

VIRGINIA BOARD OF BAR EXAMINERS

Norfolk, Virginia – February 27, 2007

You MUST write your answers to Questions 6 and 7 in BLUE Answer Booklet D

6. A local supermarket chain (Super Market) contracted with a Virginia broccoli farmer (Farmer) for delivery of 5 trailer loads of fresh broccoli on or before August 30, 2006. Farmer agreed to pay damages to Super Market in the amount of \$5,000 per day if Farmer negligently caused any delay in delivery.

The broccoli was delivered 4 days late, after having been first delivered to the wrong warehouse. Super Market sued Farmer in the appropriate Circuit Court for the delay damages. Farmer claimed the delay was caused by Super Market's failure to notify Farmer that it had moved the location of its produce warehouse last year.

At trial on September 1, 2006, the Circuit Court granted summary judgment in favor of Farmer. Judgment for Farmer was based on Super Market's failure to offer evidence that Farmer was negligent in its late delivery of the broccoli.

On September 30, 2006, Super Market filed a motion for a new trial, which the trial judge immediately denied.

On October 30, 2006, Super Market filed with the clerk of the trial court a notice of appeal from the trial court's award of summary judgment and mailed a copy to Farmer's attorney.

The Supreme Court of Virginia granted Super Market's petition for appeal. Then, Super Market posted an appeal bond with the Clerk of the Supreme Court in the amount of \$250 rather than the \$500 required by Virginia Code Section 8.01-676.1.

The Clerk of the Supreme Court certified the granting of the petition for appeal on January 4, 2007.

On February 1, 2007, counsel for Farmer, filed a motion in the Supreme Court to dismiss the appeal on two grounds:

- First, that Super Market's notice of appeal was improperly filed; and
- Second, noting for the first time the insufficiency of the amount of the bond, that the appeal bond was defective.

(a) Did the trial court rule correctly on Super Market's motion for a new trial? Explain fully.

(b) How should the Supreme Court rule on each of the grounds assigned in support of Farmer's motion to dismiss the appeal? Explain fully.

Reminder: You MUST answer Question #6 above in Blue Booklet D

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7. Ed Kerrigan, a Virginia resident, was employed by Gizmo, Inc. (Gizmo) as a sales agent to call upon government agencies located in the Northern Virginia sales district. Gizmo, a Delaware corporation with its principal place of business in Charlotte, North Carolina, is engaged in the business of developing computer software programs. Under Ed's employment agreement, he was to be paid commissions calculated at 5% for sales of original software programs and 1% for repeat sales to existing customers.

Ed resigned from Gizmo on November 1, 2006, and on November 15, 2006, he sent a letter to Gizmo demanding payment in the amount of \$2,500 for unused vacation time and for commissions based on the 5% calculation on three distinct sales transactions: \$50,000 for a sale to the Department of Agriculture; \$50,000 for a sale to the Central Intelligence Agency (CIA); and \$50,000 for a sale to the Federal Bureau of Investigation (FBI).

Gizmo responded to Ed's demands by letter dated December 5, 2006. At the top of Gizmo's letter was the following statement: "Please find enclosed 2 checks: one in the amount of \$2,500 representing payment for the vacation pay due you, and the other in the amount of \$10,000, which represents your 1% commission for the repeat sale to the Department of Agriculture, which is an existing customer of Gizmo. This is all you are entitled to. We are not including any payment relating to your claims for sales to the CIA and FBI. Such claims are invalid inasmuch as you did not complete those sales."

When Gizmo's letter arrived at Ed's home on December 7th, Ed was out of town. Without talking to Ed about it, his wife simply deposited the two checks in their joint checking account, as she had done before with some of Ed's commission checks. She neither read the letter nor knew anything about Ed's demands in connection with these particular sales commissions. The checks cleared the bank, and the funds were thereafter spent by Ed and his wife in the ordinary course. Ed did not see the letter from Gizmo until he got back home.

Ed now wishes to file suit for breach of contract against Gizmo in U.S. District Court in Virginia. He wants to assert rights to recover on three claims: (i) \$40,000 in unpaid commissions on the Department of Agriculture sale; (ii) \$50,000 on the CIA sale; and (iii) \$50,000 on the FBI sale.

Ed consults you, a newly admitted member of the Virginia State Bar, and asks for your advice on the following questions:

- (a) **Would the U.S. District Court in Virginia have jurisdiction to consider such a lawsuit, and, if so, on what basis? Explain fully.**
- (b) **If the U.S. District Court in Virginia entertains the lawsuit, what state's law would it apply? Explain fully.**
- (c) **Does the fact that the \$10,000 check was deposited and used by Ed and his wife furnish Gizmo with any defense against any or all of Ed's three claims, and how would the court rule on that defense? Explain fully.**
- (d) **Is there any curative step Ed could take as of today, February 27, 2007, to attempt to preempt Gizmo's affirmative defense, and, if he took such a step, would he succeed? Explain fully.**

Reminder: You MUST answer Question #7 above in Blue Booklet D

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→→ Now MOVE to PURPLE Answer Booklet E ←←

You MUST write your answers to Questions 8 and 9 in PURPLE Answer Booklet E

8. Maggie, a widow in Russell County, Virginia, typed and validly executed a will in 1995. In the will, she made the following testamentary dispositions. Maggie's will did not contain a residuary clause.

First: I give and devise to my son, Stanley, all my real estate, which consists of the "Blue Grass Farm" in Russell County, Virginia, near the Scott County line.

Second: I give and bequeath to my daughter, Delia, for her lifetime the income from the Washington County Shopping Mall, which I own, provided that she not marry Jethro Tubbs, for whom I have a great dislike.

Third: I give and bequeath to Alan, my equestrian partner, \$1,000 per year for the care and feeding of my favorite riding horse, Equus, so long as Equus shall survive.

Fourth: I give and bequeath \$100,000 to my dear companion, Rhoda, who so lovingly cared for me in my later years.

Alan died in 2004. Rhoda died in 2005, leaving a will in which she gave her entire estate to her son, Ernest.

Maggie died in 2006 survived by her son, Stanley and, her daughter, Delia. Within weeks after Maggie's death, Delia married Jethro Tubbs.

Equus, the horse, which can reasonably be expected to live another 10 years, is boarded at the stables of the Russell County Equestrian Society ("Society").

At the time of her death, Maggie owned the 500-acre "Blue Grass Farm" in Russell County and 100 acres, which are contiguous to the 500 Russell County acres, in the adjoining Scott County. The Russell County acreage, which had been in the family for 40 years, was the land that was actually planted with crops and farmed. The acreage in Scott County, which Maggie had acquired by inheritance from her brother in 1997, was used for grazing cattle and was where the farm manager resided. At Maggie's direction, the manager operated the entire 600 acres as a single unit.

The other assets in Maggie's estate consisted of a portfolio of securities and cash equivalents with well over \$1,000,000 and the Washington County Shopping Mall ("Mall"). Maggie's deceased husband, who bequeathed the Mall to her at his death in 1985, had expressed in his will the hope that Maggie would keep the Mall and, upon her death, leave it to Stanley and Delia in equal shares.

The evidence of how Maggie acquired and operated the 100 acres in Scott County and how she acquired the Mall was introduced and the following claims were presented in the probate proceedings:

1. Stanley claims that, under Paragraph First of the will, that he is entitled to the Blue Grass Farm, which encompasses the entire 600 acres;
2. Stanley claims that, under Paragraph First of the will, he is entitled to the Washington County Shopping Mall;
3. Stanley claims that, because Delia married Jethro Tubbs, she is not entitled to the income from the Mall;
4. Alan's employer, the Russell County Equestrian Society, has expressed willingness to care for Equus and claims the right to receive the \$1,000 per year bequeathed by Maggie; and
5. Ernest claims the right to receive the bequest of \$100,000 left to Rhoda.

(a) How should the court rule on each of the foregoing enumerated claims? Explain fully.

(b) How should Maggie's estate be distributed? Explain fully.

Reminder: You MUST answer Question #8 above in PURPLE Booklet E

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9. Shelly Smith was the sole owner of Smith's Support Service, a Norfolk, Virginia sole proprietorship, which provided litigation support services for lawyers. She employed seven employees, one of whom, Alvin Adcock, was the bookkeeper. While Smith was away from the office for a week managing the extensive documentary evidence in a case being tried in Wytheville, Virginia, Adcock made the following arrangements without Smith's knowledge or approval.

Believing employee morale would be boosted by providing morning coffee, Adcock arranged for Empire Coffee Co. to deliver two urns of fresh hot coffee to the office each morning. One urn contained Empire's "house blend" and the other contained "hazelnut." Each urn was emblazoned with the Empire Coffee Co. logo, and this logo also appeared prominently on the paper coffee cups Empire delivered each day. The coffee was a big hit with all the employees.

When Adcock found out that the receptionist, Rachel, needed money to cover an unexpected medical expense, he advanced her \$500 from petty cash. Rachel agreed to repay the loan at \$50 each week.

Tired of walking around cartons of documents that were lining the hallways of the office awaiting the resolution of a large case on which Smith was working, Adcock signed a six month lease with Lawrence Landlord for temporary storage space in the basement of the building where Smith's Support Service's office was located. The term of the written lease, which Landlord also signed, was scheduled to begin in 30 days.

For the first three weeks after Smith returned to the office from Wytheville, without asking who was paying for it, she regularly drank the coffee delivered each morning by Empire. She once commented to Empire's delivery person that she especially enjoyed the hazelnut as a change of pace. However, when Empire's invoice arrived at the end of the month, Smith refused to pay it, saying she had never authorized Adcock to order the coffee service.

On Friday of each of the first three weeks after Smith's return, Rachel handed Smith a check for \$50, each time telling her how grateful she was that Adcock had loaned her the much-needed \$500. Smith smiled, accepted each check, and deposited it in the petty cash account. When Rachel attempted to deliver the fourth \$50 check, Smith told her that Adcock had no authority to loan her the money or agree to installment payments, and she demanded that Rachel immediately repay the remaining balance in full.

Ten days before the lease for the storage space was to commence, Landlord delivered to Smith a handwritten note telling Smith that he had learned that Adcock had no authority to enter into the lease and that, in any event, the basement space was no longer available. Smith immediately took the note to Adcock and demanded an explanation. When Adcock showed her the written lease, Smith agreed that it was a good deal and something the business needed. Smith promptly wrote, signed, and delivered to Landlord a letter stating that Smith expected Landlord to honor the terms of the lease. Landlord refused.

All parties agree that, when Adcock took it upon himself to make these arrangements, he had no actual, apparent, ostensible, implied, or inherent authority to act as Smith's agent.

- (a) **Is Smith contractually bound by the arrangement Adcock made with Empire Coffee Co.? Explain fully.**
- (b) **Is Smith contractually bound by the arrangement Adcock made with Rachel the receptionist? Explain fully.**
- (c) **Is Landlord bound by the storage lease signed by Adcock? Explain fully.**

Reminder: You MUST answer Question #9 above in PURPLE Booklet E

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