

NEW YORK STATE BAR EXAMINATION  
FEBRUARY 1999 QUESTIONS AND ANSWERS

Question-One

WireCo, a corporation which makes insulated copper wire, had for many years purchased all of its copper requirements from CopCo, a corporation engaged in the mining and refining of copper. In December 1997, WireCo informed CopCo that BadCo, another copper producer, had offered WireCo a fixed price for all of WireCo's needs for the next two years if it would buy copper exclusively from BadCo. CopCo then wrote to WireCo stating that if WireCo continued to purchase its copper from CopCo, the CopCo price would remain in effect for two years. WireCo replied that in view of CopCo's letter it had rejected the BadCo offer and would continue buying from CopCo.

In March 1998, WireCo complained to CopCo that a recent shipment of copper, unlike all prior shipments, contained impurities which required costly reprocessing. CopCo replied that it gave no warranties with its sale of copper, citing the standard language on the back of its purchase order and invoice forms, which stated, "While our copper is generally of good quality, we are not able to assure you that it will serve your purposes." The forms contained no other language relating to warranties. WireCo refused to pay for the shipment.

In April 1998, CopCo announced to WireCo a price increase of 20 percent. WireCo ordered additional copper at the "old" price, but CopCo rejected the order.

CopCo has commenced an action against WireCo to recover the purchase price of the March shipment. Upon ex parte application to the court, an order of attachment was granted based upon the allegation in CopCo's supporting affidavit that WireCo "has assigned, disposed of, encumbered or secreted property or removed it from the state or is about to do any such acts." Pursuant to the attachment order, the sheriff seized a portion of WireCo's copper inventory.

WireCo has (1) moved to vacate the order of attachment on the grounds that it was issued ex parte and that the affidavit in support of the order was insufficient.

WireCo has served an answer which includes a counterclaim for breach of implied warranty of merchantability, seeking damages for the cost of reprocessing the March 1998 shipment of copper. CopCo's reply to the counterclaim denies that there is an implied warranty and denies the cost of reprocessing alleged by WireCo. WireCo has (2) moved for summary judgment on its counterclaim for breach of warranty. CopCo opposes the motion on the ground that there was no implied warranty and that, even if the warranty counterclaim were valid, the dispute over the cost of reprocessing would preclude summary judgment.

WireCo has commenced a separate action against CopCo for breach of contract in refusing to accept orders for copper at the "old" price. CopCo has served an answer and (3) moved for summary judgment dismissing the complaint on the ground that its promise to maintain the same price for two years was without consideration because WireCo was not obliged to continue buying copper from CopCo.

How should motions (1), (2) and (3) be decided?

ANSWER TO QUESTION 1

Motion (1)

WireCo's motion to vacate the order of attachment (which CopCo obtained upon ex parte application to the court) on the grounds that the order was issued ex parte and that the affidavit submitted by CopCo in support of the order was insufficient should be granted. The issue is

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whether CopCo's affidavit satisfied the requirements for obtaining a "provisional remedy" in the form of an order of attachment. Under the CPLR (New York Practice statute), "attachment" is a type of provisional remedy. Provisional remedies are designed to protect the plaintiff's interests before trial that are or may be jeopardized by granting plaintiff a security to/in an ultimate enforcement of a potential judgment. Attachment, being such a remedy, grants plaintiff security to enforce a money judgment. To obtain an order for attachment under the CPLR, plaintiff must be seeking a money judgment ("damages") and also must satisfy one other requirement from a list of potential factors. One such requirement is if the defendant is threatening to (intending to) remove, conceal, or dispose of plaintiff's assets from the jurisdiction (New York State) to frustrate enforcement of a money judgment or to defraud creditors. In this case, the defendant, WireCo, obtained a shipment of copper from plaintiff, CopCo (the copper being CopCo's assets). WireCo thereafter refused to pay for the copper because it "contained impurities" and thus was like no other shipment that CopCo had sent to WireCo in the past. There are no material facts to suggest that WireCo intended to conceal, dispose, or remove CopCo's copper from New York State since WireCo made no such threat to CopCo. CopCo has the burden to prove that WireCo had the intent to conceal or dispose of the copper in light of CopCo's action seeking money damages. Here, WireCo simply refused to pay for the copper because it alleged a breach by CopCo for delivering defective goods under the U.C.C. (Article 2), these are goods that do not comply with contract requirements and thus result in breach. Thus, CopCo should not have been granted the order of attachment and the sheriff should not have seized WireCo's copper inventory.

With respect to getting the order of attachment by ex parte application, this is permitted under the CPLR. Once obtained ex parte, the plaintiff (CopCo) must serve a confirmation of the ex parte order upon defendant (WireCo). However, CopCo's affidavit was still insufficient to support such order and thus, WireCo's motion should be granted.

Motion (2)

WireCo's motion for summary judgment for breach of warranty by CopCo should be denied. The issue is whether WireCo should be granted summary judgment. Under the CPLR, summary judgment can be granted if there are no genuine issues of material fact (no triable issues) and as a matter of law, the moving party is entitled to judgment. The court will weigh the evidence in a light most favorable to the non-moving party. In this case, WireCo moved for summary judgment by alleging that CopCo breached the implied warranty of merchantability. Under the U.C.C. (Article 2), which governs contracts for the sales of goods, there exists an implied warranty of merchantability in all sales contracts for the sale of goods that the goods will be fit for the general purpose for which they were made. Here, WireCo alleged that CopCo shipped copper that "contained impurities which required costly reprocessing." This is a vague basis for summary judgment as a trier-of-fact would most likely have to determine the facts to show the "impurities" and whether they "required costly reprocessing." Thus, there is a triable issue here and summary judgment should not be granted in favor of WireCo.

As to "judgment as a matter of right" element of summary judgment, WireCo would be entitled to judgment because there is an implied warranty of merchantability in the contract between WireCo and CopCo. However, since there is a triable issue as to whether CopCo breached the warranty, WireCo cannot obtain summary judgment.

It should be noted that since CopCo opposed WireCo's motion on the ground that no implied warranty existed but failed to assert the ground that no breach occurred, WireCo may then obtain summary judgment because as stated above, an implied warranty of merchantability does exist in their contract.

Also, CopCo's contention that WireCo's motion for summary judgment should fail because of the dispute over cost of reprocessing would not be sufficient to overcome summary judgment if it

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does not raise a triable issue; and it very likely will not; that is, the court can grant summary judgment to WireCo on the liability issue and grant an "inquest" to decide the issue of damages, to the extent that CopCo's "cost of reprocessing" contention only involves damages, not a triable issue.

Motion (3)

CopCo's motion for summary judgment should be denied. Under the CPLR, there can be no triable issues of material fact and as a matter of law, moving party is entitled to judgment in order to obtain summary judgment. Here, CopCo argued that WireCo gave no consideration for CopCo's promise to keep the "same price" for two years. Consideration is defined as a bargained-for legal detriment where the offeror's promise induces the offeree's detriment and vice versa. Here, WireCo did give consideration in that it gave up the option to buy copper from any other party except for CopCo in exchange for CopCo's promise to maintain the price (Their agreement concerning this price arrangement was in writing and required under the U.C.C. if for \$500 or more). Thus, because there is a triable issue in that a trier-of-fact could possibly find that WireCo did give consideration, CopCo's motion must be denied.

ANSWER TO QUESTION 1

(1) The court should grant WireCo's motion to vacate the order of attachment. The issues are whether CopCo met the requirements for an order of attachment and whether an ex parte order should have been granted. An order of attachment is a provisional remedy available to a party who is seeking monetary damages where the defendant poses some security risk indicating that the claimant may not be able to recover any judgment. A party must demonstrate that such a security risk exists in showing, for example, that the defendant is a non-domiciliary of the state, that the defendant has threatened to remove its property from the state so as to frustrate the plaintiff's attempts to recover on the judgment.

In this case, CopCo failed to demonstrate sufficient need for an order of attachment. In its affidavit accompanying its application, CopCo merely made conclusory allegations regarding WireCo's likelihood of removing or disposing of the property. CopCo did not, as it should have, proffer any specific facts regarding the basis for such allegations and because there is no evidence that WireCo is actually planning to move property out of state for purposes of frustrating CopCo's judgment, the court should not have granted the application for writ of attachment. Moreover, CopCo failed to provide the required undertaking.

Indeed, there appears to be no genuine threat of WireCo's moving property out of state -- CopCo and WireCo have been doing business together for years and it would probably be an enormous effort for WireCo to move its entire operation out of state.

All of this also demonstrates why an ex parte order was inappropriate, particularly without an undertaking to indemnify WireCo for any losses it may suffer as a result of an erroneous attachment.

Application for orders of attachment may be made either by motion on notice (providing a return date of at least 8 days) or by ex parte application if exigent circumstances exist indicating that swift judicial action is necessary. If an ex parte order is granted, the applicant must follow up with a motion to confirm the order within 5 days (10 for a non-domiciliary) of the order.

CopCo failed to do so. CopCo also failed to show any exigent circumstances requiring an order to issue without first holding an adversarial hearing.

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(2) WireCo's motion for summary judgment as to the issue of the existence of an implied warranty of merchantability should be granted. As to the separate issues of whether CopCo breached the warranty and what damages resulted from the breach (if any), those are fact questions that should be left for the jury.

Summary judgment is appropriate as to any issue when the moving party has demonstrated that, in viewing the facts in the light most favorable to the non-moving party, no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law.

In this case, there is no genuine issue of fact precluding the conclusion that CopCo made an implied warranty of merchantability with respect to its copper. Copper, a moveable chattel removed from the ground prior to sale, is a "good" and the contract between CopCo and WireCo is therefore covered by the UCC. CopCo is a "merchant" dealing in goods of the kind that are the subject of the contract. Accordingly, to the extent the UCC imposes higher standards on merchants (and especially on those who deal in goods of the kind) CopCo will be subject to those stricter requirements.

As to all contracts in which a merchant dealing in goods of the kind sells those goods, the UCC imposes an implied warranty of merchantability that the goods are fit for their ordinary purpose. While it is possible to disclaim such a warranty, a merchant must do so expressly and it must be conspicuously noted on the writing.

In this case, there is no factual dispute regarding the fact that CopCo is a merchant and that an implied warranty of merchantability arose. The only issue could be that CopCo disclaimed the warranty by its notation on the back of its contract. This notation however, is far from express and does not purport to disclaim the implied warranty of merchantability, but instead purports to disclaim a different warranty under the UCC, the implied warranty of fitness for a particular purpose. ("We are not able to assure you that it will serve your purposes.") Thus, the implied warranty of merchantability arose as a matter of law.

While there is some factual issue regarding whether CopCo breached the implied warranty of merchantability by shipping copper with impurities (do ordinary users need impurity-free copper or is WireCo's use unique?), that issue can be saved for the jury.

Moreover, the fact that the issue of damages remains never precludes partial summary judgment. Even if the court were to decide that CopCo breached the implied warranty of merchantability as a matter of law, it could hold an inquest to ascertain the extent of WireCo's damages.

It should further be noted that WireCo was entitled to reject the defective shipment of copper because this is an installments contract and although the perfect tender rule does not apply, a buyer is entitled to reject a particular shipment if the goods are defective such that the value of that shipment is substantially impaired.

(3) CopCo's motion for summary judgment should be denied.

A motion for summary judgment may be filed after the defendant has filed its answer (neither party may file for summary judgment before the answer unless plaintiff is entitled to file for summary judgment in lieu of complaint -- plaintiff not seeking to recover on a negotiable instrument, so summary judgment in lieu of complaint is not applicable). As explained in the prior part, summary judgment is only proper if there is no genuine issue of material fact and that moving party is entitled to judgment as a matter of law.

In this case, CopCo alleges that there was no new contract between CopCo and WireCo because of lack of consideration. In New York consideration is defined as a bargained for exchange of

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legal detriment. The contract might not fail for consideration for the precise reasons set forth by CopCo -- WireCo had an opportunity to pursue another contract with BadCo and did not, which is sufficient for purposes of consideration.

CopCo's argument is that WireCo had a pre-existing duty to purchase its requirements from CopCo and therefore, in agreeing to continue to purchase its requirements it gave up nothing, it only did what it was obligated to do. We don't know whether CopCo and WireCo had a contract in writing that would have in fact obligated WireCo to continue purchasing its requirements from CopCo even if CopCo raised its prices. Arguably, WireCo would not have entered into such a contract given the risk that CopCo would raise its prices.

Indeed, the court could conclude, based on the facts before it, that WireCo is entitled to summary judgment in its favor even though WireCo did not move.

Question-Two

On November 10, 1998, Alan and Ben, who did not know each other, started drag racing on Maple Road, a two lane road in a suburban community. As Alan, driving at 60 miles per hour, attempted to pass Ben at a blind curve in the road, he struck and killed Vic, a pedestrian who was crossing the road. Alan remained at the scene. Ben, who did not see the collision, drove away.

Police arrived at the scene almost immediately. Jerry, a police officer, suspected that Alan was intoxicated. Jerry escorted Alan to the police station where he asked Alan to take a sobriety test, consisting of walking a straight line and standing on one leg. When Alan said "no" and refused to take the test, Jerry placed Alan under arrest and then gave Alan the Miranda warnings. Alan was thereafter indicted for driving while intoxicated and criminally negligent homicide.

About an hour after the incident, while investigating drug trafficking, Frank, an undercover police officer, saw Ben on a street corner, receiving what appeared to be drugs in exchange for money. Frank radioed Debra, another police officer, told her that he had observed what appeared to him to be a drug sale, and gave Debra a detailed description of Ben and his location. Debra, who had no personal knowledge of the drug sale, proceeded to the scene and arrested Ben for possession of illegal drugs. After giving Ben his Miranda warnings, and questioning him about his activities during the preceding hours, Ben stated that he had earlier been in a drag race on Maple Road. Thereafter, Ben was indicted for criminal possession of drugs and for the criminally negligent homicide of Vic.

Prior to the start of their trials, and based on the foregoing facts, Alan duly moved to dismiss his indictment for criminally negligent homicide, on the ground that his conduct did not constitute that crime. He also moved to suppress Jerry's testimony of Alan's stated refusal to take the sobriety test on the ground that he had not received the Miranda warnings prior to his refusal. The court (1) denied Alan's motion to dismiss his indictment for criminally negligent homicide, and (2) denied Alan's motion to suppress Jerry's testimony of Alan's refusal to take the sobriety test.

Ben then duly moved to dismiss the indictment against him for criminally negligent homicide, on the ground that he was not criminally liable for Alan's conduct, and to dismiss his indictment on the drug possession charge, on the ground that Debra's arrest of him lacked probable cause and was therefore illegal. The court (3) denied Ben's motion to dismiss his indictment for criminally negligent homicide, and (4) denied Ben's motion to dismiss his indictment on the drug possession charge. Thereafter, based on proof of the foregoing facts, Alan and Ben were tried and convicted of the charges against them.

Were the numbered rulings of the court correct?

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ANSWER TO QUESTION 2

The court's denial of Alan's motion to dismiss the criminally negligent homicide indictment was correct. The issue is whether there was "legally sufficient" evidence for a grand jury to find reasonable cause that Alan committed criminally negligent homicide.

A person is guilty of criminally negligent homicide when the person fails to perceive a substantial and unjustifiable risk and that failure is a gross deviation from the standard of care that a reasonable, prudent person take in similar circumstances and that conduct causes the death of another.

Here, Alan was driving 60 mph on a two-lane road in a suburban community. It is likely that other cars would be out on the road. Moreover, Alan passed Ben on a blind curve -- presumably Alan drove into the other lane where oncoming traffic would be. Also, since it was a suburban community, it is likely that there would be many pedestrians around on the streets, etc. The last element of the crime is also met by the fact Alan caused the death of Vic by striking him with Alan's vehicle.

The next issue is whether Alan's motion to suppress Jenny's testimony of Alan's refusal to take the sobriety test was proper.

The court's denial was proper. A person who is "custodially interrogated" must be first given the Miranda warnings in order for any statements to be admissible. The waiver by defendant also must be knowing, voluntary, and unambiguous. The defendant must be in "custody" -- i.e. a reasonable person would not feel free to leave and the police must be engaging in questioning on conduct that would likely elicit a response. Asking Alan to walk the straight line and stand on one leg does not constitute interrogation because Alan was not asked to give any communicative-type statements. The 5th Amendment's Miranda Protection only protects testimonial statements - - since the sobriety tests were not testimonial in nature, the failure to give Miranda warnings is no bar to admission of the evidence.

Also, there is no hearsay problem with Jenny's testimony because Alan's statement of "no" is not being offered for the truth of the matter asserted, it is merely being offered to show that Alan refused to take the test (A legally operative statement).

The court was correct in denying Ben's motion to dismiss the indictment for criminally negligent homicide.

Since Ben engaged in the same type of conduct that Alan did, he possessed the requisite mental state for criminal negligence. That is, because Ben engaged in the drag race at speeds of 60 mph in a suburban community, Ben failed to perceive a substantial unjustifiable risk of injury to others. Just because Ben's car did not strike Vic does not mean that Ben did not cause his death. Both Alan and Ben engaged in a joint enterprise of criminal activity and therefore each is liable for the consequences.

The court was correct in denying Ben's motion to dismiss. In New York, for a police officer to arrest an individual, the arrest must be founded upon probable cause. Probable cause means that the police officer, from the surrounding facts and circumstances, believes that there is a probability that a crime has been committed and that the defendant committed it.

Debra did have probable cause to arrest Ben because; 1) Frank observed what appeared to be an exchange of drugs (this is credible because presumably Frank, as an undercover cop, has a lot of

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experience observing such transactions.), 2) the information was transmitted to Debra immediately, and 3) Ben fit the description that Frank gave her and was in the same location as Frank told her. All these facts taken together gave Debra probable cause to arrest Ben.

ANSWER TO QUESTION 2

Ruling 1 -- Motion to Dismiss Indictment

The court was correct in denying Alan's motion to dismiss the indictment for criminally negligent homicide. The issue is whether Alan's conduct constituted criminally negligent homicide.

Criminally negligent homicide is the killing of a person through criminal negligence. Criminal negligence is present when the defendants fail to perceive a serious risk of death created by his conduct when an ordinary person would have perceived it. No intentional conduct is required.

Alan's conduct satisfies this standard because drag racing around a blind corner at 60 mph is failing to perceive the substantial risk of death created by his conduct that an ordinary or reasonable person would have perceived. Additionally, Alan's criminally negligent conduct caused the death of the pedestrian. Therefore, the court was correct in denying Alan's motion to dismiss because his conduct satisfied the standard.

Ruling 2 -- Motion to suppress Jenny's testimony of Alan's refusal to take the sobriety test

Jenny's testimony should not be suppressed. The issue is whether Jenny's testimony violated Alan's 5th Amendment right against compelled statements of self-incrimination.

The 5th Amendment of the U.S. Constitution protects against police compulsion of self-incriminating statements from witnesses in custody and subject to police interrogation. A person is in custody when they reasonably believe they are not free to leave; and a person is subject to interrogation when the police's conduct is likely to elicit a response from the witness. When a person is in custody and subject to interrogation by the police, the police must give the witness his Miranda warnings. The warning apprises the witness of the fact that they have the right to remain silent, to contact an attorney, that an attorney will be provided for them if they can't afford one, and that anything they do or say can be used against them in court. If a witness makes a statement without waiving these rights or receiving the warning, the statement must be excluded through the Exclusionary Rule. Miranda and the 5th Amendment only protect statements or acts that are communicative in nature.

Alan's refusal to take the test is likely not communicative in nature because taking the test is not communicative in nature. If this refusal is not considered a communicative act or statement, then it shouldn't be excluded because it happened before the police gave him his Miranda warning.

Ruling 3 -- Motion to dismiss Ben's indictment for criminally negligent homicide

The court was correct in denying Ben's motion to dismiss the indictment for criminally negligent homicide. The issue is whether Ben's conduct constituted criminally negligent homicide.

As discussed above, criminally negligent homicide is the killing of another person through criminal negligence. While Ben's drag racing on a curvy road is probably criminal negligence, there is a question as to his liability because he did not actually hit and kill the pedestrian with his car. The element of causation is lacking. However, Ben could be liable under the theory of accomplice liability. Under this theory, a defendant is liable for the criminal acts of another that are foreseeable if he aided or encouraged the person who actually committed the crime. Here,

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Ben encouraged Alan by drag racing with him on the road. This should subject Ben to the same criminal liability as Alan. Additionally, Ben's conduct might be sufficient for independent criminally negligent homicide liability, despite that his car did not do the actual killing, as long as his conduct contributed to the death of the pedestrian.

Ruling 4 -- Motion to dismiss Ben's drug possession charge

The court was correct in denying Ben's motion. The issue is whether a police officer may make an arrest based on probable cause created by the observation of facts observed by another police officer.

The 4th Amendment of the U.S. Constitution protects against unreasonable searches and seizures by the government. A police officer may only arrest a person, i.e. "seize the person's body," when he has probable cause that the person has committed a crime. The police generally don't need an arrest warrant unless the arrest is made in the person's home. Probable cause exists when the totality of the circumstances indicate the person has committed a crime. Police may act on another officer's good faith determination of probable cause based on observation of facts.

Ben's conduct was sufficient grounds to give Frank probable cause to arrest Ben. Frank's relay of the information to Debra was acceptable under the 4th Amendment. Debra may constitutionally act on Frank's determination of probable cause in good faith. Additionally, Ben was not in his home so an arrest warrant is not required. The court was correct in denying Ben's motion to dismiss.

February 1999 NY Bar Exam

Questions & Sample Answers

Question-Three

Hal and Win were married in 1979. Prior to their marriage, Hal owned Whiteacre, real property improved by a vacant store, and Blackacre, an unimproved lot. In January 1981 their daughter, Dot, was born.

In late 1990, Hal decided to build a house on Blackacre. Due to his inability to obtain financing, Hal and Win's brother, Ben, orally agreed that Hal would transfer title to Blackacre to Ben in order to obtain a mortgage, but that Hal would pay the mortgage, taxes and all other expenses relating to Blackacre. Ben said he would reconvey Blackacre to Hal upon Hal's request. Blackacre was thereafter transferred to Ben, who successfully obtained a mortgage in his own name. Hal paid all the expenses on Blackacre, and built a house on the property. Over the next few years, Hal rented the house to various tenants.

In 1994, Hal and Win began to experience marital difficulties. Each retained legal counsel, and Win duly commenced an action for divorce. In 1995, the action was settled by a written stipulation which set forth, in pertinent part, that Win would receive sole custody of Dot, then 14 years old, and Hal would have visitation with Dot every other weekend and one month each summer. The stipulation further provided that Hal would pay child support to Win until Dot reached her 21st birthday. The stipulation was incorporated in, but did not merge with, the final judgment of divorce, which was granted in 1996. After the divorce, Hal asked Ben to reconvey Blackacre to him, but Ben refused.

Hal came to visit Dot every other weekend and Win encouraged Dot to see her father. However, within several months of the divorce, Dot began to refuse to speak with or to see Hal. Over the



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years, Hal continued to try to visit Dot. Though Hal never engaged in any conduct to justify Dot's behavior, Dot, now 18 years old, has steadfastly refused to have any contact with Hal.

In December 1996, Hal executed a written lease with Tim for the rental of Whiteacre commencing January 1, 1997 and ending December 31, 2001, at a monthly rent of \$12,000. Tim opened a retail shoe outlet on the property, but when a new shopping mall opened nearby, Tim's business dropped off sharply. In December 1998, Tim went out of business, moved out of Whiteacre and stopped paying rent to Hal.

Hal has just learned that Ben is about to enter into a contract to sell Blackacre.

(1) With respect to Blackacre:

(a) Can Hal recover title to Blackacre, and

(b) are there any procedural steps Hal can take to preserve his rights against a prospective purchaser?

(2) What advice would you give Hal regarding his future child support obligations?

(3) What are Hal's options with respect to his lease with Tim?

ANSWER TO QUESTION 3

1(a). Recovery of Blackacre

Hal will not be able to force the reconveyance of Blackacre.

The issue is whether the court will grant a constructive trust of Blackacre for the benefit of Hal. Where a deed is absolute on its face, the court will not impose a constructive trust for the property's reconveyance. An exception lies where 1) a deed is conveyed with the promise to reconvey and the promiser had no intention of reconveyance -- the promiser acted fraudulently or where 2) the parties are in a confidential relationship and the promise to reconvey is proved by clear and convincing evidence. Because constructive trust is an equitable remedy designed to avoid unjust enrichment, a constructive trust will not be formed if the equitable defenses of unclean hands, laches or estoppel are proved.

Here, the deed for Blackacre appears to be absolute on its face. The facts don't indicate that Ben's promise to reconvey was made fraudulently. Ben and Hal are in a confidential relationship because they are brother's-in-law. Accordingly, a constructive trust will be formed and Blackacre reconveyed, if Hal can prove Ben's promise by clear and convincing evidence.

Ben's promise may be shown by the fact that Hal paid the mortgage, taxes and other expenses (built a house) and thus that Hal considered Blackacre his and expected to get the deed back. Accordingly, because Hal and Ben were in a confidential relationship and Hal's promise to reconvey can be proven a constructive trust would be formed but for the defense of unclean hands.

Unclean hands bar the plaintiff from an equitable remedy. Unclean hands result when the plaintiff has engaged in misconduct in the same transaction in which he seeks equitable relief.

Here, Hal conveyed Blackacre to Ben so that Ben could present himself as the purchaser and get

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a mortgage. The lender lent on Ben's credit and not on Hal's and thus was defrauded. Because Hal is guilty of unclean hands, a constructive trust will not be formed.

1(b). Preservation of rights

Hal should file a notice of pendency.

The issue is what can Hal do to preserve his rights in Blackacre pending the resolution of his dispute with Ben. A plaintiff may file a notice of pendency in any claim the judgment in which will directly affect the title, use or possession of real property. The notice of pendency puts all potential purchasers and lenders on second notice that the plaintiff has a claim to the property.

Here, Hal's claim against Ben is directly related to the title or real property because he seeks reconveyance of Blackacre. Hal must file the notice and a copy of his complaint with the county clerk of the county in which Blackacre is located. The notice may be filed ex parte and before service of process provided service is made within 30 days. Because Hal seeks judgment as to the title of real property he should file a notice of pendency to preserve his rights pending the outcome of the action.

2. Child Support

Hal has to support Dot until she is 21.

The issue is whether a parent must support a child to age 21 when the child refuses to communicate.

Here, Hal has an obligation to support Dot until she is 21 irrespective of the support decree because in New York, parents must support their children until they are 21 unless the child is emancipated. Refusal to communicate is not emancipation. Hal would have the duty to support Dot to 21 even if she were married. Because parents have a duty to support their children to 21, Hal must continue to support Dot as per the terms of the stipulation.

3. Lease with Tim

Hal may 1) consider the lease surrendered and release Tim from future rent payments; 2) ignore Tim's abandonment and hold him liable for future rent or; 3) relet for Tim's account and hold him liable for any difference between the \$12,000 per month Tim agreed to pay and the new rent.

The issue is what may a landlord do when a tenant abandons before the end of the lease and is out of possession. As noted above, the landlord may accept the surrender, ignore the abandonment, or relet.

Here, if Hal accepts Tim's surrender, Tim may be held liable for any past due rent but no future rent because acceptance of surrender terminates the lease. In New York, a landlord may ignore the tenant's surrender; the landlord has no duty to mitigate. If Hal ignores, he may sue Tim for rent as it comes due or wait until the end of the lease and sue for all past due amount. If Hal relets for Tim's account, Tim is released from future rent payments but is liable for any shortfall between the relet rent amount and the \$12,000 per month of Tim's lease. Because Tim abandoned before the end of the lease and is not in possession, Hal may accept the surrender, ignore the surrender or relet.

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1) The issue is whether Hal can impose a constructive trust and recover title to Blackacre. A constructive trust is imposed in situations where a person has transferred property to another person on the condition that the transferee promise to reconvey the property. There must be a confidential/fiduciary relationship between the transferor and the transferee and the transferee must be unjustly enriched by the action.

Here, all of the elements of a constructive trust are satisfied. Hal has transferred title to Blackacre to Ben not to give him the property, but only because he could not obtain financing. The fact that Ben is his brother-in-law is a requisite, confidential relationship. Ben would be unjustly enriched if he were allowed to keep the property. For these reasons, the court will impose a constructive trust over Ben's ownership of Blackacre for the benefit of Hal.

2) A second issue is whether Hal should file a lis pendens over Blackacre to preserve his title during his constructive trust litigation. A lis pendens is a procedural device to put the world on notice of your interest in real property. Hal should file the lis pendens in the county where Blackacre is located. By so doing, if Ben attempts to sell Blackacre to a 3rd person, that person will be on notice of his interest because the lis pendens will be filed in Blackacre's chain of title and the purchaser will be deemed to have constructive notice of the interest. When the constructive trust litigation is settled in his favor, it will be effective against the new buyer because he will be deemed on constructive notice.

3) A landlord has three options when a tenant moves out prior to the expiration of the lease. The can do nothing; i.e., not re-rent the lease hold, and can sue the tenant for the balance of the rent. The general rule, in contrast to contract law, is that a landlord has no duty to mitigate damages.

In the alternative, the can rent the property on his own account and thus forgo back-paid rent by reletting to another tenant and considering the first tenants executory lease at an end. Or the landlord can rent the leasehold for the benefit of the tenant and simply relet to a 3rd party and sue the tenant for the difference in rent as well as recoup other damages that resulted from the tenant's premature departure.

Here, Tim has abandoned the executory leasehold because he has gone out of business. I would recommend that Hal take the first option and relet Whiteacre on his own account because it might be useless to obtain a judgment against an insolvent tenant.

4) The issue is whether a father is obligated to give child support to a child who has steadfastly refused to have anything to do with him. The general rule is that a father must give child support to his child until she reaches the age of 21 years old. However, the NYS Court of Appeals has recently affirmed a father's right to cut off the tuition payments and room and board payments for a child who was supposed to be attending the University of Alabama but really violated his condition and joined a commune. A father is thus able to set reasonable conditions for the child to abide by in order to receive child support. Here, Dot has refused to have anything to do with Hal even though he has done nothing wrong. Win has encouraged Dot to speak to her dad with no avail. Accordingly, Hal can set his daughters reasonable communications with him as a condition precedent to her receipt of child support payments.

#### Question-Four

On May 10, 1993, Amy was seriously injured when she was using a circular power saw to do remodeling work at her home in Albany. The saw had been manufactured by Tools, a small producer of power tools, and had been sold and delivered to Mart, a large national discount retailer, on May 1, 1991. Amy purchased the saw from Mart on December 1, 1991.

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After she was released from the hospital in July 1993, Amy retained Bill, an attorney, to represent her concerning her personal injury claim. Bill consulted an expert who gave an opinion that Amy's injury had been caused by a defective design of the guard installed on the saw, which was intended to protect the user from accidental contact with the blade of the saw.

In the course of unsuccessful settlement negotiations, Bill learned that Mart carried liability insurance with a large national company, but that Tools was self-insured and in weak financial condition.

On April 1, 1996, Bill finally commenced an action against Tools and Mart for Amy's personal injuries, seeking damages of \$1,000,000. The complaint alleged the pertinent foregoing facts and asserted causes of action against Tools for manufacturing, and against Mart for selling, a power saw which was not reasonably safe due to a latent defect in the design of the blade guard, causing Amy's injury. The complaint did not allege negligence on the part of Tools or Mart, but did allege that it was feasible for Tools to have corrected the design prior to the manufacture of the saw sold to Amy.

Tools served an answer consisting of a general denial and an affirmative defense that the action was barred by a four-year statute of limitations. Amy moved to strike Tools' affirmative defense.

Mart timely moved to dismiss the complaint against it for failure to state a cause of action on the ground that Mart, as the retail seller, could not be held liable for defective design.

The court (1) granted Amy's motion and (2) granted Mart's motion.

Bill then advised Amy that, while he believed the court had erred in dismissing Amy's claim against Mart, there was no need to appeal the court's order because she had a very strong case against Tools. Amy accepted Bill's advice, and no appeal was filed.

During the trial of Amy's action against Tools, Amy offered to prove that after the saw that she purchased was manufactured, Tools had made design modifications which corrected the design defect alleged, and that other power saw manufacturers had made such modifications as early as 1987. Over Tools' objection, the court (3) admitted the offered evidence.

At the conclusion of the trial, the jury returned a verdict of \$1,000,000 against Tools, and judgment was duly entered in that amount. Shortly thereafter, Amy received a notice that Tools had filed for bankruptcy, and there would be no assets available to pay the judgment.

Were rulings (1), (2) and (3) correct?

(4) What advice would you give Amy with respect to a claim against Bill?

ANSWER TO QUESTION 4

1) Amy's motion to strike affirmative defense

The first issue is whether a motion to strike is an appropriate procedural vehicle for challenging an affirmative defense. A motion to strike is used to literally remove from a pleading an allegation that is scandalous or irrelevant. Here, Amy is actually challenging the merits of an affirmative defense, so the motion to strike is not the correct procedural vehicle. Rather, Amy should have filed either a CPLR 3211 motion to dismiss the affirmative defense, or challenged the affirmative defense in a post-answer motion for summary judgment.

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However, had Amy used the correct procedural vehicle, the merits would be resolved in her favor.

The issue is what statute of limitations applies to Amy's claim against Tool, and when that cause of action occurred for statute of limitations purposes. Amy's suit against Tool was not for negligence, but for "manufacturing" a power saw which was not reasonably safe due to a latent defect in the design of the blade guard. This is a claim for strict liability.

The statute of limitations on a strict liability products liability claim under the CPLR is three years. It accrues from the date of injury. In this case, the date of injury was May 10, 1993, and Bill filed suit on behalf of Amy on April 1, 1996, within the three year statute of limitations.

Tool's claim that a four year statute of limitations applied is a clear reference to the statute of limitations for a breach of warranty action. Under the CPLR, this statute of limitations is four years and runs from the date of delivery. Because Tool delivered the goods to Mart on May 1, 1991, a cause of action against Tool for breach of warranty would indeed be barred by the statute of limitations as of May 1, 1995.

However, as discussed above, Amy's cause of action against Tool clearly states a claim under a strict liability theory (the product had a defect in design at the time it left the defendant's control, and caused damages to the plaintiff), so the strict liability statute of limitations applies.

The court, therefore, properly could dismiss the affirmative defense.

2) Mart's motion to dismiss

Mart's motion was improperly granted.

The claim against Mart was based on a strict liability products liability theory. This cause of action applies not only to manufacturers but also to merchants of the particular type of product at issue. It is a form of vicarious liability. Here, Mart was a large national discount retailer of power saws and therefore, was a legitimate defendant in the strict liability action.

Moreover, the complaint against Mart properly stated a cause of action against Mart. A motion to dismiss for failure to state a cause of action should be denied if giving plaintiff every reasonable inference, there is a substantive basis for recovery.

A cause of action for strict liability will lie if: 1) a defect existed, 2) at the time a product left the defendant's control, 3) which caused 4) damages to the plaintiff. Here, Amy alleged all four elements in her complaint. She alleged that a latent defect in the design of the blade guard, which existed when Mart sold it to Amy, caused Amy serious injury.

Thus, elements 2, 3, and 4 are clearly satisfied. The last issue is whether the allegation regarding a design defect qualifies as a "defect" under strict liability products liability law. One of the three types of defects permitted is a defect in design which rendered the product unreasonably dangerous. A safer, cost-effective alternative design must have existed. Here, Amy alleged an "unreasonably" safe defect and that it could have been corrected by Tool.

Thus, Amy properly pleaded a cause of action against Mart, and Mart's motion to dismiss should have been denied.

It should be noted that, had Mart ultimately been held liable, as seller of the goods it would have

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had the right to seek indemnity from Tool, as manufacturer. The right of indemnity did not ban the action by Amy against Tool, however.

3) Admission of evidence

Tool's evidence

Tools correction of design defects were improperly admitted. The issue is when evidence of subsequent remedial measures by a defendant are properly admitted in a strict liability case.

As an initial matter, evidence of subsequent remedial measures is relevant to the cause of action. However, public policy in favor of encouraging repair of unsafe conditions generally requires exclusion of the evidence.

In a products liability action, such evidence may only be admitted to prove the existence of a manufacturing defect (an error in production such that the product in question did not conform with the other products in its line), not for a design defect case such as that presented here. Accordingly, the evidence was improperly admitted.

Other power saw manufacturers

The evidence regarding other power saw manufacturer was properly admitted.

Generally, evidence that is unrelated in time or place to the litigation at hand is irrelevant and inadmissible. An exception to this rule, however, is when evidence of business or industry custom is offered to demonstrate standard of care or prove another relevant issue.

While this case is a strict liability case rather than a negligence case, the evidence is admissible to show that an alternative design existed. Thus, the evidence offered proves an essential element of the strict liability case (existence of a defect). Accordingly, the information is relevant and is properly admitted.

4) Advice re: Bill

Amy may want to consider a claim of malpractice against Bill.

The elements of a malpractice action are the same as a standard tort; i.e. 1) existence of a duty, 2) a breach of duty, 3) actual and proximate causation, and 4) damages.

Here, Bill clearly had a duty to Amy because they were in a contractual relationship. Amy also clearly was damaged, as she was unable to obtain any recovery for her injury.

The next issue is whether Bill breached his duty as a professional. A professional is held to the standard of diligence, skill and care that would be applied by a member of the profession in good standing in the same community. Here, Bill was aware that Tool was "self-insured and in weak financial condition" and that Mart carried liability insurance and was a large national company. Moreover, Bill recognized that the trial court likely erred in dismissing the claim against Mart. Thus, Bill was aware that Amy had a meritorious appeal and risked being unable to recover if forced to proceed against Tool alone. This is a breach of Bill's duty to Amy.

The final issue is causation. Here, Bill's failure was the actual and proximate cause of Amy's loss. Generally, in a legal malpractice case, causation is proved by showing that the client would have succeeded in the merits of his or her claim. Here, because Amy was successful against Tool, it is

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likely that she also would have been successful against Mart, and would have been able to recover from Mart. Thus, the final element of a legal malpractice suit is satisfied.

Accordingly, Amy should consider suing Bill within the appropriate three year statute of limitations.

ANSWER TO QUESTION 4

1) The ruling to strike Tool's affirmative defense should be sustained.

The issue is whether the claim in Strict Products Liability is barred due to the statute of limitations.

The statute of limitations, pursuant to the CPLR, on an action based on the theory of strict product liability is three years. This time begins to run from the date of injury.

Here, Amy's injury occurred on May 10, 1993. Her action for strict product liability was brought on April 1, 1996 -- therefore, within the three year statute. (Even within the four years had defendant's affirmative defense been correct.) Therefore, the court correctly granted Amy's motion to strike Tool's affirmative defense.

2) The ruling granting Mart's motion should be reversed (it was wrong).

The issue is whether Mart is a "merchant" within the definition provided for a claim in strict product liability.

An action for strict product liability may be brought in either a manufacturing, defect, or failure to warn classification. A product is defective when the injured party can prove that 1) there is a safer design, 2) that is cost effective and 3) practical.

Here, Amy is bringing a claim against Mart based on defective design. The elements for asserting a cause of action for a defective design are: 1) a merchant must have sold the product, 2) the product was defective, and 3) the user was foreseeable and the use of the product was foreseeable.

A merchant is one who commonly sells goods of the kind in issue. A merchant is NOT one who merely sells the product on a casual basis.

Here, Mart was a "large nation discount retailer" and is very much the intended merchant alluded to in the cause of action elements. Here the product, circular saw, was defectively designed (the "guard"). Lastly, remodeling her home appears to be an intended use, and Amy, being a normal consumer is an intended user. Here, therefore, all of the elements for a cause of action have been asserted.

Therefore, the court incorrectly granted Mart's motion.

3) The court incorrectly admitted the evidence of a remedy.

The issue is whether a court may admit evidence of a remedial design (or remedied danger) in a strict products liability case.

In an action for a strict products liability case brought under the theory of manufacturing defect, evidence of remedial measures would be acceptable. However, in an action based on defective

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design or failure to warn, such evidence is not relevant because it is specifically voided by public policy reasons.

Here, Amy's claim is based on a theory of defective design and therefore the admission of the evidence by the court was incorrect.

The court correctly admitted evidence of industry modifications.

The other issue is whether the standards of an industry is admissible in a products liability case.

Evidence is relevant when it tends to prove or disprove the issue in question. Evidence may be barred from the context of relevance in certain situations where the evidence is not closely associated with the proximity of the injury (in time or location). Standards of an industry are acceptable, and admissible, methods of proving or disproving the material issue in question. Especially where the cause of action is strict liability or negligence and the evidence tends to prove a standard of care not adopted.

Here, the evidence of the standard of the industry is admissible because it tends to prove that Tool was selling defectively designed goods. The evidence that other manufacturers have already adopted the safety modification to their design of similar saws is beneficial to the jury in determining whether the product was in fact defective.

Therefore, the court properly admitted evidence of standards of the industry.

4) Amy has a cause of action against Bill.

The issue here is whether Amy has any legal recourse against her attorney, Bill, for not appealing the Mart ruling.

A cause of action in a negligence arises when 1) a duty is owed, 2) that duty is breached, 3) the cause of harm is proximate (and the cause in fact), and 4) damages arise. A professional owes a duty similar to the average community professional's care. That is, a professional is said to have exercised reasonable care when the care was such that the average professional in that field and in that community would have rendered.

Here, it is likely that the average attorney in Amy's community would have appealed the decision in favor of Mart within the required 30 days (CPLR). Therefore, Bill has breached the duty owed to Amy and she may recover. The saw blade was the cause in fact of her injuries and she suffered personal injury damages.

Therefore, Amy has a negligence cause of action (malpractice) against Bill.

Note that the statute of limitations on this cause of action is three years from the date when the appeal should have been taken.

#### Question-Five

On March 17, 1998, Ford, a childless widower, delivered \$100,000 to Trent, as trustee, pursuant to a trust instrument which was executed that day by Ford and Trent. The trust instrument provided that the income of the trust would be paid to Ford for his life and, on his death, the principal of the trust would be paid to Abbey, the daughter of Ford's brother, Bart. The trust instrument further provided that it could be amended or revoked at any time. The execution of the



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trust instrument by Ford and Trent was acknowledged in the manner required for recording of deeds.

In May 1998, Ford's brother, Bart, duly executed a will which included the following relevant provisions:

FIRST:

I give \$200,000 to Trent, as trustee of the trust my brother Ford created in March 1998, to be distributed in accordance with the terms of the trust;

SECOND:

I give the rest and residue of my estate to my issue;

THIRD:

I appoint Trent executor of my estate.

The will made no reference to the effect of any amendments to the trust.

Bart had two sons, Stone and Simon, and two daughters, Dana and Abbey. Dana died in July 1998, survived by her daughters, Jane and Jill. Stone died in August 1998, survived by his son, Sam. Abbey has a son, Andy.

Bart died on September 1, 1998, survived by his son, Simon, his daughter, Abbey, and his grandchildren, Jane, Jill, Sam and Andy. His duly executed will has been admitted to probate, and Trent has been appointed executor.

Ford and Trent duly executed an amendment to the March 1998 trust instrument on October 6, 1998, changing the beneficiary of the principal of the trust from Abbey to Ford's friend, Fran.

On January 6, 1999, Abbey filed in Surrogate's Court a signed and acknowledged writing purporting to renounce her interest in the residuary of Bart's estate. The renunciation, which was delivered to Trent, as executor of Bart's estate, was accompanied by an affidavit stating that Abbey received no consideration for the renunciation. It was Abbey's intention, by filing the renunciation, that Andy would receive her share of the residuary of Bart's estate.

Ford died on January 10, 1999. On February 5, when Abbey learned of the purported amendment to Ford's trust, she immediately filed in Surrogate's Court and served on Trent, as executor of Bart's estate, a signed and acknowledged notice stating that she was revoking her renunciation of her interest in the residuary of Bart's estate.

Abbey and Fran each claim to be entitled to the principal of the trust, including the bequest to the trust made by Bart's will. Simon, Abbey, Jane, Jill, Sam and Andy all claim to be entitled to share in the residuary estate.

Your office has been retained by Trent, and you have been asked to prepare a memorandum answering the following questions:

(1) Was the bequest to the trust effective?

(2) To whom should the principal of the trust be distributed?

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(3) What is the effect of the purported renunciation by Abbey and was the renunciation effectively revoked?

(4) How should the residuary estate be distributed?

ANSWER TO QUESTION 5

1) Bart's bequest of \$200,000 to Ford's trust is effective as a gift pouring-over into an already existing trust.

Here, Bart's will was "duly executed" in accordance with all formalities. Ford's trust is valid, as \$100,000 was delivered and accepted by Trent as trustee pursuant to a trust agreement. A pour-over gift to a trust already existing is an exception to New York's "No Incorporation by Reference" rule. The trust therefore need not be executed with all the formalities of a will, it was validly executed as a trust and may receive the gift from Bart's will.

The bequest to Ford's trust is effective.

2) Although trusts in New York are presumed irrevocable and unamendable, a creator of a trust may expressly reserve the right to amend or revoke a trust at any time. Ford did expressly reserve the right to revoke and amend, as stated in the trust instrument.

Therefore, Ford validly exercised his right to amend the trust and leave the principle to Fran. However, such amendment to the trust is ineffective against the \$200,000 (Bart's testamentary) pour-over gift. The gift will follow the terms of the trust as of the date the \$200,000 was given to the trust, i.e. when Bart died September 1, 1998. As of that time, Abbey was still a trust beneficiary. Abbey will receive the \$200,000 from Bart's estate. This policy is a fairness issue, that a testator who disagrees with amendments to a trust, may in the testator's lifetime, revoke his gift in the will. Obviously, Bart cannot exercise his intentions once he is dead. Therefore, as to the gift from Bart's will of \$200,000, it will follow the directions of the trust only as of Bart's death on September 1, 1998.

Any other amounts left as principle in the trust (\$100,000 minus Ford's lifetime income interest) will go to Fran, obeying the trust's amendments as of October 6, 1998.

3) Abbey validly renounced her interest in Bart's will by signing and acknowledging in writing her intention to renounce. Abbey also fulfilled the other requirements for renouncing her gift from Bart's will: gave a separate affidavit stating she received no consideration for the renouncing and filed it with the executor, Trent, within nine months of Bart's death. Bart died on September 1, 1998, and Abbey validly renounced her interest on January 6, 1999 (four months later).

Her interest will be treated as though she predeceased Bart and will be saved by the antilapse statute, to be distributed per capita at each generation. (see, *infra*.)

Abbey may not revoke this renunciation, because as of January 6, 1999, she is treated as predeceasing Bart. Since Bart died September 1, 1998, all of the other beneficiary's rights have vested and all the rest may call for a distribution of Bart's estate.

4) Two rules govern the distribution of Bart's estate: 1) the New York antilapse statute and 2) distribution per capita at each generation. The residuary is left to Bart's issue: Stone, Simon, Dana and Abbey, on the first level of takers. Stone and Dana predeceased Bart. The antilapse statute provides that the gifts to them would lapse, unless the beneficiaries are testator's issue, brother or sister and leave descendants to take the shares. Stone and Dana's gifts are saved from the lapse,

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because Stone and Dana are Bart's issue and Stone and Dana left behind their own issue. Abbey, who also is treated as though she predeceased Bart, due to her valid renunciation of her gift, has a gift saved by the antilapse statute. However, Andy, Abbey's son, does not directly receive Abbey's share.

New York follows the per capita at each generation rule, that persons of the same generation will take in equal shares. Therefore, Stone = 1/4, Simon = 1/4, Dana = 1/4 and Abbey = 1/4 of the residuary. Since Stone, Dana and Abbey all are not takers, but their gifts are saved, their quarter shares are combined into 3/4 of the estate. This 3/4 of the residuary is divided equally among the next generation: Jane, Jill, Sam and Andy. So Simon gets 1/4 of the estate and the rest is divided between Jane, Jill, Sam and Andy equally.

ANSWER TO QUESTION 5

1) The bequest by Bart to the trust was effective as a bequest to a "pour over" trust. A "pour over" trust is one which may or may not be funded prior to death of the settler. It is a statutorily approved exception to the requirement that every trust have a res or corpus capable of being identified.

Use of a "pour over" trust is proper where the instrument creating the trust is executed prior to or contemporaneously with the will naming the beneficiaries of that trust. Here, that is precisely what happened: the trust was created in 1998 and additional funding was added to the res on the date of Bart's death.

The issue is raised whether one person may create a trust into which a second person "pours." The fact that the settler of the trust was not the sole donor thereto is immaterial. There is no requirement in trust law that they be the same person.

2) The trust principle should be distributed in accordance with the terms of the trust as they existed on the date of Bart's death, i.e., Abbey should receive them.

Although the trust was fully revocable and amendable, the amendment had not occurred until after Bart's death. This is the date the will is "fixed" in place for purposes of that distribution.

Alternatively, a court might find that this trust should be distributed according to the trust terms as existing later. Under the Doctrine of Facts of Independent Significance, distributions may be made using, as markers or defining events, things of independent significance. Thus, for example, one could make a bequest of "all the money in my bank account" since this is a fact of independent legal significance, but one could not make a bequest to "all people on the list left in my drawer," since such a list has no other lifetime relevance. Where no independent lifetime significance is found, the doctrine of incorporation by reference -- as applied in New York -- is insufficient to recognize such bequests. Incorporation by reference may only be made by incorporating documents executed with all the formalities of a will (i.e., another person's will). Here the trust was not so executed, but its existence was independent of its use in Bart's will.

3) Abbey's renunciation was not effective. Any gift, whether made by will or intestacy, may be disclaimed (except, under case law, if the person disclaiming the interest is the recipient of public benefits such as Medicaid).

Although a person is entitled to disclaim an interest received by bequest, such disclaimers must be filed with the surrogate's court and not merely with the trustee of the trust. They must be signed and notarized, and they must be accompanied by an affidavit indicating that no consideration has been paid in exchange for the disclaimer. If done properly, this acts to directly

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assign the interest to the next person in line for it, without there having been any tax consequences to the disclaiming party. Such revocations are final, and not modifiable once made.

If the disclaimer had been effective here, it would, however, only have acted to cause any gifts in favor of Abbey to be passed on to Andy. Where a gift would fall into the residue of the estate because disclaimed, the law treats the disclaiming party as having passed their interest on by predeceasing the testator.

4) The residue of the estate should be distributed  $\frac{1}{4}$  to Simon,  $\frac{1}{4}$  to Abbey, and  $\frac{1}{8}$  to each of Sam, Jill, Jane, and Andy.

Bart has left the residue of his estate to his "issue," which is a term of art that includes his lineal offspring, as well as any adopted children. This is a class gift, because it speaks generally rather than naming Bart's children individually.

The issue here is that Stone and Dana have died between the time the will was executed and the time Bart died. Normally, their gifts would lapse (i.e., fail). However, New York's Anti-Lapse Statute acts to save them. Where a testator has left a bequest to his/her issue, brother, or sister, and any one of them has predeceased the testator, leaving issue, the gift does not fail. Instead, it is passed on to the surviving issue of the issue, brothers or sisters to whom the gift was directed by the testator.

Here, that is precisely what happened. Bart left the residue to his issue -- his children, and the two who predeceased him died leaving issue. Accordingly, their gifts do not fail.

In 1992, New York's laws regarding distribution of gifts to "issue changed." Accordingly, distribution of this gift will be "per capita at each generation" because no other method -- such as per stirpes or per capita -- has been specified. This means the residue will initially be divided at the first generation where there are living takers: Bart's children. Since there are four of the children, it will be divided four ways, with Simon and Abbey taking  $\frac{1}{4}$  each. Then, at the next generation, the residue is pooled back together and divided again equally amongst the next generation in which there are living takers. Thus here Sam, Jill, Jane, and Andy will each take quarters of the remaining half.

It should be noted that if Abbey's renunciation were effective, it would change this distribution, causing Simon to receive  $\frac{1}{4}$  of the residue and then Sam, Jill, Jane, and Andy splitting four ways the remaining  $\frac{3}{4}$  of the residue, thus each taking  $\frac{3}{16}$  thereof.

#### Question-Six

Cly is the owner of 1,900 of the 10,000 issued and outstanding shares of Net Corp, a New York business corporation which deals in high-tech internet activities. He is not an officer or director of Net Corp.

Before 1997 Net Corp was profitable, but it suffered substantial losses in 1997 and 1998. The losses were the result of the decision of the board of directors in 1996 to expand the activities of Net Corp into interactive internet games.

The decision of the board was based upon a report and projections prepared by Pete, a Net Corp employee and financial analyst. Cly believes that the report and projections which recommended the business expansion were negligently prepared. Cly has learned that Pete was recently fired by

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Net Corp for incompetence because of numerous errors made by him in his analyses since he was hired in 1992.

On February 17, 1999, Cly received, by first class mail postmarked February 15, a notice of a meeting of shareholders to be held February 26. The notice included a copy of a plan for the merger of Net Corp with Tech Corp approved by the board of directors of Net Corp. The notice also stated that a vote would be taken at the meeting for the shareholders to approve the plan of merger. Cly intends to attend the meeting and to vote his 1,900 shares against the resolution.

Cly has consulted you and asked the following questions:

- (1) May Cly hold the directors personally liable for Net Corp's losses, suffered as a result of their decision to expand Net Corp business into interactive internet games?
- (2) Prior to commencing any action, may Cly depose the directors in order to assist in determining his rights?
- (3) Was notice of the meeting of shareholders properly given to Cly?
- (4) Assuming notice was proper, how many shares must be voted against the merger plan to defeat it?
- (5) What rights, if any, will Cly have in the event the merger plan is approved and what, if anything, must he do to assert such rights?

ANSWER TO QUESTION 6

- 1) Cly may not hold the directors personally liable on these facts for NetCorp's losses.

The issue is whether directors are liable for bad judgment in carrying out their duties as directors.

As a general rule, directors have a duty of care to the corporation. This means that the directors must carry out their duties as directors with the care, skill and diligence expected of ordinarily prudent persons in similar circumstances. Therefore, if a director makes mistakes or does not exercise that care, he or she will be liable to the corporation for the losses caused by this misfeasance.

However, the court will apply what it calls the "business judgment rule" to the interpretation of the director's actions. This means that the court recognized that decision made by directors may not always be good in hindsight, but at the time, they may have appeared reasonable. Basically, the court will not second guess a director's decision that was based on reasonable grounds or had some reasonable basis for believing it was a prudent decision.

Furthermore, the court allows a director to rely on the reasonable advice of professional advisors, such as attorneys or accountants, or committees of the Board, where such reliance is reasonable, and upon matters that the professional or committee was qualified to provide advice.

In this case, the Board appears to have made a bad judgment regarding the interactive internet program, but such a decision, on these facts, appears to be grounded in some reasonable basis, as it was related to their regular line of business. The court would therefore most likely excuse this error on the basis of the business judgment rule.

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Furthermore, the Board was entitled to rely on the opinion of Pete, assuming that his advice was within his purported expertise. This reliance may be found to be unreasonable, however, based on the fact that Pete may have been known for his incompetence based on his history of making errors. Cly may want to find out more about the relationship of the Board to Pete; (see question 2 below), and there may be a basis in negligence against the director for relying on and keeping Pete employed in the first place.

If Cly does bring an action, it would be in the form of a derivative action in the name of the company. Before commencing such an action, Cly would have to approach the Board and ask it to commence the action, unless such an action would be futile, because for instance, it was too interested in the subject matter of the litigation.

2) Cly may depose the directors. The issue is whether pre-action deposition is available to potential plaintiffs.

Under the New York CPLR, oral depositions before trial typically occur after an action has been commenced.

However, in limited circumstances, the court may allow depositions before an action is commenced if there are particular facts known only to the party being deposed which would aid in letting the plaintiff know if a cause of action is feasible or proper. To conduct such a deposition, the plaintiff must apply to court to obtain an order to compel the deposition.

In this case, there is an indication that some information may be in the hands of the corporation that would assist Cly in determining whether he has any rights to assert.

Cly would also be able to obtain information by making a request, on five days' notice, to examine the corporation's books and records. This right is given to Cly as a shareholder under the New York BCL, and Cly also has a common law right to examine on reasonable notice. Here, however, Cly may want or need additional information regarding the basis of the decisions that lead to the reliance on Pete and the internet business, and a deposition may be useful.

Given Cly's status as shareholder, such an order would likely be granted.

3) Notice of the meeting was properly given.

The issue is how much notice must be given for a special meeting.

The meeting proposed here is a special meeting in that it is not a regular annual general meeting, and is called for a special purpose.

Notice of special meetings must be provided to all shareholders at least ten and no more than sixty days before the meeting. Failure to give proper notice voids all decisions carried out at the meeting. The notice must also describe what will be discussed at the meeting.

In this case, Cly received notice of the meeting eleven days before the meeting was scheduled. It was therefore timely and provided notice of the subject matter of the meeting. Notice was therefore proper.

4) A total of 3,334 shares must be voted against the merger.

The issue is how many shares are required to vote to defeat a fundamental corporate change.

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For business corporations incorporated before February 22, 1998, to approve a fundamental change like a merger, two thirds of the shares entitled to vote had to be voted in favor of the change, (a majority of shares for post-February 22, 1998 corporation), unless the certificate of incorporation provided otherwise. NetCorp was operating at or prior to 1992, so it was incorporated before February 22, 1998 and there is nothing to suggest that its certificate provides for less than a 2/3 super majority requirement for approval of fundamental corporate changes.

Therefore, the approval must be approved by 2/3 of the total shares outstanding entitled to vote, no matter how many shares are actually voted at the meeting. Therefore, 6,667 shares are required to approve the merger; conversely, 3,334 are required to defeat it.

5) Cly may require the corporation to purchase his shares at fair market value. The issues are (i) what rights Cly has if he objects to the fundamental corporate change, and (ii) what procedures he must follow to effect such rights.

For certain fundamental corporate events such as mergers, shareholders may have "appraisal rights." These rights allow a shareholder to require the corporation to purchase their shares if the shareholder objects to the changes. For corporation incorporated before February 22, 1998, the corporation had appraisal rights unless the certificate of incorporation provided otherwise. Since NetCorp was in existence prior to 1998, it is fair to assume that Cly's shares have such rights. There are no facts stated which indicate facts to the contrary in regard to the Certificate of Incorporation.

Cly can therefore require NetCorp to purchase his shares at their fair market value.

To give effect to such rights, Cly must: (a) give notice to the secretary of the corporation before the vote that he intends to exercise his appraisal rights, (b) vote against the measure or abstain from voting, and (c) demand within a short time after the meeting that the corporation repurchase his shares. Only if all of these formalities are complied with, can Cly exercise his appraisal rights.

## ANSWER TO QUESTION 6

### 1) DIRECTORS LIABILITY

Cly may hold the directors liable only if they did not believe Pete was competent. The issue is whether a board may rely on an employee's report to benefit from the business judgment rule.

Directors are fiduciaries of a corporation, and as such owe a duty of care to the corporation. This duty means they must act in their duties in good faith and with the knowledge, care and skill of an ordinary prudent person in similar circumstances. If directors breach this duty, they may be held personally liable to the corporation for any losses suffered as a result.

Directors need not be "right" to stay within the duty of care. Directors are protected by the business judgment rule. A director will not be found to be in breach of the duty if he/she acted in good faith and reasonably informed him/herself about the transaction. Directors, in making decisions, may rely on the reports of relevant professionals (i.e. accountants), board committees of which they are not a member (and the issue is within the scope of the committee) or officers and employees of the corporation where the matter is within their scope of duties and they are believed competent in those duties.

Here, the decision to expand the business was properly one for the board as the managers of the business and the activity was within the area of "high-tech internet activities." The board

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obviously made a bad decision but relied on the report and projections of an employee which is a permissible means of informing themselves of the transaction.

However, if any of the directors did not feel Pete was competent, they do not have the benefit of the business judgment rule and could be liable to the corporation for any losses which can be traced to that decision.

Here, Pete had been known for errors since 1992 so it was unlikely that his reports and projections were considered competent.

The directors may be personally liable if Pete's incompetence was known. It should be noted that this area is governed by the NY Business Corporations Law (BCL).

## 2) DEPOSITION

Cly may depose the directors prior to commencing his action. The issue is whether you can serve notice of deposition on an intended party before commencing an action.

- This is governed by NY statutory law.
- Cly would have to obtain permission to depose on motion with notice.
- Return date can be no less than eight days after service.
- Directors must receive 20 days prior notice of deposition.

## 3) NOTICE OF MEETING

Notice of meeting was proper as to timing but improper as to content. The issue is what is proper notice for a shareholders' meeting.

Under the BCL, notice of a shareholders' meeting must be given to all record shareholders no less than ten days in advance and no more than 60 days. A record shareholder is a shareholder on the corporation's shareholder list as of a record date, selected by the corporation within the same 10-60 day period before the meeting.

The notice was mailed to Cly on February 15, 11 days before the meeting on February 26, and was thus proper in the timing aspect.

A notice of a shareholder meeting at which action is to be taken giving rise to appraisal remedies, such as a merger, must state that such remedy is available and reiterate the statutory (BCL) provisions of that remedy. The notice on the facts stated that a merger would be voted on but did not specify that it would give rights to appraisal remedies and what they are. The notice was improper as to content and the merger should not be allowed to be voted upon.

## 4) MERGER PLAN

The sum of 3,334 of the 10,000 outstanding shares, assuming all are voting, must be voted against the merger, provided NetCorp was formed before February 1998.

The issue is what is the proper level of approval for a merger.

The BCL provides that a merger as a fundamental change must be approved by 2/3 of the voting shares of the corporation (in total not just voting at the meeting) if the corporation was formed



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prior to February 22, 1998, and a majority of the voting shares if formed after that date. These provisions apply where no provision to the contrary is made in the certificate of Shareholder By-Laws.

Since NetCorp suffered losses in 1997, it was formed before 1998 and the 2/3 vote applies. Therefore, to defeat the merger over 1/3 must vote against the merger, at least 3,334 of the outstanding shares. Note the approval is based on total outstanding voting shares not just those voted at the meeting.

Note also that TechCorp's board and shareholders must also approve the plan of merger.

#### 5) RIGHTS ON APPROVAL

Cly has a right to an appraisal remedy provided NetCorp is the company to be acquired. The issue is what must you do to assert appraisal right.

Appraisal rights are given to shareholders who vote against fundamental corporate changes which are ultimately approved by the share holders (or directors in some cases, i.e. short form merger). It is a right to have your shares purchased by the corporation. Merger is one of the fundamental rights which give way to appraisal rights but only for the corporation which is merged into the continuing corporation. The merged company is considered the acquired company.

Cly has potential appraisal rights as a shareholder if NetCorp merges with TechCorp to form a continuing TechCorp.

In order to preserve appraisal rights, the shareholder must notify corporation (the secretary) of its dissent and intent to exercise its rights before the meeting, vote against or abstain from voting on the change at the meeting and then notify the corporation after the meeting of its demand for appraisal remedy. If the corporation and the shareholder cannot agree on a value, the corporation commences an action against the shareholder and the court assigns a value with no diminution because it is a minority interest.

Cly must take the before, during and after meeting steps to assert his appraisal rights.