

VIRGINIA BOARD OF BAR EXAMINERS

Norfolk, Virginia - February 24, 2004

Write your answers to Questions 6 and 7 in Answer Booklet D - (the **BLUE** booklet)

(6) On March 1, 2002, Paul purchased a new sports utility vehicle ("SUV") from Lexiconda Motors of Lexington, Virginia. The SUV was manufactured by Allied Industries. No express warranty was provided to Paul.

Beginning on April 1, 2002, Paul began experiencing problems including a loose gearshift lever, heater malfunctions, fast idling, excessive oil consumption, and overheating. These were all problems that he could not have reasonably discovered before he bought the SUV and which he reasonably expected the dealership could remedy. From the time of purchase until July 31, 2002, Paul had returned the SUV to the dealership at least five times. The dealership responded to all the complaints with efforts to repair the vehicle. Some problems were cured, while others recurred after temporary repairs. The overall effect was that defects and malfunctions persisted, he was deprived of the use of the SUV for significant periods of time, and he incurred rental expenses for a vehicle while the SUV was at the dealership undergoing repairs.

On August 1, 2002, after having driven the SUV 5,000 miles, Paul wrote to Lexiconda Motors demanding that Lexiconda Motors pick up the SUV and give him a full refund of the purchase price, along with interest and expenses incurred while the vehicle had been in the shop or, in the alternative, a replacement with a new, comparable SUV. Lexiconda Motors decided not to respond, waiting instead for Paul actually to tender his SUV back to the dealership.

While waiting for a response, Paul continued to drive the vehicle because he lacked any other means of transportation. Within a week after he began hearing a front-end noise in late August, Paul bought another vehicle and left the SUV parked in his driveway, intending not to use it until Lexiconda Motors came to pick it up. As of that time, he had driven the SUV an additional 2,000 miles.

Lexiconda Motors has not responded to Paul. He now wishes to file suit against Lexiconda Motors to revoke his acceptance of the sales contract and to obtain a refund of the purchase price. He also wishes to sue both Lexiconda Motors and Allied Industries for damages he incurred as a result of the defects in the SUV and punitive damages. **In your answer to the four subparts below, do NOT discuss the Virginia Motor Vehicle Warranty Enforcement Act ("Lemon Law").**

- (a) Under the Uniform Commercial Code (UCC), is Paul entitled to seek the alternative relief of revocation of the sales contract and compensatory damages in the same lawsuit? Explain fully.

- ✓(b) Under the UCC, as against Lexiconda Motors, is Paul entitled to revocation of the sales contract and a return of the purchase price? Explain fully.
- ✓(c) Under the UCC, as against Lexiconda Motors and Allied Industries, is Paul entitled to recover damages incurred as a result of the defects in the SUV and, if so, what is the measure of those damages? Explain fully.
- ✓(d) As against Lexiconda Motors and Allied Industries, is Paul entitled to recover punitive damages? Explain fully.

Reminder: Write your answer to the ABOVE question #6 in Booklet D - the BLUE Booklet.

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7. Abby was a graduate student at the University of Virginia in Charlottesville, Virginia. She planned to live in Charlottesville for the next two years while she completed her studies and then to return to Tennessee, which was her home and where she maintained her mailing address and voter registration.

Coffee Haven, a café on the university campus, is one of a chain of cafés owned and operated by Coffee Havens, Inc. (CHI), a Delaware corporation with its principal place of business in Tennessee.

On August 15, 2002, while Abby was having a cup of coffee at an outdoor table at Coffee Haven, the café's heavy overhead sign fell and struck Abby. She suffered severe head trauma, was hospitalized, and had to drop out of school for the semester.

On October 15, 2002, Abby filed a motion for judgment against CHI in the Circuit Court in Charlottesville alleging negligence and seeking damages in excess of \$100,000. Before her attorney could effect service of process on CHI, a local newspaper published an article about the incident and mentioned Abby's lawsuit.

On October 30, 2002, CHI's law department in Tennessee, having received the newspaper article, obtained a copy of the motion for judgment from the Circuit Court clerk's office in Charlottesville. On November 15, 2002, CHI was properly served with the notice of motion for judgment at its home office in Tennessee.

On December 15, 2002, CHI took the following steps to remove the case to the federal district court in Charlottesville: It filed a Notice of Removal in the federal district court, attaching a copy of the notice of motion for judgment and a short statement that removal was based on diversity grounds; it served the Notice of Removal and the attachments on Abby. CHI did nothing further to effect removal.

On January 14, 2003, Abby filed in the federal district court a motion to remand the case to state court on the grounds that (i) CHI's removal was procedurally flawed and (ii), in any event, the court lacked subject matter jurisdiction. The court denied Abby's motion on both

grounds.

On September 1, 2003, after a trial on the merits, the federal district court entered a judgment against CHI for \$100,000. On September 10, 2003, CHI properly filed a motion for a new trial. On October 10, the court properly denied the motion and entered its order of denial.

On October 20, 2003, CHI filed a Notice of Appeal with the federal district court clerk and paid all necessary fees. The clerk served the notice upon Abby. Abby filed a motion in the federal Court of Appeals for the Fourth Circuit to dismiss the appeal on the ground that it had not been timely filed.

- (a) Were the federal district court's rulings on *each* of the grounds of Abby's motion to remand correct? Explain fully.
- (b) How should the Court of Appeals rule on Abby's motion to dismiss the appeal? Explain fully.

**Reminder: Write your answer to the ABOVE question
#7 in Booklet D - the BLUE Booklet.**

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→→ Now SWITCH to the PURPLE Answer Booklet - Booklet E ←←

Write your answer to Questions 8 and 9 in Answer Booklet E - (the PURPLE booklet).

8. Dolly Lama lives in a residential subdivision in Fairfax County, Virginia. Abutting the rear of Dolly's lot is a wooded ten-acre undeveloped and unoccupied parcel owned by Ronny Church. River Bend Run, a fast-running, but non-navigable, creek in Fairfax County, runs along the far edge of Ronny's parcel. To get from Dolly's lot to the creek, one must walk across Ronny's parcel for about 150 yards.

Two years ago Dolly discovered that the creek is well-populated with bass and trout, and, since then she frequently crosses Ronny's property to fish in the creek.

Dolly is active in promoting activities for disabled children. She frequently invites groups of disabled youngsters to come to her home and to hike back through Ronny's beautiful woods to the creek, where they enjoy a few very wholesome and therapeutic hours. Dolly has received national acclaim for this, including a citation from the Virginia General Assembly commending Dolly's program and her important work in the public interest.

Ronny, who lives in an apartment in the City of Alexandria, Virginia, noticed that a small path has been worn from the rear of Dolly's lot across his ten acres to the creek. One weekend, he found Dolly fishing in the creek, confronted her about crossing his property without permission, and told her to stay off of his property. Dolly tried to explain to Ronny about the enjoyment that the disabled children derived from playing around and in the creek, but Ronny

was adamant that no one should go on his property. Dolly was equally adamant that she and her friends, the disabled children, would continue to cross the property on weekends to get to the creek, which Dolly says is a "public treasure." Despite Ronny's demand that Dolly identify the children by name, she refused to do so and she instructed the children not to speak to this "mean man."

Ronny filed a Bill of Complaint against Dolly and "unnamed children" in the Circuit Court of the City of Alexandria. In the suit Ronny seeks to recover damages against Dolly for crossing his land without permission and prays for immediate and permanent injunctive relief against Dolly and the unnamed children to prevent further incursions on his land.

Dolly filed a demurrer seeking dismissal of Ronny's suit on the grounds that (i) it is filed in the wrong court; (ii) it cannot proceed against unnamed persons; and (iii) it improperly joins legal and equitable claims.

The Court denied Dolly's demurrer on all grounds and entered a decree, transferring the case to the Circuit Court of Fairfax County.

Dolly then filed an answer in which she asserted the following defenses: (i) Ronny has suffered no appreciable damages; (ii) Ronny has an adequate remedy at law; and (iii) the interests in this case should be balanced in her favor.

- (a) Was the disposition of the Alexandria court on Dolly's demurrer correct on each ground? Explain fully.
- (b) Can Ronny present a *prima facie* case on each of the elements of each of his claims? Explain fully.
- (c) How should the court rule on each of Dolly's defenses? Explain fully.

**Reminder: Write your answer to the ABOVE question
#8 in Booklet E - the PURPLE Booklet.**

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9. Beginning at about 10:00 a.m. February 17, 2000, and continuing heavily throughout the day, a major winter storm arrived in the City of Norfolk, Virginia. The snow accumulated more rapidly on the ground, streets and bridges than it could be removed.

At about noon on February 17, Percy went to S & T Market, his local grocery store, to obtain food and other supplies. Although a store employee swept the snow off its walkways periodically, it kept accumulating rapidly. Percy slipped on the snow that had accumulated on the sidewalk in front of the store since the last sweeping and broke his ankle. As a result, Percy could not walk, so he was transported to the hospital by the City of Norfolk's paramedic rescue service.

En route to the hospital, the ambulance in which Percy was being transported was

broad-sided at an intersection by a car driven by Dallas. Dallas failed to stop because the traffic light at the intersection malfunctioned. Percy suffered a concussion and multiple contusions as a result of this collision.

While waiting in the hospital emergency room with Percy, the City's paramedic filled out a standard City accident report for his supervisor. Percy told the paramedic, "The only thing I want you to be sure to put in your report is that this whole situation would not have happened if I hadn't had to wait so long in line at City Hall to pay my gosh darned car tax. That's the only reason I didn't get to S & T before it started snowing."

Upon his release from the hospital on February 19, Percy visited his attorney, Lawyer, and told her he wanted to sue the City and S & T. At a civic club meeting on February 28, Lawyer saw the City's Fire and Paramedic Chief, told him about what had happened to Percy, and mentioned that Percy intended to sue the City. When he returned to his office later that day, the Fire Chief called the City Attorney, advised him of the conversation with Lawyer, and sent the City Attorney a copy of the accident report submitted earlier by his paramedic.

On December 1, 2000, Lawyer sent a letter to the City Attorney advising him of Percy's injury, the date of the injury, the location of the injury, and of Percy's allegation that the City was liable for the injuries he suffered in the collision. In January 2001, Lawyer filed an action for Percy against the City and the S & T Market. The motion for judgment alleged that the City was liable for Percy's injuries resulting from the collision because it had negligently maintained the traffic light. As against S & T, it alleged that S & T was liable for Percy's broken ankle because of S & T's negligence in keeping its walkways clear of snow as the storm began.

- (a) What defenses, if any, does the City have to Percy's claim? Explain fully.
- (b) What defenses, if any, does S & T Market have to Percy's claim? Explain fully.

**Reminder: Write your answer to the ABOVE question
#9 in Booklet E - the PURPLE Booklet.**

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***Proceed to the short answer questions in Booklet F - (the
GRAY Booklet).***

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→→ Now SWITCH to the YELLOW Answer Booklet - Booklet B ←←

Write your answer to Questions 3 and 4 in Answer Booklet ~~A~~^B - (the YELLOW booklet)

3. In 1990, Law and Barrister, both prominent criminal lawyers in Northern Virginia, formed a firm and practiced criminal law in Alexandria, Virginia. There was no written agreement between them, but they orally agreed that they would practice law together, pay expenses out of revenues, and share the profits 60% to Law and 40% to Barrister. In 1994, Law and Barrister invited one of their associates, Justice, to become an owner, and they realigned the ownership interests to be Law 55%, Barrister 35%, and Justice 10%.

In June 1999, at the suggestion of their accountants, to maximize certain tax benefits, they formed a Virginia professional corporation called Law, Barrister, & Justice P.C. ("LB&J P.C.") and issued stock as follows: Law 55%, Barrister 35%, and Justice 10%. LB&J P.C. was properly formed, the three shareholders sent notice to all their clients announcing the formation of the P.C., and did everything else formally necessary to maintain the corporation. Informally, however, among themselves, they continued to refer to themselves as "partners," to hold what they called "partnership meetings," and to describe Law as the "managing partner" in internal memos and documents, such as the firm's employee handbook.

In January 2000, Law, Barrister, and Justice each signed a document entitled "Shareholders' Agreement" in which, among other things, they agreed that in the event of a state or federal tax audit, they would share any liability for unpaid taxes equally. All this was done without calling meetings of either the board of directors or the shareholders of LB&J P.C., and no minutes were kept of the transaction.

For several years, Barrister and Justice had tried to convince Law that it was in the firm's best interest to expand into a general civil practice, but Law refused even to consider the possibility. In March 2001, Barrister and Justice left the firm and began practicing together in Virginia.

In April 2002, Law received three items. The first was a notice from the Internal Revenue Service addressed to LB&J P.C. advising that the firm's 2000 tax return was being audited and that it appeared that there would be substantial liability for unpaid taxes.

The second item was a timely filed motion for judgment seeking to recover damages from Law, Barrister, and Justice as individuals based on two counts of malpractice by Justice for (i) his failure to file a suit within the one-year statute of limitations for injuries a regular client sustained in May 1998 in a barroom brawl and (ii) his failure to file an appeal of the same client's forfeiture of his Rolls Royce automobile resulting from a 2000 arrest and conviction for drug distribution.

The third item was a letter from Barrister and Justice stating, "We hereby demand that LB&J P.C. be dissolved and that you make an accounting to the partners and distribute the assets." Law, believing it to be in his best interest not to act, refused.

- (a) Is the Shareholders' Agreement regarding liability for unpaid taxes enforceable? Explain fully.

→→ Now SWITCH to the TAN Answer Booklet - Booklet C ←←

Write your answer to Question 5 In Answer Booklet C - (the TAN booklet)

5. Tom and Jerry were partners in a real estate agency in Haysi, Virginia. Over the years, they had come to dislike each other intensely. Their initial partnership agreement had a buy-out provision that would allow either of them to buy out the interest of a deceased partner at a very favorable price.

Tom, who was trying to buy Jerry's interest now, became frustrated because Jerry refused to sell and decided to eliminate Jerry so Tom could exercise his buy-out rights. Early one morning, under cover of darkness, Tom placed a bomb under Jerry's car. He wired the bomb so it would explode when Jerry started the car. Upon reflection, Tom became concerned that he would be caught and convicted because the bomb could probably be traced to him, so he disarmed it and removed it. He decided instead to hire an assassin.

Tom contacted Skeeter, a professional killer, and offered to pay him \$15,000 to kill Jerry at noon the next day. Skeeter agreed to do it. Tom told Skeeter where Jerry would be at the appointed time and paid Skeeter \$5,000 up front, promising to pay the remaining \$10,000 upon completion of the job.

When Tom returned to his office, he was surprised to find that Jerry was willing to sell his half of the agency for a fraction of its value. Tom accepted Jerry's offer. He immediately contacted Skeeter and told him he had changed his mind. He told Skeeter to keep the \$5,000 but to call off the assassination. Without telling Tom, Skeeter decided to go forward with the assassination and to

blackmail Tom thereafter.

Skeeter murdered Jerry the next day. He has since disappeared and cannot be found.

Tom has been charged with (a) attempted murder and (b) conspiracy to commit murder. The Commonwealth's Attorney is confident she can prove the foregoing facts.

What elements of each of the crimes with which Tom has been charged must the Commonwealth prove, what defenses can Tom reasonably assert, and what is the likely outcome on each charge? Explain fully.

Reminder: Write your answer to the ABOVE question #5 in Booklet C - the TAN Booklet.

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ATM — took a substantial step ~~that~~ toward comm. of offense w/intent to kill. He did, when he planted bomb. Fact that he charged his mind does not matter.

Consp. Agreement w/another coupled w/an overt act (don't remember whether Va. requires overt act). Would not matter, because parent of down parent would qualify. Issue is renunciation — can one "renounce" and avoid liab for consp.? Don't know Va. law. I think Calif. rule allow for renunciation.

~~may also involve issue of whether since he is not charged w/murder, cannot be~~