 7. His age alone will not make him incompetent. If the court is satisfied Billy can meet the above requirements he will be allowed to testify. Most prevalent in a case like Billy's is whether he can recognize the effects of telling the truth as opposed to lying so that the court can be assured Billy recognizes his obligation as a witness to tell the truth. It is likely that a child of 7 understands the nature and effects of lying rather than telling the truth.

3. Tony's lawyer should file a strict liability action against MAS because the explosion resulted from MAS' storage of highly volatile and explosive gas canisters.
A strict liability action can result from injuries resulting from an abnormally dangerous activity. An abnormally dangerous activity is an activity that is dangerous as determined by multiple factors including: the extent of a high risk of harm, the likelihood of harm, the ability to prevent the harm with reasonable care, and the benefit of the activity in relation to the area. Under a strict liability action, the plaintiff's injury must result from the dangerous activity. Regardless of whether the defendant exercised reasonable care, the defendant is liable for harm resulting from an abnormally dangerous activity.

Here, MAS is arguably conducting an activity that is abnormally dangerous because the kiln gases are highly volatile and explosive. MAS' mixture of gases are extremely volatile for the fire needed to cook the ceramics, but the mixture of gases, as the facts reveal, could be a less volatile mix of gases. The facts show that a high risk of harm is apparent because Tony, a bystander, was injured when walking by MAS' facility during the explosion. Although the canisters were secured in MAS' inventory, the airborne debris from the explosion caused Tony's injury. The injury was a result from the highly explosive gas, and, the explosion occurred due to an activity with a relatively remote benefit to the area. The benefit of storing highly volatile gases in a residential community is slight compared with explosions and debris from the explosions causing bystander injuries.

Therefore, Tony should file a strict liability action.

4. Sue has a claim against MAS for loss of consortium.

Loss of consortium is a claim available to spouses of injured parties that may be brought as a derivative suit to their spouse's suit for personal injury. Any defenses the tortfeasor may have against the injured spouse will be available against the spouse suing for loss of consortium. Under a loss of consortium, a spouse may bring a claim for damages against the tortfeasor for their loss of their injured spouse's support and company while they were injured. The claimant may seek damages for loss of services, affection, sexual interaction, and loss of society.

Here, Tony was in the hospital for three months and homebound for three more months while injured. During those 6 months, Sue had to take care of Tony and the house while Tony was recovering. During that time, Sue may argue that she lost the benefit of her husband's help around the house, the benefit of his social company, and the benefit of his affection. Sue may recover for all of these damages under a loss of consortium claim.
**Question No. 3: Sample Answer**

1. The Detective should bring charges of receiving stolen property and theft by deception against Bob. Theft by deception occurs when a defendant 1) obtains the property of another, and does so by 2) making a false or fraudulent statement to the victim; 3) which the defendant knew to be false; 4) intending to induce the victim's reliance; and 5) on which the victim relies. In the present case, Bob obtained $8,500 from Kristen. He made a false statement to Kristen that the vehicle was never in an accident. He also knew this to be false. He made this statement intending on Kristen to rely on it by purchasing the vehicle at more than double the vehicle's actual value. Kristen did in fact rely on the statement, and purchased the vehicle for $8,500. Therefore, the elements of theft by deception have been met, and the Detective should bring charges for theft by deception.

   A claim for receiving stolen property will lie where a person knows, or believes that property now held in his possession is or probably has been stolen.

   Here, Bob brought a new snowblower to Quality's sales office. The snowblower still had the tag on it from the retailer, Snow Removers R Us. Bob told Lester, an employee of Bob's, that his buddy stole the snowblower three days earlier and gave it to him to use at the Quality business location.

   As a result, Bob was aware at the time that he accepted the snowblower from his "buddy" that his buddy stole it from Snow Removers R Us three days earlier. As a result, Bob will be charged with receiving stolen property because he was aware that the property that he now possessed for use at Quality was stolen.

2. The prosecutor should respond that the statement is not being offered for the truth of the matter asserted and is not hearsay. In the alternative, the prosecutor should argue it is an admission or statement by a party opponent. The court should overrule the objection. All relevant evidence is admissible under the Pennsylvania rules of evidence unless a rule prohibits its exclusion. The rule against hearsay evidence generally excludes an out of court statement entered into evidence for the purpose of proving the truth of the matter asserted. Under an exception to this rule, any relevant statement made by a party opponent is admissible evidence at trial, unless another exception applies. In this case, there is no other applicable exception to exclude Bob's statement.

   In this case, Bob is a party opponent. His false statement to Kristen is an element of the charge which the prosecution is bringing against Bob. The statement is not being offered for the truth of the matter asserted but to show that the statement was made, and is therefore admissible. Furthermore, even if it were being offered for the truth of the matter asserted, Bob's statement would be admissible as a statement by a party opponent. Because of these reasons, the court should overrule the objection.
3. (a) Jane's parents are seeking partial physical custody and are not seeking legal custody of the minor child, Ian. Jane's parents (hereinafter "grandparents") do have standing under Pennsylvania law to assert custody rights under Pennsylvania law.

Ian, born December 1, 2010, is the child of Bob and Jane. As such, Ian is 3 1/2 years old - going on 4 years old. Three weeks after Ian's birth, Jane died in a car accident. Since Jane's death, Bob verbally consented to grandparents raising Ian. Grandparents live in C County, Pennsylvania. Jane's parents have provided for all of Ian's needs, including daily care giving, buying him food and clothing and taking him to all medical appointments. Ian was very happy under his grandparents' care. Bob generally only spent time with Ian for a few hours on Saturday afternoons. Bob came to pick up Ian on Saturday, May 3, 2014, and without citing any reasons, told Jane's parents he wouldn't be returning Ian after that time. As a result, grandparents met with Attorney Able and told him that they only want an overnight stay with Ian every Wednesday and every other weekend from Friday at 5pm to Sunday at 5pm and they do not object to Bob making all of the major decisions concerning Ian.

Legal custody refers to the power that is vested in one parent to make all legal decisions regarding the child. Physical custody refers to the location of the physical presence of the child in relation to each parent or, here, third party grandparents. Grandparents are only seeking partial physical custody because they have outlined a schedule in which they seek to have the child in their presence. Because they are only seeking to have the child every other weekend and every Wednesday, they are not seeking shared physical custody of the minor child, Ian, because Ian will still be spending more than half of his time with his biological father, Bob.

Standing is conferred on a third party, here grandparents, when they: (1) have been acting in loco parentis, (in the place of the parent).

Grandparents undeniably have standing here. The grandparents raised Ian after Jane's death, which was over three years ago. Since that time, grandparents have been acting in loco parentis, or in the place of the parent, for both Jane and Bob, as Grandparents have provided for all of Ian's needs including daily care giving, buying him food and clothing and taking him to medical appointments. This is often referred to as providing for a child's necessaries. Because they have been acting in loco parentis after the death of their daughter Jane, Ian's mother, Grandparents have third party standing and can assert their claim for partial physical custody of the minor child, Ian.

3. (b). Assuming Jane's parents have standing and a custody action is filed on their behalf to obtain the custody rights they are seeking, the court should apply the "best interests of the child" standard and there are several factors that the Court should take into consideration that would support Jane’s parents securing custody rights.

The Best Interests of the Child takes into account social and economic factors, based upon the totality of the circumstances that would support a finding as to what is in the best interests of the child. Factors such as the ability to provide a loving environment, emotional support, financial support, living conditions, quality of education, the availability of familial relationship, and stability are all taken into account. This list, as provided, is not exhaustive.
Since Jane's death, and with Bob's verbal consent, grandparents have primarily raised and have provided for all of Ian's needs. They have given him care, bought him food and clothing and have ensured that he is receiving proper medical attention. They are providing for all of his necessaries. For almost 4 years, grandparents have essentially been Ian's parents. Bob, his father, has only spent time with Ian for a few hours on Saturday afternoons. Whether Ian, at such a young age, can understand or comprehend that Bob is his father and grandparents are his grandparents is unknown. Ian's happiness will be a factor - however, because he is so young, it's not determinative as to whether grandparent's attempt at seeking partial custody will prevail. The Court prefers, usually, to maintain a relationship between the biological parent and child if feasible.

Nevertheless, as evidenced by grandparents, they have provided a loving environment, a home for Ian to grow up in, emotional support, a familial relationship and medical care. Additionally, the facts do not indicate that either of grandparents have been incarcerated, have abused Ian, have a substance abuse problem or unduly impose a burden on any relationship that Ian would have with his father, Bob. The facts also do not indicate that Bob would necessarily object to grandparents attempt to seek partial custody of Ian. Also, the court should take into consideration the fact that Bob may potentially be incarcerated for the crimes that he has committed. As a result, Bob would not be able to provide the loving and stable environment from his jail cell, that grandparents could provide from their home.

Thus, based on the facts, grandparents have standing and, based upon the best interests of the child standard, would likely be granted partial physical custody of their grandchild, Ian.
Question No. 4: Sample Answer

1. Paul should assert a violation of the procedural Due Process Clause of the United States Constitution because he was deprived of a liberty interest without Due Process of law, and this claim would likely be successful.

The Due Process Clause protects individuals from being deprived of a life, liberty, or property interest without due process of law. In order to have a liberty interest an individual must claim harm to his or her reputation. Additionally, a stigma to one's reputation is not enough, and they need to suffer from sort of adverse harm (stigma plus). Also, before the Due Process clause will apply, there must be some sort of state action.

Here, the facts show that Paul was employed by C City for 10 years as an accountant. C City is governed by a City Council, therefore there is state action in this case. Paul had a liberty interest in maintaining his good reputation that was damaged in connection with the termination of his employment. The facts show that a local drug sweep resulted in arrests for marijuana possession, and photos of the partygoers, one of whom looked like Paul were published. However, Paul was not at the party. The statement from the C City manager that Paul was terminated because of his association with drug users caused a stigma to Paul's reputation. Paul was deprived the Due Process of the law because he suffered both a termination, which was effective immediately, and damage to his reputation; and he was given no opportunity to be heard or present his case. There was not just a stigma to Paul's reputation, but the facts show he meets the stigma plus test because he was terminated from his employment.

Even upon requests for an opportunity to address the matter and establish his innocence of any drug activity or association with drug users, Paul was denied such opportunity. To determine what procedures would be necessary the court would need to apply the Matthews v. Eldridge factors (state interest, Paul's interest in more procedure, and whether more procedure would have assisted to cure the wrong that Paul suffered). Paul has a valid claim that is likely to be successful because he was deprived of a liberty interest when he was terminated from his employment and suffered damage to his reputation that resulted in severe harmful impact to him and his family. The deprivation was in violation of the Due Process clause because Paul was not given any opportunity be heard and show that he was not in fact a drug user or associating with drug users.

2.) To obtain class certification, Nina must establish the following: commonality; adequate representation; numerosity; and, typicality. It is likely that she will be able to obtain class certification.

As to the first element, commonality, Nina must establish that her sex discrimination claim in violation of Title VII is based on a question of law or fact common to all members of the class. As to the second element, she must demonstrate that she is an adequate representative of the class - which means that her claim must not be particularized to her own private interests and must adequately represent the interests of the entire class that she would represent. As to the third element, numerosity, she must demonstrate that there are so many other individuals with
the same claim that it is more feasible and would more appropriately adjudicate the issues if certified to a class. As to the typicality element, she must demonstrate that the basis of her claim would be central and involve the same issues as the claims of everyone else in the class.

Here, Nina is a 30 year old female. Store is seeking to open a new facility at which it would employ over 1000 workers. A recently published study found that long term exposure to some of the chemicals sold at store may pose a risk to male and female fertility. Store thus implemented a policy that banned women of childbearing age from being hired or placed in any job that involved contact with the chemicals unless they produced a certificate of infertility. As a result of the policy, Nina and 125 other female applicants who applied for various positions at Store's new facility were rejected. Nina filed suit in federal district court claiming sex discrimination in violation of Title VII and sought injunctive relief for herself and on behalf of women of childbearing age who were all denied employment based on Store's policy.

Nina will be able to gain class certification because the facts and legal issues related to her claim are common and central to each of the 125 other women who were of childbearing age and were denied employment at Store's new facility. She is an adequate representative because her claim is not particularized to her as an individual - rather, it's central to all women in the prospective class, alike. Nina satisfies the numerosity element because it would be more feasible for the court to determine the issue once for 125 individuals similarly situated, than it would be if each of the 125 individuals filed separate claims addressing the same issues. And, lastly, Nina can satisfy the typicality prong of the class action requirement because the issues that would be resolved in Nina's case that are essential to her claim of sex discrimination in violation of Title VII would need to be addressed in every one of the 125 individual lawsuits if the class were not certified.

Nina also would have to demonstrate that her class action is of a certain type of class action, one type of which involves seeking injunctive or declaratory relief applicable to the class. Here because she is seeking injunctive relief applicable to the class, she would meet this requirement.

As a result, Nina will be able to establish the requirements necessary to obtain class certification and would be successful in obtaining such certification.

3. Nina should file a disparate treatment claim against Store, and she is likely to succeed.

Under Title VII, a disparate treatment claim premised on sex discrimination arises when an employer with 15 or more employees discriminates in terms of hiring, firing, terms, or conditions of employment based on the sex of the employees. Under a disparate treatment claim, intent to discriminate must be evidenced, which is satisfied where the policy of the employer facially discriminates based on sex. The plaintiff will have satisfied a prima facie case if the employer facially discriminates against a protected class, such as females, in favor of males, and the policy of the employer evidences this discrimination. Sex discrimination may be inferred when a policy is based on a characteristic particular to women.
Here, Store employs 5,000 employees, so Title VII applies. Nina applied for a position within the company that paid substantially more salary than her current position. Nina did not receive the position solely because the employer adopted a policy banning all women of childbearing age from being hired for the position unless they produced a certificate of infertility, but permitted all males to receive the job. The policy of the employer facially discriminated against Nina solely because of her female status. Therefore, she is very likely to succeed on her claim.

4. Store can support its policy by claiming that it derives from a bona fide occupational qualification (BFOQ), but it will likely be unsuccessful.

A defense to disparate treatment based on a facially discriminatory policy is that the employer's policy was a BFOQ. In order to be a BFOQ, the employer must show that the policy was reasonably necessary for the business, and that the protected class is merely a proxy for qualification. In order to show the later, the employer can show that the protected class would be unable to perform the duties of the job due to this qualification or that this qualification or trait would prevent substantially all or all of the employees in this class from performing the job efficiently or safely.

The Store will state that the protected class was a proxy to not hire women of childbearing age without a certificate of infertility, because women could not safely perform the duties of their jobs in this working environment. Because they will be near industrial farm equipment and chemicals, this would not be safe for them to do the duties of their jobs. Nonetheless, this BFOQ defense will be unsuccessful. First, the BFOQ must relate to the inability of women to perform the duties of the job, and there is no evidence that women were unable to perform the duties of the positions being sought because of their sex. Thus, this defense will likely fail.
Question No. 5: Sample Answer

1. Peter will not be successful in his suit for breach of contract because WBAR materially changed its position in reliance on Peter's anticipatory repudiation, extinguishing Peter's ability to retract the anticipatory repudiation.

When two parties enter into a contract, and one party anticipatorily repudiates, the other party may treat the anticipatory repudiation as an immediate breach. Anticipatory repudiation involves unequivocal words or conduct by a party that he does not intend to perform under the contract. Actions or words that a reasonable person in the position of the non-breaching party would consider to be an unambiguous intention not to perform will suffice. The breaching party need not directly tell the non-breaching party that he is repudiating the contract; any conduct that evidences an unambiguous intent to refuse to perform under the contract will suffice. However, mere expressions of doubt as to the ability to perform will not suffice. The repudiating party may retract the repudiation if the time for performance has not yet arrived, but only if the non-breaching party has not detrimentally relied on the anticipatory repudiation.

A radio station, WBAR, "recently had signed Peter to a new three year contract to continue his daily radio talk show," so WBAR and Peter had a valid contract, and both parties were under an obligation to perform under the contract. Several days after visiting Cable's headquarters in Los Angeles, "Cable posted an announcement on its website that Peter had signed a contract to host a nationally broadcast talk show in Los Angeles for Cable." The announcement included a video of Peter stating "While I hate to leave WBAR and my loyal fans in Smallville, Cable's offer to host a show in LA is simply one that I couldn't refuse!" Peter's signing of the contract with Cable, as well as the video of Peter stating that he was leaving WBAR to join Cable, evidences an unambiguous intention on Peter's part that he will not perform his obligations under his contract with WBAR. It is immaterial that Peter did not directly tell WBAR that he was repudiating the contract. The signing of the contract and the video constituted conduct that a reasonable person would consider to be an unambiguous intention to refuse to perform under the contract.

When a non-breaching party learns of the breaching party's anticipatory repudiation, he may treat the contract as breached and obtain substitute performance. Upon learning that Peter was taking the job with Cable, "WBAR immediately hired another talk show host to replace Peter." In reliance on Peter's anticipatory repudiation, WBAR obtained substituted performance from another host. Although a party may revoke an anticipatory repudiation, he may not do so once the non-breaching party has materially changed his position in reliance on the repudiation. Therefore, Peter will not succeed on his suit for breach of contract.

2. Eli can sue Cable under the theory that he is a third party beneficiary and is entitled to payment for the equipment rented to Alicia.

A third party beneficiary is a third party to an existing contract who will receive some benefit or payment from the original promise. There are two types of intended beneficiaries. A donee beneficiary is one who is intended to receive a gift while a creditor beneficiary is one who
is entitled to receive a payment.

In the contract between Alicia and Cable, Cable agreed to pay for all expenses related to Alicia's production of voiceover ads. When Alicia rented sound equipment from Eli, Alicia informed Eli that Cable would directly pay him for the cost of the rental equipment. Cable was aware that it was to bear any of Alicia's direct costs related to the production of the ads and recognizing a right of payment to Eli reflects the parties intent in the contract. Therefore, because Cable was aware of the responsibility to pay Alicia's direct costs, Eli is an intended creditor beneficiary and is entitled to payment.

3. Whether or not WBAR could obtain a judgment against Peter and force a sale of Blackacre would depend on whether or not Peter and Alicia were tenants in common, joint tenants, or tenants by the entirety.

In Pennsylvania, there is a presumption that when a married couple receives property and the four unities are present, that they received the property as tenants by the entirety. The four unities are time (property must be conveyed to them both at the same time), title (must receive property in the same title), interest (must have an equal interest in the property), and possession (must have equal possession to the whole property). When these are met and the couple is married then there is the presumption. Evidence can be used to rebut the presumption and thus create a tenancy in common.

If property is held as tenants by the entirety, then neither party may sever this co-ownership without approval from the other party. Likewise, creditors cannot sever the title without approval and signature by both parties.

In this case, Peter and Alicia were married when they obtained the deed to Blackacre. Thus the unity of time and title are met because they received their interest at the same time and from the same title, the deed. The unity of interest and possession is presumed because they received the properties as grantees. They are married so they would likely be seen as tenants by the entirety, as there is no evidence to rebut this presumption.

Alicia quitclaimed Blackacre to Diane. Since she and Peter would likely be tenants by the entirety, this deed would not sever the unity and would be invalid since Peter did not consent. This means that the transfer to Diane would be invalid. This matters because it shows that WBAR may only obtain a judgment if the common interest as tenants by the entirety was severed. In this case it is likely that it was not severed and WBAR may not force a sale of Blackacre.

It is likely that Peter and Alicia hold Blackacre as tenants by the entirety, and that WBAR may not as a creditor force a sale without both of their interests in the property being subject to the creditor.

4. The National Audobon Society has legal title to Greenacre. Alicia's transfer of Greenacre to Will was valid, because the deed was validly delivered to Will. Will's handing the deed back to Alicia did not transfer title of Greenacre back to Alicia, because he handed her the
same deed he had been given and did not execute a new deed. Therefore, when Will died he was the legal owner of Greenacre, and it passed to the National Audobon Society when he died.

In order for the transfer of real property to be valid, the grantor of the land must deliver the deed to the grantee. The deed can be delivered in person, although personal delivery is not required. Delivery will be effective so long as the grantor manifests the clear intent to transfer the deed to the grantee, the grantee is given constructive possession over the deed, and the grantee accepts the deed. Alicia manifested the clear intent to transfer the deed of Greenacre to Will when she left it in a box on the table at Greenacre, and told him to open the box. Inside the box was the deed, which had been signed by Alicia and which named Will as the Grantee. Alicia's actions show the clear intent to transfer ownership of Greenacre to Will. Further, Alicia placed Will in constructive possession of the deed, because she placed the deed on the table at Greenacre, and then explicitly invited Will to use the property that weekend, knowing he would be the next person to come in contact with the box. Finally, Will accepted the deed when he opened the box, and texted Alicia back, stating it was a "wonderful surprise" and expressing his gratitude for the gift. The fact that Will did not record the deed is irrelevant to delivery of the deed.

Will did not transfer Greenacre back to Alicia when he handed her back the deed after learning of her separation from Peter. If a grantee hands back the deed that was executed on his behalf to the grantor after he has validly accepted the deed, giving the deed back does not transfer the deed back to the grantor. A new deed, naming the original grantee as the grantor, and naming the original grantor as the grantee is required, and must be validly delivered for the title of the property to revert back to the original grantor. Hence, Will did not validly transfer Greenacre back to Alicia when he gave her back her deed, and therefore the Audobon society now holds legal title to Greenacre, in accordance to Will's will.
1. If Newco is formed, Dr. Derm should be afforded preemptive rights. Preemptive rights protect a shareholder's interest from the dilutive effect of issuing additional shares of the corporation. A shareholder entitled to preemptive rights may elect, in the event of issuance of additional shares, to purchase an amount of additional shares that would maintain his current ownership interest in the post-issuance equity structure. For instance, if there are currently 10 shares of common stock outstanding, and Dr. Derm owns 30%, or 3 shares of common stock, and Newco is authorized to and does issue an additional 10 shares of common stock, then Dr. Derm will be entitled to purchase up to 3 of those additional shares to maintain his 30% equity interest in the company and avoid dilution. Preemptive rights should be established in the articles of incorporation of Newco.

2. MI Can Enforce the Oral Contract

The next issue is whether MI can enforce the oral contract for the hand shaped containers. Article II of the Pennsylvania Uniform Commercial Code governs sale of goods. Here, the contract was for the production of goods—the 2,000 hand containers. Therefore, the UCC applies.

The UCC statute of frauds requires contracts for the sale of goods over $500 to be in writing. There are certain exceptions to this requirement, including specially manufactured goods. When an oral contract for specially manufactured goods is made, it can be enforced, despite the statute of frauds if the manufacturer has completed a substantial portion of the goods and the goods cannot be sold in the normal course of the manufacturer's business. Here, the contract is worth $10,000 and thus is within the statute of frauds. However, these are specially manufactured goods and the oral contract may be enforceable. MI told Pam they had never made hand shaped containers before and informed her there was no market for these containers elsewhere. MI had already made half the containers when Pam attempted to cancel the contract. This would likely be considered a substantial portion of the order. Therefore, MI can enforce the oral contract for the specially manufactured goods.

3. Pam will have personal liability under this contract, because she is a promoter and there has not been a novation.

When a corporation has not yet been formed, a promoter is liable for all contracts made on behalf of the corporation. When a corporation expressly adopts the contract, the corporation, too, is liable. The promoter is liable until there is a novation that takes away the promoter's liability.

Pam is a promoter, because she is contracting on behalf of a corporation not yet formed, Newco. There has not been a novation which would release Pam from potential liabilities. Thus, if she breaches a contract as a promoter, she will be liable for it.
4. In a federal case, the conflict of laws rules that apply are the laws of the forum. Here, there is a federal diversity case because the plaintiff and defendant are from State X and Pennsylvania. Thus, Pennsylvania conflict of laws rules apply. Pennsylvania uses the interests approach, which combines the government interest analysis with the substantial relationship analysis. The government interest analysis identifies the policies and contacts within the forum to figure out which forum is interested. The court first looks to see if the two states would treat the issue differently. If so, the court looks to see if there is a true conflict. If there is a false conflict, the law of the interested forum applies. If there is a true conflict, the court will balance the contact factors to see which interests are implicated by the relationship to the states. Quality, not quantity, will determine which state has the most significant interests.

Here, Pennsylvania has the policy of allowing claims for negligence, breach of implied warranty and products liability. This policy could implicate the idea that Pennsylvania wants to redress more generously for injuries. State X on the other hand, limits these claims to just products liability. This could be to protect doctors from exercising professional judgment. Mary used the body cream which caused her burnt skin leaving permanent scars. She is from state X. Dr. Derm does not want all of these claims brought against him, and he is from Pennsylvania. This is not a false conflict; the interests directly oppose each other. Thus, we look to which interests have a substantial relationship to the state. Some considerations are the locations of the parties, where the injury occurred, and where the conduct causing the injury occurred. There is a strong showing towards State X, because this was a tort and the accident occurred in State X, where Mary used the cream and also, Mary is a resident of State X. There is also a strong showing for Pennsylvania because Dr. Derm is a doctor in Pennsylvania and likely saw Mary at his office in Pennsylvania where he gave her the cream.