Summary of suggested answers & annotations to the essay part of the February 2016 Virginia Bar Exam. Prepared by William H. Shaw, III & J. R. Zepkin of William & Mary Law School, David Frisch & Emmeline P. Reeves of University of Richmond Law School, Benjamin V. Madison III of Regent University Law School & C. Reid Flinn who is on the adjunct faculty of William & Mary Law School, George Mason University Law School, Washington & Lee Law School and University of Richmond Law School.

✖✖ After each bar exam, representatives from some of the law schools in Virginia collaborate to prepare suggested answers which we think should be acceptable to the Virginia Board of Bar Examiners. These answers also include cites to some of the case and statutory law for reference even though the VBBE may not expect such specificity in applicants' answers on the exam. jrz

1. [Va. Civil Procedure] Farm 99 is a California corporation with its headquarters located in Carlsbad, California. In early 2013, Farm 99 expanded into Virginia and opened grocery stores in the City of Roanoke and the city of Newport News. Farm 99 registered with the Virginia State Corporation Commission as a foreign corporation and appointed Lauren, an attorney in the City of Richmond, to serve as its registered agent.

On December 26, 2013, Ashley, a resident of Loudoun County, Virginia, was visiting her adult daughter in the City of Roanoke. While they were shopping at Farm 99, Ashley slipped and fell in the produce department and injured her back. Ross, the Farm 99 manager on duty at the time of Ashley's fall, gave her a copy of the incident report signed by him as the manager on duty. Ashley, a veterinarian, missed two months of work and incurred approximately $12,000 in medical bills for treatment of her back injury.

Ashley, proceeding *pro se*, filed a Complaint in the General District Court for Loudoun County on Monday, December 28, 2015, on a theory of negligence against Farm 99, seeking $25,000 in compensatory damages for personal injuries. Ashley's husband, Marvin, is a Loudoun County Deputy Sheriff. Marvin personally served the Summons and Complaint on the manager on duty, Ross, at Farm99's Roanoke store on January 22, 2016. The Loudoun County line is three hours away and is not contiguous to Roanoke. The Summons and Complaint indicate that the matter is scheduled for trial on March 30, 2016. Marvin timely filed the proper return of service with the clerk. Ross, the manager on duty, immediately forwarded the lawsuit papers to Farm 99's corporate headquarters.

Farm 99's general counsel, Elizabeth, has retained you as Virginia counsel to defend Farm 99 in the suit. Elizabeth asks you to address several procedural issues. What is your advice to Elizabeth on each of the following issues she has asked you to address?

(a) Was service of process on Ross in Roanoke properly done? Explain fully.

(b) Was the Complaint filed within the applicable statute of limitations? Explain fully.

(c) Can Farm 99 challenge venue and have the case transferred to another jurisdiction and, if so, where? Explain fully.

(d) In the event Ashley wins in General District Court and Farm 99 appeals, will Ashley's *ad damnum* be limited to $25,000? Explain fully.

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Comment: The facts indicate a complaint & summons were served, for a case in General District Court. While a plaintiff can prepare her own complaint, or notice of motion for judgment, in GDC, there is no summons used in GDC... Only the Circuit Court uses the "summons".

(a) Service in Roanoke was not proper.

(i) Ashley's husband, as a deputy sheriff, has authority to serve court process within his jurisdiction [Loudoun County] or any contiguous jurisdiction. However, Roanoke is not a contiguous jurisdiction. Va. Code §8.01-293, §8.01-295.

(ii) If you treat Ashley's husband as a civilian, while he was 18 and not a party, he was interested in the subject matter in controversy and this disqualifies him from serving the papers.

(iii) The manager on duty is not a person listed in Va. Code §8.01-301 as appropriate for the process to be served on,. An officer, director or registered agent are the persons listed as to be served.

However, the facts are that the manager on duty, who was served, forwarded the papers to Farm 99's corporate headquarters. The facts do not disclose if any of the proper parties to receive service of process received it in time. If they did, Va. Code §8.01-288, the *curative statute* would cure the defects in service.

Frey v. Jefferson Homebuilders, Inc. 251 Va. 375, 1996 Va Lexis 26 [023/01/66] Record No. 950949. Va. Code §8.01-288 applies to receipt of process by the Registered Agent of a corporation.

(b) The filing was within the Statute of Limitations but barely.

The S/L for injury to the person of an adult is two years.

Facially, 12/26/15 would be the last day to file, since the day of the event [injury], 12/26/13, is not counted as the first day; 12/27/13 is counted as day one. Va. Code §1-210(A) December 26, 2015 fell on a Saturday and December 27th, 2015 fell on Sunday. Under Va. Code §1-210(B) Ashley had until the next work day when the courthouse was open, to file, and that day would have been Monday,12/28/15, the day of filing. The S/L had not run on the claim.

(c) Venue is not proper.

The venue statute, Va. Code §8.01-262 sets venue where the cause of action arose, Roanoke, or where the principal place of business is, perhaps, Roanoke, or where the registered office is located, Richmond.

Venue is improper in Loudoun County. Farm 99 should file a motion to transfer pursuant to Va. Code §8.01-264, for lack of venue in Loudoun. The motion to transfer should set forth why venue does not lie in Loudoun and where venue would be proper and in the GDC, must be filed on or before the return date. The GDC of Loudoun should transfer the case to either Roanoke or Richmond to be set for trial.

Venue can also be where "the defendant regularly conducts substantial business, which Farm 99 probably does in Newport News", but the facts to not suggest any practical nexus, as required under Va. Code ¶3 of §8.0-262.

(d) If Ashley wins, and Farm 99 appeals, Ashley's ad damnum will not be limited to $25,000.00?

Under Va. Code §16.1-114.1, when a defendant appeals, the Circuit Court is granted the discretion to permit the plaintiff to amend the complaint to seek an amount in excess of the dollar jurisdictional limit of the General District Court.

2. [Corporations] Jake and Ellwood, both Hampton, Virginia, residents, are electricians who duly formed Jake and Ellwood, Inc., ("J&E"), as a closely held Virginia corporation for the purpose of teaming up to bid on large electrical jobs. Each man paid $5,000 in cash for the corporation's stock. No other capital investment was made in the business.

To run the business, Jake and Ellwood brought in Sally to serve as president and treasurer of J&E. Sally owned no stock but was a member of the Board of Directors.

J&E was subsequently awarded a $100,000 contract to wire electricity in an office building in Hampton. The corporation subcontracted all the labor for the job to a third party. Sally ordered $60,000 worth of electrical supplies on open account from Electric Supply House, Ltd. ("Electric Supply"), a Newport News, Virginia, supply firm, and these supplies were properly invoiced to J&E. The supplies were used and the job completed.

Several months after the office building had been completed and after the time had passed in which a mechanic's lien could have been filed, an internal audit at Electric Supply revealed that it had never been paid for the electrical supplies sold to J&E. The president of Electric Supply contacted Sally to demand payment and was told the following facts:

1) Shortly after the completion of the office building, J&E was properly dissolved by majority vote of the Board of Directors at a properly called meeting at which Sally was present but did not vote or explicitly abstain from voting. The dissolution resolution had been duly approved by unanimous action of the stockholders.

2) The entire corporate assets, consisting of $25,000 cash, had been disbursed equally to Jake and Ellwood, the shareholders, at the time of dissolution.

3) All other corporate funds were previously used to meet ordinary operating expenses.

Electric Supply immediately filed suit against J&E, Jake, Ellwood, and Sally in the Hampton Circuit Court alleging J&E's failure to pay for the electrical supplies and that the distribution of J&E's assets to the shareholders violated Virginia law. Electric Supply obtained a judgment in the amount of $25,000 against J&E, Jake, Ellwood, and Sally, declaring that the distribution did violate Virginia law. Electric Supply now seeks to enforce the judgment against Jake, Ellwood, and Sally as individuals.

(a) Was the Court correct in ruling that the distribution violated Virginia law? Explain fully.

(b) What personal liability and for what amount, if any, do Jake, Ellwood, and Sally each have on the judgment? Explain fully.

(c) If Sally satisfies the judgment by paying Electric Supply from her personal assets, what rights, if any, does she have to recover from Jake and Ellwood? Explain fully.

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(a) Yes, the court was correct in ruling that the distribution violated Virginia law. Under the Virginia Stock Corporation Act (VSCA), upon dissolution of a corporation, the Board of Directors is required to pay creditors' claims before distributing assets to the shareholders. Here, J&E's remaining assets were distributed to shareholders Jake and Ellwood before the debt owed to Electric Supply was paid. Va. Code §13.1-746.3A

(b) Sally is personally liable for $25,000. The Virginia Code provides a procedure for resolving known claims against a dissolved corporation, and if the statutory procedure is followed, then directors are not liable for distributions to shareholders. Va. Code §13.1-746.3B The directors of J&E, however, did not follow the statutory procedure in this case. Additionally, the Virginia Code provides that a director who votes for or assents to a distribution that violates the Va. Code is liable to the corporation and its creditors for the amount of the improper distribution. Va. Code §13.1-692A As previously established, the $25,000 distribution to Jake and Ellwood violated the Va. Code because Electric Supply's claim was not paid and the Directors did not follow the statutory procedure for resolving claims at dissolution. Further, Sally will be personally liable because she assented to the dissolution and distribution. Under the Va. Code a director is deemed to assent to an action taken at a meeting if the director is present and fails to either dissent or abstain. Here, although Sally did not affirmatively vote in favor of the dissolution and distribution, she did not abstain or vote against the action, and thus, she assented.

The facts did not indicate whether Jake and Ellwood are also directors of J&E, but assuming that they are, they would each be liable for the full amount of the improper distribution, $25,000, for the same reasons that Sally would be personally liable. Note, however, that although Jake, Ellwood and Sally would be jointly and severally liable for the full $25,000, Electric Supply would only be able to recover a maximum of $25,000 total.

[*Alternatively*, assuming that Jake and Ellwood were shareholders only and that they were not directors, they would each be personally liable for the amount that they actually received, rather than the full amount of the improper distribution. Again, because the directors of J&E did not follow the procedure for disposing of known claims, Electric Supply could enforce its claim against shareholders personally up to the amount of corporate assets distributed to the individual shareholder. Here, Jake and Ellwood each received $12,500 and Electric Supply could recover that amount from each of them. Va. Code §13.1-746.1D]

(c) If Sally satisfies the judgment by paying Electric Supply from her personal assets, she will have a claim for contribution from the other directors. Thus, again assuming that Jake and Ellwood were directors, she would have a contribution claim against each of them.

[*Assuming*, however, that Jake and Ellwood were not directors, Sally would have a claim for recoupment from Jake and Ellwood in the amount of $12,500 each. The Virginia Code permits a director who is liable to a creditor for an improper distribution to seek recoupment of the amount improperly distributed from the shareholders who received the distribution. Va. Code 13.1-692B2. Thus, Sally could recoup $12,500 each from Jake and Ellwood.]

3. [Domestic Relations] After finishing college, Harry landed a job in the zoning office of Chesapeake, Virginia. He enjoyed the work, especially the flexible schedule that permitted him to accept small projects for the construction company he formed while in college. Harry managed his finances well and soon purchased his own residence. Four years after finishing college, Harry reconnected with his college girlfriend, Wendy, who was just then completing dental school. Wendy joined a dental practice in Chesapeake, and they were married. Wendy and Harry moved into Harry's home, and from that point forward paid all of their household bills, including the mortgage payments, from their joint bank account. In 2001, their first child, a son, was born, and in 2003 their second son was born. Both children have learning disabilities and attend a private school that is thirty miles from the home.

Harry and Wendy appeared to be doing well, but in 2010, Harry began smoking marijuana. Soon he was smoking several times a day. Wendy worried about the influence his habit would have on the children and feared the legal consequences of his marijuana use. Wendy began to talk to Harry about his habit and urged him to stop. He refused to discuss the matter except to say that he was not hurting anyone and that she should not worry about it. As Harry's use increased, Wendy became more persistent in confronting him, and in January 2011, she asked him to enter a treatment program. That suggestion enraged Harry; he shoved Wendy against the wall and stormed out of the house. Wendy then took the children and moved to her parents' residence. Shortly thereafter, Harry apologized for shoving Wendy and agreed to stop his marijuana use. After a seven-week separation, Wendy returned to the marital residence with the children. All appeared to be going well until Harry resumed smoking marijuana a year later. Once again, he refused to acknowledge that his smoking was a problem for the family and would not consider any type of treatment.

On June 1, 2014, Wendy again took the children and moved out. She rented an apartment near the children's school and moved there with them. At the time of their separation, Harry's total annual income from all sources was $175,000 and Wendy's was $425,000. Harry never missed a chance to see the children and he provided support for them pursuant to an informal agreement he and Wendy reached. The children enjoy spending time with Harry, and they often ask Wendy if they can spend more time with him.

Realizing that he may have lost his family, Harry finally decided to seek treatment. He entered a residential treatment facility in Maryland to address his addictive behavior and any associated psychological problems. After a two-month stay, Harry returned to his job. He no longer used marijuana and even stopped drinking alcoholic beverages. Harry continued to see his children at every possible opportunity.

Although Harry and Wendy continued to talk and meet from time to time, Wendy believed the marriage was totally broken. In July 2015, Wendy filed a complaint for divorce. She sought a divorce on several grounds: cruelty based on Harry's shoving incident in 2011, irreconcilable differences, and separation for over one year. She also asked for sole physical custody of the children, child support, spousal support, and an interest in the marital residence.

Even though he knew the marriage was over, Harry was surprised that Wendy had never talked to him about a divorce. He was especially concerned about her wanting sole physical custody of the children and spousal support, as well as the fault grounds upon which she sought the divorce.

You are a law clerk for the Circuit Court judge in Chesapeake who is assigned to this case. She asks you to prepare a bench memorandum addressing the legal merits of the following questions:

(a) Can Wendy obtain a divorce on each of the grounds she stated? Explain fully.

(b) Should the Court grant Wendy sole physical custody of the children or should the Court grant shared physical custody to Harry and Wendy? Explain fully.

(c) Should the Court grant either Wendy or Harry spousal support? Explain fully.

(d) Is Wendy entitled to any interest in the marital residence? Explain fully.

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(a) The Court should not grant Wendy a divorce upon the grounds of either cruelty or irreconcilable differences.

It is unlikely that the single battery upon Wendy would be sufficient to constitute cruelty even if generated by marijuana use. If the incident did constitute a ground, Wendy condoned the offense by resuming the marital relationship. Ordinarily the defense of condonation must be specifically pleaded. The defense is defeated if Harry, after the resumption of the marital relationship, commits the same or a different marital offense. In this case, Harry's resumption of marijuana use is not, without more, sufficient to vitiate his defense of condonation.

Irreconcilable differences is not a ground for divorce in Virginia. See Va. Code § 20-91.

Separation of the parties for one year or more without interruption and without any cohabitation may or may not be sufficient ground of divorce in this case. Va. Code § 20-91 (A)(9)(a). The physical separation of the parties must be accompanied by an intent of at least one of the parties that the separation be permanent i.e. with intent to terminate the marriage. A party may form the requisite intent after the initial physical separation but the intent must be coupled with at least one year of continuous, uninterrupted separation without cohabitation after the intent is formed and before the complaint for divorce is filed. Hooker v. Hooker, 215 Va. 415(1975). It is not clear when Wendy's intent to terminate the marriage was formed.

(b) Va. Code § 20-107.2 allows the Court to make custody and visitation determinations; in doing so the Court must consider the "best interests of a child" factors set forth in Va. Code § 20-124.3. Harry was active and important in the children's lives before the separation. There is no suggestion of child abuse. After the separation, although Wendy is the children's primary caretaker, Harry has made positive efforts to see the children and remain involved in their lives. There is no evidence that either parent discourages the relationship of the children with the other parent. Therefore, it is in the children's best interests that their parents share their physical custody.

(c) The Court shall consider the provisions of Va. Code § 20-107.1 in its determination of whether to award support, and if so, the nature, amount, and duration of the award. Neither party has committed a marital offense that likely would (adultery) or could (e.g. cruelty, desertion) bar a support award. However, neither party has physical or mental health issues that would warrant support. Each is gainfully employed. There is no need for special training or education. Harry earns less than Wendy, but he owns the marital residence. On these facts, the Court should not award support to either party because neither can show a need.

Wendy is entitled to an interest in the marital residence because the mortgage payments as well as household bills were paid by martial funds, i.e. the joint bank account, into which, presumably, both parties' incomes were deposited. The increase in value of Harry's separate property (residence) is marital property to the extent that marital funds (joint account) increased the value of the property. Va. Code § 20-107.3.

4. [Local Government] The Board of Supervisors of Prince William County, Virginia, is considering adopting an ordinance to authorize installation and operation of a video-monitoring system on the County's public school buses to create a video record of vehicles which illegally pass stopped school buses. Video monitoring is seen as a means of encouraging compliance with Virginia's traffic laws which, with certain exceptions, make it unlawful for a driver to pass a stopped school bus as it takes on or discharges students.

During the period leading up to the vote on the proposed ordinance, Board members exchanged emails only among themselves concerning technical and safety aspects of the measure. A reporter from a local newspaper has requested access to review and make copies of the emails.

Although passing a stopped school bus can lead to a charge of reckless driving, Va. Code § 46.2-844 (set out in pertinent part below) authorizes, in lieu of a reckless driving charge, the imposition of a civil penalty based on video from a school bus' video-monitoring system pursuant to a local ordinance:

> A. The driver of a motor vehicle approaching from any direction a clearly marked school bus which is stopped on any highway, private road or school driveway for the purpose of taking on or discharging children, the elderly, or mentally or physically handicapped persons, who, in violation of [law], fails to stop and remain stopped until all such persons are clear of the highway, private road or school driveway, is subject to a civil penalty of $250 and any prosecution shall be instituted and concluded in the same manner as prosecuted for traffic infractions …

> B. A locality may, by ordinance, authorize the school division of the locality to install and operate a video-monitoring system in or on the school buses operated by the division … for the purpose of recording violations of subsection A.
>
> Va. Code § 46.2-844.

The Code of Virginia provides that, unless otherwise stated, traffic infraction prosecutions are initiated by a summons, and that "a summons shall be executed by [a law enforcement officer] delivering a copy to the accused personally." Va. Code Ann. § 19.2-76.

Somewhat similar to the school bus statute is the "photo red" statute Va. Code §15.2-968.1, which enforces alleged traffic light violations, where the evidence is from video-monitoring. Va. Code §15.2-968.1, the "photo red" statute, provides an exception to the general rule requiring personal service by allowing the summons for this violation to be mailed:

> Notwithstanding the provisions of Va. Code §19.2-76, a summons for a violation of this section Va. Code §15.2-968.1 may be executed by mailing by first class mail a copy thereof to the owner, lessee, or renter of the vehicle.
>
> Va. Code § 15.2-968.1(G).

The chairman of the Board of Supervisors asks you, as the County Attorney, the following questions:

(a) Is it legally permissible and valid to provide an alleged "stopped school bus" violator with a summons solely by first class mail, requiring payment of a civil penalty, where the evidence is video from a school bus video-monitoring system? Explain fully.

(b) Is it legally permissible for the Prince William County Board of Supervisors to conduct its vote by electronic mail (that is, email) on the issue of whether or not to adopt the ordinance described in Va. Code §46.2-844(B)? Explain fully.

(c) Is the Board of Supervisors required by law to accept the request of the reporter to review and copy the emails prior to the Board's vote? Explain fully.

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(a) No. Applicants should recognize that Virginia localities operate under Dillon's Rule, which provides that Virginia localities may exercise only those powers which are expressly granted by charter or statute, necessarily implied, or essential.

Va. Code § 46.2-844 expressly authorizes the County to adopt a local ordinance imposing a civil penalty for passing a stopped school bus based on a school bus video-monitoring system. This Code section also provides that any prosecution shall be instituted and concluded in the same manner as prosecuted for traffic infractions. Under Va. Code § 19.2-76, unless otherwise stated, traffic infraction prosecutions are initiated by a summons, and "a summons shall be executed by [a law enforcement officer] delivering a copy to the accused personally."

A "somewhat similar" statute, Va. Code § 15.2-968.1 (the "photo red" statute), is for enforcing alleged traffic light violations based on video-monitoring evidence. Va. Code § 15.2-968.1 includes an express exception to the general rule requiring personal service by allowing the summons for this violation to be executed by first class mail to the owner, lessee, or renter of the vehicle.

Applicants should recognize that Dillon's Rule is a rule of strict statutory construction, so the locality may not exercise a power if any reasonable doubt exists as to whether the power has been conferred. The power to serve a summons on an alleged "stopped school bus" violator solely by first class mail is not expressly granted, necessarily implied, or essential, and thus does not apply to enforcement of Va. Code § 46.2-844. Therefore, unless there is other statutory authority, the County lacks legal authority to adopt this method of service.

(b) No. Applicants should recognize the applicability of the Virginia Freedom of Information Act ("VFOIA") Va. Code § 2.2-3700 *et seq*. and should recognize that VFOIA's purpose includes ensuring that, absent a statutory exception, meetings of public bodies conducting public business shall be open to the public.

Va. Code § 2.2-3710 prohibits transacting public business other than by votes at meetings: "Unless otherwise provided by law, no vote of any kind of the membership, or any part thereof, of any public body shall be taken to authorize the transaction of any public business, other than a vote taken at a meeting conducted in accordance with the provisions of this chapter. Unless expressly provided by this chapter, no public body shall vote by telephone or other electronic communication means."

Va. Code § 2.2-3707 and § 2.2-3708 further provide that no meeting shall be conducted through telephonic, video, electronic or other communication means where the members are not physically assembled to discuss or transact public business. Exceptions exist if the Governor has declared a state of emergency Va. Code 2.2-3708(G), or for a single member to participate electronically under certain conditions if a quorum of the public body is physically assembled Va. Code 2.2-3708.1.

None of those exceptions exists here; the facts simply state that Board members have communicated by email. Communicating electronically to ascertain a public body member's position is permissible under § 2.2-3710(B), provided the contact is done on a basis that does not constitute a "meeting." Also see Beck v. Shelton, 267 Va. 482, 593 S. E. 2d 195 (Va. 2004), holding that email communication was not a "meeting" because it lacked the simultaneity of communications such as chat rooms or instant messaging. It is therefore not legally permissible for the County to conduct its vote by email on the issue of adopting the proposed ordinance.

(c) Yes. Applicants should recognize that VFOIA provides a non-judicial mechanism for Virginia residents to obtain public records. Va. Code § 2.2-3704 provides that, "Except as otherwise specifically provided by law, all public records shall be open to inspection and copying by any citizens of the Commonwealth during the regular office hours of the custodian of such records. Access to such records shall not be denied to citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth."

Va. Code § 2.2-3701 defines "public records" as "all writings and recordings that consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostatting, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business."

Email by its nature is an "electronic writing or recording," and the facts specify that Board members exchanged emails only among themselves concerning technical and safety aspects of the measure prior to the vote on the proposed ordinance. These emails would therefore qualify as "public records in the transaction of public business." Also see Beck v. Shelton 267 Va. 482 [March 2004].

Assuming the reporter is a citizen of the Commonwealth or the "local" newspaper has circulation in the Commonwealth, and there is no applicable exemption, Va. Code § 2.2-3704 provides that the Board or its designated records custodian has 5 working days to make one of the permitted responses. Va. Code § 2.2-3705.2 includes exemptions for records relating to public safety, but none applies here. If the Board has a reasonable basis to do so, it may respond that it is not practically possible to provide the requested records or to determine whether they are available within 5 working days, in which case the records must be provided within an additional 7 working days.

The facts do not specify the date of the request or the Board meeting, so it is unclear whether the records must be provided prior to the Board's vote.

5. [UCC Article 2-Sales & Contracts] Joe Spork owned and operated "Joe Bread," a commercial bakery, which is famous for its artisan breads, located in Henrico County, Virginia. Early in 2014, Joe decided to change the packaging for his bread. He directed the plant manager to discuss possible alternatives with Ace Packaging, Inc.,("Ace"), his long-standing packaging supplier. Following these discussions and preliminary decisions about the materials and dimensions, the plant manager, on April 1, 2014, gave the Ace representative a verbal order, followed by a confirming email, for the new packaging with the condition that before proceeding to book the order and manufacture the materials, Ace was to submit packaging samples and the new "artwork" to the plant manager for approval.

During the same period, Joe was negotiating the sale of Joe Bread's assets to Owens Bakery, Inc.("Owens"). The asset purchase contract provided that Owens was not to assume or be responsible for any of Joe Bread's contracts involving more than $5,000 that might be in effect at closing. Joe Bread thereafter ceased to be an operating entity. On April 3, 2014, without notice to Ace, the asset sale of Joe Bread to Owens was closed. Joe Bread's plant manager was hired by Owens for the same position with the same responsibilities that he had held at Joe Bread's company.

On April 5, 2014, Ace sent the plant manager a written "Acknowledgment of Order" form with Ace's logo at the top and setting out specifications, delivery instructions, the order date, and the quantity for the new packaging materials. The space for "Price" on the form was left blank, and the following was typed in the "Comments" section: "Obtain customer approval of artwork before proceeding." The form also included the following provision: "Buyer waives all claims relating to goods unless received in writing by seller within thirty (30) days of receipt of goods."

On May 1, 2014, the Ace representative met with the plant manager to review samples of the new packaging and artwork. The manager told the representative to change the name on the wrapping to"Owens Bakery" and with that change to "proceed with the order." On May 14, Ace sent the plant manager samples of the trays and of the changed wrapping for testing on Owens' packaging machinery.

In June 2014, Ace shipped the full order of new packaging materials with an invoice for $18,000 to Owens. In September 2014, Owens, without prior notice, returned the packaging materials to Ace with a letter stating that they did not meet the size or quality specifications set forth in the Acknowledgment of Order form. Ace responded in writing that it would not accept the returned goods because the natural aging process of the materials had caused discoloration which substantially impaired the goods' value and because the wrapping bore Owens' unique artwork.

Ace filed a contract action against both Joe Bread and Owens for the $18,000 purchase price of the packaging materials. Owens defends on the grounds that (i) no enforceable contract was created between Owens and Ace, and, alternatively, (ii) that return of the goods relieved Owens of any obligation to Ace.

(a) Does Joe Bread have a valid defense against Ace on the contract claim? Explain fully.

(b) Is it likely that Owens can prevail on each of the defenses it has asserted against Ace? Explain fully.

NOTE: Do not discuss any possible cross-claims between defendants.

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The question is based on Flowers Baking Co. v. R-P Packaging, Inc., 229 Va. 370 (1985).

(a) Yes, Joe Bread does have a valid defense to Ace on the contract claim. Joe Bread was engaged in negotiations with Ace, but the parties did not form a contract. Joe's email confirming its order clearly provided that the order was conditioned upon submission of sample packaging and approval of the artwork by Joe's. There was no contract between the parties until this condition was met. It was not until May 1 - after Joe Bread was sold to Owens - that the buyer approved the artwork, the condition was met, and a contract was formed between the parties. Thus, Ace never had a contract with Joe Bread.

(b)(I) Owens will not prevail on its defense that no enforceable contract was formed with Ace. The issue is whether Ace has a statute of frauds defense. A contract for the sale of goods of $500 or more is within the statute of frauds and generally must be evidenced by a writing signed by the defendant to be enforceable. Va Code § 8.2-201(1) Here, there were some writings evidencing preliminary negotiations, but the contract was not entered into until the meeting on May 1 when then Owens manager approved the artwork and instructed Ace to "proceed." Thus, the contact was oral and there is no writing, signed by the defendant, that sufficiently evidences the contract. There are, however, two exceptions to the statute of frauds that apply on these facts.

First, an oral contract is enforceable to the extent that the goods have been received and accepted. Va Code § 8.2-201(3)(c) As discussed in part (b)(ii) below, Owens received and accepted the goods and thus the contract is not unenforceable based on the statute of frauds.

Second, there is an exception to the Art. 2 statute of frauds for specially manufactured goods. Va Code § 8.2-201(3)(a) An oral contract for the sale of goods is enforceable if the goods are specially ordered by the buyer, cannot be resold by the seller in the ordinary course of its business, and the seller has made a substantial beginning of performance. Here, the goods are clearly specially ordered and the seller will not be able to resell them. The wrapping was sized to fit the buyer's needs and it included the buyer's name. Also, the Ace has completed manufacture of all of the goods. Thus, the contract is enforceable against Owens.

(b)(ii) Owens also will not prevail on its defense that the return of the goods relieved Owens of any obligation to Ace. Owens did not timely or effectively reject or revoke acceptance of the goods. First, Ace will argue that the contract between the parties included the provision in its acknowledgment form requiring the buyer to assert any objections to the goods within 30 days of delivery. Owens did not raise any objections to the wrapping until approximately three months after delivery.

Ace will argue in the alternative that Owens has failed to timely reject or revoke acceptance under the default rules of Art. 2. A buyer accepts the goods if it fails reject them after a reasonable opportunity to inspect. Here, three months passed between delivery and the buyer's objection and a court would likely find that Owens had accepted the goods and, thus, could not reject. Additionally, Owens did not effectively revoke its acceptance. A buyer may revoke its acceptance if the nonconformity substantially impairs the value of the goods and the buyer has a reason for its delay in raising the objection (e.g. latent defect or reliance on seller's assurances of cure). It is unclear from the facts whether there was, in fact, a nonconformity of the goods - it is not clear whether Ace or Owens made the mistake as to the sizing, but in any event, Owens has no legitimate reason for the delay. The defect, if there was one, would be immediately apparent and there are no facts about Ace promising to cure. Furthermore, the buyer must revoke acceptance within a reasonable time of when it discovered or should have discovered the defect and before a substantial change in the goods. Again, Owens should have discovered the problem with the sizing immediately and three months is not a likely a reasonable time. Additionally, Ace alleges that a substantial change in the condition of the goods due to discoloration from the natural aging process. In short, Owens' defense based on returning the goods will fail.

6. [Va. Civil Procedure] Peter and Mary Jane Parker are retired and live in the sleepy town of Harmony, located in Wise County, Virginia, in a house that is situated on 200 acres of land. Because the Parkers' home is located at the northeastern corner of their large lot, the Parkers initially were unaware of the Superhero and Villain theme park under construction on the land owned by Eddie Electro ("Electro") adjacent to the far southwestern corner of their property. Located in that vicinity near the boundary of the Parker property and the Electro property is a grove of approximately 75 mature magnolia trees which are 50 to 70 years old.

The theme park, which will be open to the public, is set to open in 10 days, to coincide with the end of the public school year. The final phase of the construction project involves the creation of a permanent access road which is necessary for the theme park to open. The Parkers just discovered that Electro is planning to cut down the grove of magnolia trees to accommodate the access road, under the belief by Electro that he owns the land on which the grove stands. Electro has instructed his chainsaw crew to start cutting down the trees in three days to support the theme park's scheduled opening. The Parkers are adamant—based on a property survey conducted two years ago—that the trees in question are situated on their property.

Electro is not willing to delay cutting down the trees pending a resolution of the Parkers' claim of right. He asserts that any delay in opening the park to the public will require him to obtain an extension of his bank financing at a cost of about $30,000, in addition to any lost profits from the operation of the theme park.

The Parkers have come to you with a desperate plea to "save their magnificent magnolia trees." Based upon your experience dealing with such boundary disputes, you know that scheduling a trial on the merits will take at least six months based on the Wise County Circuit Court docket.

(a) Is there a remedy you could seek that would prevent Electro from cutting down the magnolias pending resolution of the dispute between the Parkers and Electro, and, if so, will you be able to establish the prerequisites for obtaining such relief? Explain fully.

(b) If the Court were to grant the relief sought, what further requirement would it likely order the Parkers to satisfy before the relief would become effective and why? Explain fully.

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(a) Yes, the remedy is to file an equitable claim in the Circuit Court of Wise County seeking a temporary injunction against Electro, enjoining Electro from proceeding with the cutting down the magnolia trees, pending a ruling over who owns the land on which the trees are situate. Va. Code §8.01-620

When ruling on the Parker's request for a temporary injunction, the trial judge should consider the following factors:

i. Would the temporary injunction preserve the status quo and avoid irreparable harm to the Parkers? Because they trees were mature trees, if cut, they could not be replaced and this made the argument strong for irreparable harm and preserving the status quo.

ii. Is there an adequate remedy at law? There is not. The trees being irreplaceable would prevent money damages from fairly compensating the Parkers, if it was later determined that they owned the land & trees. Also, there's a presumption that removal of trees that are part of realty [as opposed to not yet planted] results in irreparable harm.

iii. What's the likelihood of the plaintiff winning on the merits? The survey two years before suggests the plaintiff's had a likelihood of success on the merits.

iv. Does the court's balancing the equities of both sides, favor the plaintiff? Yes, because the court's declining to grant the temporary injunction would result in irreparable harm to the Parkers if the court ultimately decides that the Parkers own the land & if the court determines that the Parkers do not own the land, damages would adequately compensate Electro for damages & costs suffered due to the delay in getting started.

(b) If the court decides to grant the temporary injunction, prior to entering the order, the judge will require the Parkers to furnish a bond in sufficient amount to assure that if ultimately Electro wins, there will be assurance Electro can recover whatever damages & costs he suffered due to the granting of the temporary injunction. §8.01-631

7. [Wills] In 2001, Tom and Wanda, both residents of Virginia, married later in life. Tom had no children of his own. Wanda had an adult child named Sandra, who was born out of wedlock in a non-marital relationship between Wanda and another man that had ended in 1995.Tom never adopted Sandra nor did they ever live together in the same household. However, at social gatherings Tom repeatedly let it be known that he had feelings of affection for Sandra and that, "She is the daughter I never had."

In 2005, Tom executed a valid will leaving "all my property to my wife, Wanda and, if she predeceases me, to her children." When Wanda died in 2010, Tom's health began to decline, and he had be hospitalized from time to time for treatment. On one such occasion a few months before Tom's death, during a bedside visit by Sandra, a nurse was adjusting Tom's intravenous medication. Tom introduced Sandra to the nurse, saying, "She's my deceased wife's daughter and the daughter I wished I had. But it's never too late. I've left her everything in my will. I was looking for it just before I had to be brought here, but I can't remember where I put the darned thing. It's somewhere in the file cabinet at home where I keep my important papers or maybe in my safe deposit box at the bank. Anyway, it's all Sandra's when I go."

Tom died in 2015, survived by Sandra, his brother, Jack, and a niece, Melanie, who is the daughter of Tom's deceased sister. Although Sandra and Jack conducted a diligent search, no one has been able to find the original of the executed will since Tom's death. Sandra did, however, find a photocopy of the fully executed will in the file cabinet in Tom's house. The individuals who signed it as witnesses are dead.

Sandra filed a petition in the appropriate Circuit Court seeking to establish the photocopy as the will of Tom and asserting her claim to the entire estate. Jack opposed the action and filed across-petition seeking a declaration that Tom died intestate.

At the hearing, Sandra testified, relating the bedside remarks Tom had made in the presence of the nurse, and she called the nurse as a witness, who confirmed what Tom had said and that Tom appeared to be fully in command of his faculties. Sandra also called as witnesses two social acquaintances of Tom, who testified they often heard Tom express his feelings of affection for Sandra.

Jack, on the other hand, testified that he had paid Tom a visit at the hospital just before the visit Sandra testified about. During that visit, Jack said, while he and Tom were alone together in the room, Tom told him that he had torn up his 2005 will intending to draft a new one leaving everything to Jack and Melanie but never got around to it.

Sandra and Jack filed cross-motions to strike the other's evidence of the hospital conversations with Tom, each invoking the Virginia Dead Man's Statute.

(a) How should the Court rule on the cross-motions to strike the evidence? Explain fully.

(b) Is the evidence Sandra produced at the hearing sufficient to establish the photocopy as Tom's will, and, if she succeeds, can she inherit under the will? Explain fully.

(c) If Sandra does not succeed, to whom and in what proportions should Tom's estate be distributed? Explain fully.

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(a) Applicants should recognize that the distinction between Jack's motion and Sandra's motion turns on the statutory requirement for corroboration. Since Jack lacks corroboration, his motion would be denied. Sandra has corroborating testimony of the nurse and the two acquaintances, so on the basis of the Dead Man statute [Va. Code 8.01-397], her motion arguably would be granted.

(b) Probably yes, but it will depend on the relative weight accorded the conflicting evidence of Tom's intent.

Applicants should recognize that the general rule in Virginia is that a will which was in the possession of the decedent and which cannot be located at his death is presumed to have been destroyed by the decedent with the intent to revoke (*animo revocandi*).

Per Edmonds v. Edmonds ___ Va. _____, 2015 Va. Lexis 78 [2015], the presumption may be rebutted with clear and convincing evidence of general statements that the decedent made about his testamentary intent, if those statements confirm the dispositive scheme in the decedent's will.

If the finder of fact gives more weight to Sandra's testimony than to Jack's, this should be sufficient to overcome the presumption of revocation, in which case the photocopy could be established as Tom's will. Tom's statement to the nurse regarding his intent to leave his estate to Sandra was unambiguous, and the nurse (a trained medical observer) testified that Tom was in full command of his faculties. The two social acquaintances also testified that they had "often" heard Tom express his feelings of affection for Sandra. Given these facts, it is likely that Sandra can overcome the presumption.

As to whether Sandra can inherit under the will in the event that she succeeds in establishing the photocopy as Tom's will, note that "inheritance" is through intestate succession, not through a will. Our thinking is that an applicant should therefore receive credit for making this distinction, in which case the answer to this part of the question is "no."

Assuming, however, that the word "inherit" is used generically (*i.e.*, "take"), then the answer is "yes." The unambiguous language of the will provided that Wanda's children would take if Wanda predeceased Tom. Wanda did predecease Tom, and the facts state that Sandra is Wanda's only child. The facts also stipulate that Tom's will was validly executed, obviating any discussion of Tom's testamentary intent or capacity or compliance with the statutory formalities for executing a will.

(c) Applicants should recognize that if Sandra does not succeed in establishing the photocopy as Tom's will, then the will is presumed revoked by the decedent with the intent to revoke. Since Tom did not execute another will, he therefore died intestate, and the intestate succession statute [64.2-200 to -202] applies.

Tom left no surviving spouse because he never remarried after Wanda died. Tom left no children or their descendants because Tom had no children of his own, and he did not adopt Sandra. Tom left no parents and their descendants because the facts state that Tom was survived by Sandra, his [Tom's] brother Jack, and his [Tom's] niece Melanie. Tom's estate therefore passes to his brothers and sisters and their descendants; on these facts, one-half to his brother Jack, and one-half to his niece Melanie, who takes in place of her deceased mother [Tom's sister].

8. [Criminal Law] While on routine traffic patrol, Officer Wilson observed a minor traffic accident on Main Street in Tazewell, Virginia. A car driven by Jerry failed to stop at a stoplight and collided with another vehicle. The drivers of the vehicles involved in the accident were not injured, but Jerry's vehicle was disabled by the collision and could not be driven off Main Street.

In order to issue Jerry a citation for his failure to stop at the traffic signal, Wilson asked Jerry for his driver's license, which Wilson ran through an electronic database of criminal records. The search of the database revealed that there was an active warrant for Jerry's arrest.

In light of this information, Wilson informed Jerry that he was under arrest and proceeded to pat Jerry down for weapons and search the contents of his pockets. Jerry told Wilson that he had a permit to carry a concealed weapon and that he had a handgun in a holster beneath his coat. Wilson seized the weapon.

Wilson then reached into a pocket of Jerry's coat and found an opaque bag, which he had to open in order to see its contents, and found four smaller, sealed clear baggies that each contained a white powdery substance and a piece of note paper on which was written "8 pm, corner 5th & B St." Based on his training and experience, Wilson believed that this

substance was cocaine. Subsequent laboratory analysis confirmed that the four smaller bags seized from Jerry's coat pocket each contained almost one gram of cocaine.

Wilson also found $1,515 in small bills and a cell phone in the front pocket of Jerry's pants. Wilson confiscated the money and searched through the digital contents of the cell phone. He read several text messages that Jerry had sent to various individuals that night informing them that he would meet them at various locations, including 5th and B St. at 8 p.m. He also found an image of Jerry snorting a substance that appeared to be cocaine from the surface of a large glass table.

Pursuant to the standard procedure of the Tazewell Police Department concerning stalled or disabled vehicles, Wilson arranged to have Jerry's car towed to the impound yard maintained by the department. Later that day, Wilson, in compliance with standard police department procedures, searched Jerry's car to make an inventory of its contents to prevent items from being lost and avoid accusations of theft by the police. In the back seat of the car, Wilson found digital scales covered with a white powder, and he seized them as evidence.

Jerry was charged with possession of cocaine with the intent to distribute it. Prior to his trial, he moved to suppress the opaque bag and its contents, the handgun, the cash, the cell phone and its contents, and the digital scales found in the car on the ground that these items of evidence were obtained in unlawful warrantless searches.

It is Jerry's intention at trial to assert the defense that the Commonwealth's admissible evidence will not support a conviction of possession with intent to distribute (as opposed to mere possession for personal use).

(a) How should the Court rule on the motion to suppress as to each item of evidence? Explain fully.

(b) Based on the admissible evidence, can the Commonwealth make a *prima facie* case that Jerry possessed the cocaine with the intent to distribute? Explain fully.

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(a) The Court should grant the motion to suppress with respect to the cell phone's contents, and overrule the motion with respect to the other seized items.

Wilson arrested Jerry lawfully and the lawful arrest is justification for Wilson's full search of Jerry incident to the arrest, even if the search was not only for Wilson's personal safety or evidence of the offense for which Jerry was arrested. United States v. Robinson, 414 U.S. 218 (1973). Wilson properly seized the handgun, the opaque bag and its contents, and the cash. However, although he could seize the cell phone, he could not search its contents without a search warrant, or had probable cause to search its contents without a warrant coupled with exigent circumstances. See Riley v. California, 134 S. Ct 2373 (2014); Rivera v. Commonwealth, 65 Va. App. 379 (2015). Wilson had neither.

The digital scales were lawfully seized from the vehicle pursuant to the police department's standard inventory of disabled or seized vehicles impounded by the department. South Dakota v. Opperman, 428 U.S. 364 (1976)

(b) The Commonwealth can make a *prima facie* case that Jerry possessed cocaine with intent to distribute. The police lawfully seized four separate baggies of cocaine, $1,515.00 in small bills, and digital scales, and possession of each indicates cocaine sale or distribution rather than personal use. To a lesser extent, but probative of sale or distribution, nevertheless, Jerry's handgun was seized from his person during the search.

9. [Federal Civil Pro & Conflict of Laws] Plumlee Brothers Insulation & Coatings Company ("PBIC"), a Virginia corporation with its executive offices in Tysons, Virginia, manufactures chemical roofing materials in its plant in Winchester, Virginia. PBIC sells materials to companies that install roofs. PBIC itself does not install the materials. The materials are, in fact, chemicals, which are sold in a liquid form that is sprayed onto the roof sub-base. The chemicals and their fumes can be hazardous during application, but after application the finished roofing product is harmless.

Ready Roofing, Inc. ("Ready"), a North Carolina corporation with its main office and property yard in Henderson, North Carolina, is in the business of installing and repairing roofing systems. Ready's president, its chief financial officer, and all other corporate officers, other than Ready's regional vice presidents, regularly work in and direct operations from the Henderson office.

In 2012, Ready signed an "Applicator Agreement" under which Ready agreed to use PBIC's products in its operations. In return, PBIC agreed to sell the chemicals as well as to provide brochures, samples, and application training videos to Ready. The Applicator Agreement, signed by the parties, states in pertinent part:

> The Applicator [Ready] shall be liable for the injury, disability, or death of workers and other persons resulting from Applicator's operations and Applicator shall defend, indemnify, and hold harmless PBIC from any liability, loss, expense, claim, or settlement arising from Applicator's acts or omissions, including any legal expenses incurred by PBIC with respect to such acts or omissions. . . . This Agreement shall be interpreted, construed, and governed by the laws of the Commonwealth of Virginia.

For larger jobs, Ready often has a "project office" located in a mobile trailer on the job site, which is the office of Ready's project superintendent and sometimes a regional vice president, whose duties are to assist with the administration of the project and to market Ready's services to prospective customers in the area of the project. Ready established such a project office in Petersburg, Virginia, as of January, 2016.

In 2015, pursuant to its contract with the City of Greenville, Ready installed a roofing system on the Greenville municipal complex in Greenville, South Carolina, using the materials supplied by PBIC. Alleging that they were injured by exposure to noxious fumes from chemicals, ten municipal employees who worked for entities housed in the Greenville complex during the application process sued Ready and PBIC in various South Carolina state court actions for a total of ten million dollars, alleging negligence by both PBIC and Ready. PBIC tendered the defense of the suits to Ready and asserted its right to indemnity under the Applicator Agreement. Ready refused the tender and denied any obligation to indemnify.

PBIC filed a declaratory judgment action in the U.S. District Court for the Eastern District of Virginia, contending that the Applicator Agreement requires Ready to defend and indemnify PBIC against any costs incurred as a result of the South Carolina litigation.

In defending the suit, Ready made the following assertions:

(a) The federal court lacks subject matter jurisdiction over this matter.

(b) The indemnity provision in the Applicator Agreement is unenforceable because, read literally, that provision purports to protect PBIC from injuries caused by its own negligence, and, under South Carolina law, which Ready cites correctly, a party may not contract against its own negligence.

(c) The indemnity provision violates Virginia Code §11-4.1, which provides in pertinent part:

> Any provision contained in any contract relating to the construction, alteration, repair or maintenance of a building, . . . or any provision contained in any contract relating to the construction of projects other than buildings by which the contractor performing such work purports to indemnify or hold harmless another party to the contract against liability for damage arising out of bodily injury to persons . . . suffered in the course of performance of the contract, caused by or resulting solely from the negligence of such other party or his agents or employees, is against public policy and is void and unenforceable.

How should the Court rule on each of Ready's assertions? Explain fully.

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(a) The court should reject this assertion because it does have subject matter jurisdiction. Plumlee Brothers Insulation and Coating Company ("PBIC") brought a declaratory judgment action in the U.S. District Court for the Eastern District of Virginia. Although the Federal Declaratory Judgment Act is a federal statute, it merely creates a remedy and thus cannot on its own serve as a basis for subject matter jurisdiction. Instead, the court must look to see whether there is a federal question in the underlying dispute or, as here, diversity of citizenship jurisdiction.

In determining whether the diversity of citizenship requirements are met, one analyzes whether there is complete diversity of citizenship and, if so, whether the amount in controversy requirement has been met. Complete diversity means that every plaintiff is a citizen of a state different from every defendant. The plaintiff and defendants here are corporations. Corporations have dual citizenship—in the state in which the corporation is incorporated and in the state of the corporation's principle place of business. Here, PBIC the plaintiff is incorporated and has its principal place of business in Virginia.

Ready Roofing, Inc. ("RRI"). RRI is incorporated in North Carolina. The facts mention that its "main office and property yard" is in Henderson, North Carolina. The facts later discuss how RRI "often has a 'project' office located in a mobile trailer." This office is in a trailer, for the project superintendent, and is designed to provide a place of that superintendent to assist with the administration of the project and to market the project in the region. RRI's office here is in Petersburg, Virginia. If the Petersburg office were the principal place of business of RRI, there would be a lack of complete diversity. However, the test applicants should identify is the fairly recent test

from the U.S. Supreme Court called the "nerve center test." Hertz Corp. V. Friend 559 U.S. 77, 82 (2010) That test identifies the principal place of business of a corporation as the location where the corporation's high level officers direct, control, and coordinate the corporation's activities. Here, that place would be in Henderson, North Carolina, not Petersburg, Virginia. A proper application of the nerve center test confirms that there is complete diversity of citizenship.

The other requirement for diversity jurisdiction is that the amount in controversy threshold derived from 28 U.S.C. § 1332 exceed $75,000 exclusive of interests and costs. In a declaratory judgment action, the federal court must consider the amount appearing to be the object of the litigation and, under the test stated in St. Paul Mercury Co. v. Red Cab Co. 303 U.S. 283, 288-90 (1938), it "must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal". Here, the claims brought against PBIC and RRI were $10 million by persons allegedly exposed to noxious fumes, and the dispute indemnification between PBIC and RRI was thus that amount. There, the amount in controversy requirement would clearly be met.

(b) A federal court sitting in diversity will apply the choice of law rules of the state in which it is sitting. Virginia's choice of law rules, like most, provide that if the parties choose the law to apply, then that will govern. Indeed, Virginia's UCC states in Va. Code § 8.1A-301(b) provides that "Except as otherwise provided in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or such other state or nation shall govern their rights and duties." The Applicator Agreement provides that this "Agreement shall be interpreted, construed, and governed by the laws of the Commonwealth of Virginia." The transaction clearly bears a reasonable relation to Virginia. Therefore, South Carolina would have no bearing on the enforceability of the Agreement because the parties chose Virginia law, not South Carolina law, to govern.

(c) Although Virginia law governs in this case, Va. Code § 11-4.1 is not applicable here because the indemnity provision is part of a sales contract for the sale of chemicals for roofing. They are not, however, a "contract relating to the construction, alternation, repair or maintenance of a building, . . . or any provision contained in any contract relating to the construction of projects. The U.S. Court of Appeals for the Fourth Circuit's decision *in Carpenter Insulation & Coatings Co. v. Statewide Sheet Metal & Roofing, Inc.*, 1991 U.S. App. LEXIS 14267 (1991) (unpublished opinion)—which was clearly the model for this Bar Exam Question, reached the identical ruling in holding that a sales contract for chemicals to apply to roofs was a sales contract and that the indemnity provision was not invalidated by Va. Code § 11-4.1 because the contract was not a construction contract. The court in Carpenter emphasized that the harms were not suffered in performance of the contract to support its interpretation that the contract was a sale contract, not a construction one. In addition, *RSC Equipment Rental, Inc., v. Cincinnati Insurance Co.*, 54 F. Supp. 3d 480 (W. D. Va. 2014) involved an agreement for rental of a forklift that the general contractor used in the construction of a Bojangles restaurant. The forklift driver was hit in the head as a result of the use of the forklift and sued RSC Equipment Rental. RSC sought indemnification under its rental agreement from the contractor, who tried to argue that Virginia Code § 11-4.1, invalidated the indemnification agreement. Relying on the Fourth Circuit's decision in *Carpenter*, the U.S. District Court for the Western District of Virginia held that Virginia Code § 11-4.1 did not apply. The agreement was a rental one, not a construction contract.